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ENVIRONMENTAL LAW

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I. INTRODUCTION

THIS article reviews judicial developments in Texas environmental law between October 1, 1999 and September 31, 2000. The Texas legislature did not convene during the Survey period.

II. JUDICIAL DEVELOPMENTS

During the Survey period, Texas appellate courts heard several environmental cases. The first case involved the issue of whether the State's anti-dumping statute requires a culpable mental state. The second case addresses questions regarding whether failing to follow certain statutory procedural prerequisites affects subject-matter jurisdiction. The third case involves a number of issues about the Texas Natural Resource Conservation Commission's (also referred to as "the Commission") wastewater permit exemption for certain shrimp research facilities. The fourth case pertains to the Commission's review of contested case hearing requests on permit applications, and the fifth case deals with the issue of unconstitutional delegation of legislative powers. The sixth case concerns landowner challenges to a permitted discharge to an intermittent stream as causing property damages. The seventh and eighth cases determine that the plaintiff's claim in both cases were barred by statute of limitations because of publicity of the release in one case and the fact that discussion of the problem with government agencies and others had put them on notice of their claims in the other case. Two other cases decided during the Survey period involve environmental insurance provisions, but

they are not discussed in this review.[1]

A. Culpable Mental State for Texas Environmental Criminal Provisions

1. *The Texas Anti-Dumping Statute Requires a Culpable Mental State of at Least "Recklessness"*

In the case *Ex Parte Bennett Weise*,[2] the Appellant, Bennett Weise, challenged the lower court's denial of his motion to quash the information charging him with violating the Texas "anti-dumping" statute[3] and the denial of his pretrial habeas corpus application. Weise argued that the anti-dumping statute was unconstitutional, as applied to him, for lack of a culpable mental state. In other words, Weise challenged imposition of strict liability for violation of an environmental statute.

The state charged Weise[4] with violating section 365.012 of the Texas Health and Safety Code, specifically, subsections (a) and (c). Subsection 365.012(a) provides that "[a] person commits an offense if the person disposes or allows or permits the disposal of litter or other solid waste at a place that is not an approved solid waste site . . . ."[5] Subsection

---

1. *See* Mid-Continent Cas. Co. v. Safe Tire Disposal Corp., 16 S.W.3d 418 (Tex. App.—Waco 2000, writ denied). In *Mid-Continent Casualty*, the plaintiffs filed suit against the defendant/insurer seeking a declaratory judgment that the defendant had a duty to defend the plaintiff in three lawsuits brought by neighboring residents for damages allegedly suffered as a result of smoke from a fire on plaintiffs' premises. The Waco court of appeals affirmed the trial court decision with the following two findings: 1) that the pollution exclusion in the insurance policy did not apply to exclude coverage for damages because the rubber chips and wire from which the fire originated were desired products, and did not constitute "waste" under the policy; and 2) that defendant insurer had a duty to defend, and the award of attorney's fees and costs to the insureds was proper. *See also*, Pilgrim Enters., Inc. v. Md. Cas. Co., 24 S.W.3d 488 (Tex. App.—Houston [1st Dist.] 2000, no pet.). In *Pilgrim Enterprises*, the insurance company claimed it had no duty to defend its insured when plaintiffs filed suit for personal injuries and property damages allegedly caused by long term exposure to perchloroethylene and other hazardous substances released from dry cleaning facilities. The issue was whether the injuries and damages from contamination "occurred" under Texas law at the time the harm was "discovered" for coverage under the parties' occurrence-based insurance policy. The Houston court of appeals held that the answer is "no"—for such policies: the injuries could occur as the exposure took place. Thus, the court found that the insurance company owed the insured a defense because the pleadings alleged damages for the exposure during the policy periods. For more details on these cases, please see the insurance review of the SMU Texas Survey.
2. 23 S.W.3d 449 (Tex. App.—Houston [1st Dist.] 2000, pet. for review granted).
3. Tex. Health & Safety Code § 365.012 (Vernon Supp. 2000).
4. By misdemeanor information, the State charged that Weise did:

> . . . unlawfully, transport litter and other solid waste, namely, HOUSEHOLD TRASH, having an aggregate weight of more than fifteen pounds and less than 500 pounds, and a volume of more than thirteen gallons and less than 100 cubic feet, to a place that was not an approved solid waste site for disposal at the site.
>
> . . . unlawfully, dispose, allow, and permit the disposal of litter and other solid waste, namely HOUSEHOLD TRASH, having an aggregate weight of more than fifteen pounds and less than 500 pounds, and a volume of more than thirteen gallons and less than 100 cubic feet, at a place that was not an approved solid waste site.

Weise, 23 S.W.3d at 450.

5. Tex. Health & Safety Code § 365.012 (Vernon Supp. 2000).

365.012(c) provides that "[a] person commits an offense if the person transports litter or other solid waste to a place that is not an approved solid waste site for disposal at the site."[6] Neither provision contains a culpable mental state, and Weise argued that a culpable mental state is required by section 6.02 of the Texas Penal Code.[7] This provision provides 1) that a person does not commit a criminal offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in the prohibited conduct, and 2) where the prohibited conduct does not prescribe a culpable mental state, a culpable mental state of intent, knowledge, or recklessness is required unless the definition plainly dispenses with any mental element.[8] Thus, the Houston Court of Appeals was left to decide whether the illegal-dumping statute plainly dispenses with any mental element.

a. Texas Case Law has Established Six Factors for Assessing Whether a Statute Requires a Culpable Mental State

The court reversed the lower court's ruling and ordered the information dismissed after concluding that the anti-dumping statute requires a culpable mental state.[9] The Penal Code and a prior decision by the Texas Court of Criminal Appeals required that the court review the relevant statute to determine whether an affirmative statement that the conduct is a crime even though done without fault exists. The statute must manifest an intent to dispense with a culpable mental state. Offenses that are punishable by incarceration have particularly strong presumptions against strict liability. Where several provisions use the term "knowingly" and one does not, this can be enough to show that the legislature intended to dispense with a culpable mental state. This not true with respect to the illegal dumping statute.

The First District Court of Appeals reviewed the trash dumping statute based upon a Texas Court of Criminal Appeals decision, *Aguirre v. State*,[10] that set out a significant level of guidance regarding when a criminal statute should require a culpable mental state if it is silent as to such a

---

6. *Id.*

7. *Ex parte* Bennett Weise, 23 S.W.3d 449, 452 (Tex. App.—Houston [1st Dist.] 2000, pet. for review granted).

8. See TEX. PENAL CODE ANN. § 6.02 (Vernon 1994). Section 6.02 of the Penal Code provides as follows:

> (a) Except as provided by Subsection (b), a person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires.
> (b) If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.
> (c) If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b), intent, knowledge, or recklessness suffices to establish criminal responsibility.

9. *Id. Weise*, 23 S.W.3d at 455. The appeals court reviewed the trial court's decision under the abuse of discretion standard. *Id.* at 451 (citing *Ex parte* Ayers, 921 S.W.2d 438, 441 (Tex. App.—Houston [1st Dist.] 1996, no writ)).

10. 22 S.W.3d 463 (Tex. Crim. App. 1999).

state. Specifically, courts are to inquire "whether an intent to dispense with the requirement of a culpable mental state is manifested by other features of the statute."[11]

The court then turned to the application of the public health doctrine enumerated in a U.S. Supreme Court decision, *Morisette v. United States*.[12] This doctrine holds that certain actions that impair public health and welfare, such as violations of food protection statutes, can be criminally prosecuted since ordinary care would prevent violations from occurring.[13] In addition, the punishments are usually not severe and do not impair the offender's reputation. The Texas Court of Criminal Appeals has imposed strict liability for certain environmental violations, such as air and water pollution; however, the court pointed out that the Water Code now provides for knowing violations, and the air pollution statutes now provide for culpable mental states when they impose criminal liability.[14]

The court arrived at its conclusion after applying six factors developed in *Aguirre*.[15] That case addressed whether a culpable mental state was required in an El Paso ordinance that regulated adult businesses but was silent as to whether a culpable mental state was required. In *Aguirre*, the Court of Criminal Appeals set out guidelines for determining whether a statute plainly dispenses with a mental state element or whether the legislature meant to impose strict liability. The six factors cited in *Aguirre* are: 1) the legislative history of the statute or its title or context; 2) the severity of the punishment (the more severe the punishment, the less likely the legislature intended to impose strict liability); 3) the seriousness of the harm to the public expected to follow from the forbidden conduct (the more serious the consequences to the public, the more likely the legislature intended to impose strict liability); 4) the defendant's opportunity to ascertain the true facts; 5) the difficulty prosecuting officials would have in proving mental state for this type of crime (the greater the difficulty, the more likely the legislature intended strict liability); and 6) the number of prosecutions to be expected (the greater the number of prosecutions, the more likely the legislature intended to impose strict liability).[16]

b. Application of those Six Factors Indicates that the Texas Anti-Dumping Statute Requires a Culpable Mental State

Next the court applied the guiding rules and principles of *Aguirre* to section 365.012. The court acknowledged that the statute was a public health and safety law, which normally imposes strict liability.[17] However,

11. *Weise*, 23 S.W.3d at 452.
12. 342 U.S. 246 (1952).
13. *Ex parte* Bennett Weise, 23 S.W.3d 449, 453 (Tex. App.—Houston [1st Dist.] 2000, pet. for review granted).
14. *Id.*
15. *Id.* at 454.
16. *Id.*
17. *Id.*

the court believed this factor was diminished by the relatively minor danger posed by illegal dumping.[18] In assessing the other factors, the court noted that it is uncertain that requiring a culpable mental state of at least "recklessly" would make illegal dumping offenses more difficult to prove.[19] The court also noted that it is difficult to predict the number of prosecutions that might be expected under the illegal dumping statute, much less what effect the addition of a culpable mental state of at least "recklessly" would have on that number. For these reasons, the court concluded that these were neutral factors in its analysis.[20] The court also concluded that the fact that Weise is an ordinary citizen and that the statute in question does not direct itself solely to businesses favor interpreting the statute as requiring a culpable mental state.[21]

Ultimately, the court was most persuaded by the factor assessing the severity of the punishment imposed by section 365.012, which could be up to one year in jail. The court considered that factor to be particularly weighty when the punishment of the anti-dumping statute was compared with the fine imposed by the *Aquirre* ordinance, which was found to require a culpable mental state. As a result, the court held that a culpable mental state of at least "recklessly" was likewise required for the anti-dumping provisions under section 365.012.[22] The court held that Weise's information was unconstitutional because it lacked a culpable mental state; therefore, denying appellant's habeas corpus petition was an abuse of discretion.[23]

B. Statutory Prerequisites and Subject-Matter Jurisdiction In Appeals of Three Contested Case Decisions

1. *When the Decision in a Contested Case Hearing is Appealed to a District Court, the Failure to Serve Citations on All Parties of Record is not an Issue Affecting Subject-Matter Jurisdiction*

The case *Sierra Club and Downwinders at Risk v. Texas Natural Resource Conservation Commission*[24] involved judicial review of a Commission order. There, the Commission had granted TXI Operations, L.P. ("TXI") a permit to burn solid waste in TXI's cement kilns in Midlothian. Sierra Club and Downwinders at Risk (plaintiffs) challenged the issuance of the permit in a contested case hearing.[25] In addition to the plaintiffs, the parties of record to the contested case hearing included the Commission's Public Interest Counsel, and seven individuals (referred to hereaf-

18. *Id.* at 454-55.
19. *Ex parte* Bennett Weise, 23 S.W.3d 449, 454-55 (Tex. App.—Houston [1st Dist.] 2000, pet. for review granted).
20. *Id.* at 455.
21. *Id.*
22. *Id.*
23. *Id.*
24. 26 S.W.3d 684 (Tex. App.—Austin 2000, pet. ref'd).
25. *Id.* at 685.

ter as "the other parties"). After the Commission granted the permit, the plaintiffs sought judicial review in district court alleging numerous errors of law in the Commission's decision and naming the Commission as the sole defendant.[26] The Commission was served with citation and appeared by filing an original answer containing a general denial. Although the other parties of record received copies of the plaintiffs' petition, they were not served with citation requiring them to appear and answer. Because plaintiffs failed to serve a citation upon every party to the action, the district court decided to dismiss the appeal for want of subject-matter jurisdiction.[27]

In arriving at its decision, the district court construed the plaintiffs' petition as alleging a single statutory cause of action under section 361.321 of the Texas Health and Safety Code and section 2001.176 of the Texas Government Code, a part of the Administrative Procedure Act ("APA").[28] Because these statutes require service of citation on the other parties, which plaintiffs did not do, the district court dismissed for want of subject-matter jurisdiction citing the doctrine requiring strict compliance with such provisions established by the Texas Supreme Court in *Mingus v. Wadley*.[29]

The Austin Court of Appeals reversed the dismissal of the complaint and remanded on the grounds that plaintiffs' failure to comply strictly with all requirements for service of process did not deprive the trial court of jurisdiction.[30] The court began its analysis by reviewing the two statutory provisions with which the plaintiffs had not complied. The first provision, section 361.321 of the Texas Health and Safety Code, had two applicable subsections. Subsection 361.321(a) provides that "[a] person affected by a decision . . . of the commission may appeal the action by filing a petition in a district court of Travis County."[31] Subsection 361.321(c) provides that in such actions "the petition must be filed not later than the 30th day after the date of the . . . decision" and "[s]ervice of citation must be accomplished not later than the 30th day after the date on which the petition is filed."[32] The second statute, subsection 2001.176(b)(2) of the APA requires that "a copy of the petition must be served on the state agency and each party of record in the proceedings before the agency."[33] Although the Commission, the sole defendant

26. *Id.*

27. *Id.*

28. *Id.* at 685-86; *see also* TEX. HEALTH & SAFETY CODE ANN. § 361.321 (West Supp. 2000); TEX. GOV'T CODE ANN. § 2001.176 (West Supp. 2000).

29. 285 S.W. 1084, 1087 (Tex. 1926). In *Mingus*, the Texas Supreme Court held that when a plaintiff asserts a purely statutory cause of action to recover a statutory remedy, subject-matter jurisdiction is not presumed in the reviewing court. The record must show affirmatively that the plaintiff complied strictly with the statutory procedures for transferring the controversy from the administrative venue to the district court. *Id.*

30. Sierra Club and Downriders at Risk v. Tex. Natural Res. Conservation Comm'n, 26 S.W.3d 684, 688 (Tex. App.—2000, pet. ref'd).

31. TEX. HEALTH & SAFETY CODE ANN. § 361.321(a) (West Supp. 2000).

32. *Id.* at § 361.321(c).

33. TEX. GOV'T CODE ANN. § 2001.176(b)(2) (West Supp. 2000).

named in the plaintiffs' petition, was served with citation within the time required, the citation was not served on the other parties of record before the 30th day after the plaintiffs filed their petition.[34]

a. Under the *Mingus* Doctrine, When a Plaintiff Asserts a Purely Statutory Cause of Action, the Plaintiff Must Strictly Comply with the Statutory Procedures for Transferring the Matter to District Court in order to Demonstrate Subject-Matter Jurisdiction

Next the court reviewed case law. In *E.R.S. v. McKillip*, the Austin Court of Appeals had held that subsection 2001.176(b)(2) required that each party of record in an agency proceeding be served with a copy of the petition attached to a citation issued and served.[35] Further, the court had ruled that simply serving "notice," as was done in the immediate case, did not satisfy the statute.[36] Moreover, the court acknowledged that *McKillip* provided that compliance with section 2001.176(b)(2) was essential to the reviewing court's subject-matter jurisdiction under the *Mingus* doctrine—the same doctrine relied upon by the district court.[37] But the court also noted that since the district court's decision, the Texas Supreme Court had overruled *Mingus* in *Dubai Petroleum Co. v. Kazi* "to the extent that it characterized the plaintiff's failure to establish a statutory prerequisite as jurisdictional."[38] The *Dubai* decision would be critical in the Austin Court of Appeals' decision to reverse the district court's decision.

b. Under *Dubai*, Plaintiffs Need not Plead the Statutory Elements to Demonstrate Subject-Matter Jurisdiction

In *Dubai*, the Texas Supreme Court expressly overruled the part of the *Mingus* opinion that required plaintiffs to plead the statutory elements to demonstrate affirmatively that the trial court had subject-matter jurisdiction.[39] The *Dubai* case involved a statute that gave citizens of foreign countries the right to maintain a wrongful-death action in Texas courts provided that the decedent's country of citizenship afforded reciprocal consideration to United States citizens under a treaty.[40] The supreme court held that the plaintiffs' burden to demonstrate the existence of such a treaty was not a jurisdictional prerequisite, but rather a condition upon which their right to relief depended.[41] As the court of appeals noted, the

34. *Sierra Club*, 26 S.W.3d at 686.
35. Employees' Ret. Sys. v. McKillip, 956 S.W.2d 795, 799 (Tex. App.—Austin 1997, no pet.).
36. *Id.*
37. Sierra Club and Downriders at Risk v. Tex. Natural Res. Conservation Comm'n, 26 S.W.3d 684, 686 (Tex. App.—Austin, pet. ref'd).
38. *Id.* (quoting Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 76 (Tex. 2000)).
39. *Dubai Petroleum Co.*, 125 S.W.3d at 71.
40. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.031(a)(4) (West Supp. 2000).
41. *Dubai Petroleum Co.*, 12 S.W.3d at 76-77.

Texas Supreme Court overruled the long-standing *Mingus* doctrine primarily because the classification of such "statutory prerequisites" as issues of subject-matter jurisdiction results in judgments that are perpetually "vulnerable to delayed [collateral] attack for a variety of irregularities that" often result from "a good-faith mistake in interpreting the law."[42] Under the new doctrine established by *Dubai*, such "irregularities" or "statutory prerequisites" no longer raise issues about subject-matter jurisdiction, but instead go "to the right of the plaintiff to relief."[43] Thus, the court of appeals concluded that the next step in its analysis was to determine whether the service-of-citation defect at issue in the immediate case was the type of "irregularity" or "statutory prerequisite" that the supreme court intended to remove from the issue of subject-matter jurisdiction.[44]

c. The Service-of-Process Defect was not the Type of Defect that the Texas Supreme Court Intended to Affect Subject-Matter Jurisdiction

First, the court of appeals noted that those terms do not include matters that are traditionally and undoubtedly elements of subject-matter jurisdiction. As general examples, the court cited the general constitutional or statutory delegation of power conferred on a court, or a special jurisdictional statutory provision that dictates the kind of cause to be heard and the kinds of relief to be awarded.[45] As a specific statutory example of the latter, the court cited section 2001.174 of the APA.[46] That provision empowers the reviewing court to examine the agency record for error in cases of substantial-evidence review; however, if prejudicial error is found, the statute only allows the reviewing court to reverse or remand the case to the agency.[47]

In contrast, the court noted that the citation requirements in subsection 361.321(c) and subsection 2001.176(b)(2) "do not define, enlarge, or restrict the class of causes the court may decide or the relief that may be awarded."[48] Thus, the court reasoned, failure to comply with the requirements in those provisions would not be "a defect that goes to the district court's subject-matter jurisdiction under *Dubai*."[49] Accordingly, the court concluded that the district court had erred in dismissing the plaintiffs' cause of action, reversed the judgment of dismissal, and remanded the cause to the district court.[50]

42. *Id.* at 76 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. (b), at 118).
43. *Id.*
44. *Sierra Club*, 26 S.W.3d at 687.
45. *Id.*
46. *See* TEX. GOV'T CODE ANN. § 2001.174(2).
47. *Id.*
48. *Id.*
49. *Sierra Club*, 26 S.W.3d at 687.
50. *Id.* at 688. Justice Mack Kidd concurred in the result reached by the majority opinion, but on different grounds. Justice Kidd noted that the plaintiffs brought their appeal in district court under sections 382.032 and 361.321 of the Health and Safety Code

C. Wastewater Discharge Permit Exemption for Shrimp Research Facilities

1. *The TNRCC's Wastewater Permit Exemption for Certain Shrimp Research Facilities is Valid*

In addition to the *Sierra Club* case, the Austin Court of Appeals also decided a case involving the Commission's rulemaking powers in the context of shrimp research facilities in *Lower Laguna Madre Foundation, Inc. v. Texas Natural Resource Conservation Commission*.[51] The Loma Alta Trust ("Loma Alta") filed an application requesting authorization to construct and operate a shrimp research facility under the exemption requirements provided by subsection 321.272(b)(3) of the Texas Administrative Code.[52] Subsequently, the Commission's executive director sent a letter granting the exemption and including a list of requirements that Loma Alta must satisfy to retain its exempt status.[53]

Thereafter, the Commission's general counsel asked the Commission to review the executive director's grant of the exemption to Loma Alta, and a public hearing was held on the issue. At the public hearing on Loma Alta's exemption the Appellant, Lower Laguna Madre Foundation ("the Foundation"), expressed its concerns about the dangers to native shrimp from the introduction of non-native species. After considering the comments presented by Loma Alta and by the Foundation at the public hearing, the Commission affirmed the executive director's decision to grant Loma Alta's exemption. The Foundation challenged the Commission's decision regarding Loma Alta in district court. Both the Foundation and Commission filed cross-motions for summary judgment.[54] The district court granted the Commission's motion for summary judgment, while denying the Foundation's motion.[55]

(the "Clean Air Act") and section 5.351 of the Texas Water Code, none of which contain detailed provisions regarding the steps necessary to appeal a ruling, order, decision, or other act of the Commission. *Id.* at 689; *see also* TEX. HEALTH & SAFETY CODE ANN. § 382.032 (West Supp. 2000); TEX. WATER CODE ANN. § 5.351 (West 2000). But as Justice Kidd pointed out, nowhere within the organic statutes governing the Commission is there any requirement that the applicant be served at all. *Sierra Club*, 26 S.W.3d at 688. The procedural requirements that plaintiffs failed to follow are in the APA, not the organic statutes. Justice Kidd stated that subsection 2001.176(b)(2) of the APA section applies only in the absence of other controlling provisions. *Id.* He argued that in the immediate case, other applicable statutes exist that explicitly deal with service and notice of appeals made pursuant to the Clean Air Act, Solid Waste Disposal Act, and the Water Code. *Id.*; *see also* TEX. HEALTH & SAFETY CODE ANN. §§ 361.321, 382.032 (West 2000); TEX. WATER CODE ANN. § 5.357 (West 2000). Thus, Justice Kidd reasoned that the APA provision was inapplicable to this appeal. *Sierra Club*, 26 S.W.3d at 689. In other words, none of the provisions applicable to the instant case required service of citation on all parties involved at the agency level. *Id.* at 689.

51. 4 S.W.3d 419 (Tex. App.—Austin 1999, no pet.)

52. *See* 30 TEX. ADMIN. CODE § 321.272(b)(3) (West 2000).

53. *Lower Laguna*, 4 S.W.3d at 421.

54. *Id.* at 422.

55. *Id.* at 428.

a. The TNRCC's Rules Provide an Exemption from Wastewater Permitting for Certain Shrimp Research Facilities

On appeal, the court was asked to address the four issues raised by the Foundation. The first issue addressed by the court was how to interpret the inartfully drafted subsection 321.272(b)(3).[56] The court concluded that by reading the rule as a whole and after considering the rulemaking history, the rule's language could be reconciled to provide that those shrimp research facilities that do not discharge in excess of five million gallons per day and not more than thirty days per year are exempt from the individual wastewater permit requirement.[57]

b. The TNRCC Satisfied the Legal Requirements in the Texas Water Code in Promulgating the Shrimp Research Facility Exemption

Next the court examined an issue raised by the Foundation regarding section 26.040 of the Texas Water Code, which grants the Commission some discretion in regulating certain waste discharges by rule rather than by permit. The Foundation argued that in promulgating section 321.272 the Commission overstepped its limited discretion and violated the statutory requirements established in section 26.040 by 1) failing to include specific conditions and requirements regulating the discharges from shrimp research facilities, and 2) determining that individual permits would be unnecessarily burdensome for shrimp research facilities and for the Commission.[58]

Section 26.040 generally allows the Commission to establish, by rule, requirements and conditions for the discharges of waste for certain facilities for which requiring individual permits would be unnecessarily burdensome both to the waste discharger and the Commission.[59] The court noted that in promulgating section 321.272, the Commission had estab-

56. Subsection 321.272(b)(3) reads as follows:

> An aquaculture facility that discharges within the coastal zone . . . must obtain an individual wastewater discharge permit . . . if the facility contains, grows, or holds aquatic species as described in any of the following three categories:
>
> . . .
>
> (3) Shrimp species in ponds, raceways, or other similar structures at:
> (A) a shrimp research facility that discharges less than 30 days per year but at a flow rate that exceeds five million gallons on any single day of discharge or
> (B) any other shrimp aquaculture facility regardless of production or discharge quantity.

30 TEX. ADMIN. CODE § 321.272(b)(3)(A), (B).

57. *Lower Laguna*, 4 S.W.3d at 423.

58. *Id.* at 424.

59. Section 26.040 of the Water Code reads in pertinent part:

> Whenever the Commission determines that . . . the general nature of a particular type of activity which produces a waste discharge is such that requiring individual permits is unnecessarily burdensome both to the waste discharger and the Commission, the Commission may by rule regulate and set the requirements and conditions for the discharges of waste.

TEX. WATER CODE § 26.040.

lished adequate qualifications for discharge limitations for shrimp research facilities and that exempt facilities must also comply with other regulatory requirements.[60] The court also noted that the executive director's letter to Loma Alta granting the exemption contained additional licensing, reporting, and notification requirements. Based on these additional requirements, the court concluded that the Commission established sufficient conditions and requirements in the rule to satisfy the regulation requirements of section 26.040.[61] Furthermore, the court noted that section 26.040 gives the Commission discretion to determine what type of discharges may be regulated by rule and that the Commission did not overstep its discretion in determining that the rule permits shrimp research facilities.[62]

c. The TNRCC Order Adopting the Shrimp Research Facility Exemption Contained a Reasonable Justification

The third issue addressed by the court was whether the order adopting section 321.272 contained a "reasoned justification" that substantially complied with the requirements of subsection 2001.033(1) of the APA.[63] Under this provision, an agency must provide a reasoned justification that includes a summary of comments received on the rule, a restatement of the rule's factual basis, and the reasons why the agency disagrees with party submissions and proposals.[64] The Foundation argued that the order adopting the shrimp research facility exemption failed to provide a reasoned justification. The court disagreed, holding that the Commission hoped to encourage beneficial shrimp research projects by eliminating the prohibitively expensive process of obtaining an individual permit.[65] By citing several examples, the court recognized that the Commission sufficiently answered comments in the adoption order and provided reasoned explanations for its decision to allow exemptions for shrimp research facilities. In concluding that the Commission substantially complied with the reasoned-justification requirement, the court held that the Commission's responses explained how and why the Commission reached the conclusions it did and that, after considering the comments in full, the commission had provided adequate rationale for its decision.[66]

d. The TNRCC's Failure to Provide an Appeal in the Exemption did not Prejudice the Foundation's Substantial Rights

Finally, the court addressed the issue of whether the Commission's failure to provide for an appeal in the exemption in section 321.272 had

60. TEX. ADMIN. CODE §§ 321.272(f), (h) (West 2000).
61. Lower Laguna Madre Found., Inc. v. Tex. Natural Res. Conservation Comm'n, 4 S.W.3d 419, 424 (Tex. App.—Austin 1999, no pet).
62. *Id.*
63. *See* TEX. GOV'T CODE ANN. § 2001.033(1) (West 1999).
64. *Id.* § 2001.033(a)(1)(A)-(C).
65. *Lower Laguna*, 4 S.W.3d at 426.
66. *Id.* at 425.

prejudiced the Foundation's substantial rights. The court began its analysis by noting that section 5.122 of the Water Code provides that any person affected by an action delegated to the executive director "may appeal the executive director's action to the Commission unless the action is a decision . . . specified as final and appealable by the Commission rule that delegates the decision to the executive director."[67] The Foundation requested that section 321.272 be declared invalid because it failed to provide for an appeal to the Commission as required by section 5.122. The court held that although such a failure is an error of law, the Foundation's substantial rights were not prejudiced because the Foundation did receive a review of the executive director's decision by the full Commission. Furthermore, as the court noted, the Commission also invited the Foundation to submit written comments on the matter and to present oral argument at the public hearing. Thus, the court overruled the last of the Foundation's points of error and affirmed the district court's summary judgment in favor of the Commission.[68]

D. TNRCC Review of Hearing Requests on Permit Applications

1. *A Hearing Requestor May Be Entitled to a Preliminary Hearing to Present Evidence in Support of the Hearing Request*

In May 18, 2000, the Austin Court of Appeals issued an opinion on rehearing that addressed how hearing requests on permit applications are to be evaluated in cases not subject to House Bill 801 ("HB 801").[69] In that case, United Copper Industries, Inc. ("United Copper") applied to the Texas Natural Resource Conservation Commission ("TNRCC" or "the Commission") for a permit to construct and operate two copper melting furnaces in Denton, Texas.[70] Because the permit application was declared administratively complete before September 1, 1999, the application was not subject to the public participation provisions of HB 801 or the TNRCC rules promulgated to implement HB 801.[71] Following public notice of the application, Joe Grissom ("Grissom") sent a letter to the TNRCC requesting a contested case hearing on United Copper's permit application.[72] Grissom's letter indicated that he lived about two miles downwind from the proposed facility and that he was concerned about the negative impact that he thought United Copper's emissions would have on his health and the health of his two sons, all of whom suffer from

67. Tex. Water Code Ann. § 5.122(b) (West 1985 & Supp. 2000).

68. *Lower Laguna*, 4 S.W.3d at 426.

69. *See* United Copper Indus. v. Grissom, 17 S.W.3d 797 (Tex. App.—Austin 2000, pet. dism'd). HB 801 was enacted by the Texas Legislature in 1999 and applies to most state environmental permit applications that are declared administratively complete after September 1, 1999. Tex. H.B. 801, 76th Leg., R.S. (1999).

70. *Grissom*, 17 S.W.3d at 800.

71. *See* 30 Tex. Admin. Code §§ 39.1, 50.2, 55.1.

72. *See Grissom*, 17 S.W.3d at 800.

serious asthma.[73] Although the TNRCC Executive Director and United Copper filed written responses urging the Commission to deny Grissom's hearing request, Grissom never replied to those responses or submitted any evidence to support his hearing request.[74] The Commission denied Grissom's hearing request because it concluded that Grissom's hearing request was unreasonable and that Grissom had not satisfied the regulatory requirements for a hearing request.[75] The Commission then issued United Copper's air quality permit.[76] On review, the district court reversed the Commission's decision and remanded the case to the Commission for a preliminary hearing.[77] The court ordered the Commission to conduct a preliminary adjudicative hearing at which Grissom would be provided an opportunity to present competent evidence in support of his hearing request.[78]

On appeal, the Austin Court of Appeals agreed that Grissom was entitled to a preliminary hearing and affirmed the district court's judgment.[79] The court first found that Grissom was an "affected person" as contemplated by the Texas Clean Air Act and the TNRCC rules.[80] The court then determined that the Commission acted unreasonably by denying Grissom a meaningful opportunity to offer evidence in support of his hearing request and an opportunity to refute evidence offered by United Copper in it response to Grissom's hearing request.[81] The court in *Grissom* specifically limited its holding to the facts of that case.[82]

a. The Question of Whether a Hearing Requestor is an "Affected Person" Must Not Be Confused with the Question of Whether the Hearing Requestor Will Ultimately Prevail on the Merits

In their appeals, United Copper and the TNRCC contended that Grissom was not an affected person as defined by the TNRCC rules.[83] United Copper relied upon the modeling data it provided to the Commis-

73. *Id.*
74. United Copper Indus. V. Grissom, 17 S.W.3d 797, 800 (Tex. App.—Austin 2000, pet. dism'd).
75. *Id.* at 801.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 806. In its original opinion, the Austin Court of Appeals had reversed the district court's judgment based upon its conclusion that the Commission's denial of Grissom's hearing request was not invalid, arbitrary, or unreasonable. *Grissom*, previously reported at 2000 Tex. App. LEXIS 737 (Feb. 3, 2000). However, on motion for rehearing, the court later withdrew its earlier opinion and affirmed the judgment of the district court. *Grissom*, 17 S.W.3d at 800-06.
80. United Copper Indus. V. Grissom, 17 S.W.3d 797, 803-04 (Tex. App.—Austin 2000, pet. dism'd).
81. *Id.* at 805.
82. *Id.* at 806.
83. *Id.* An affected person "has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." 30 TEX. ADMIN. CODE § 55.29(a).

sion in arguing that Grissom could not be an affected person because the unrefuted evidence established that Grissom's health, safety, and property would not be affected.[84] The Austin Court of Appeals rejected that argument, stating that "the data merely suggests that Grissom may not be affected to a *sufficient degree* to entitle him to prevail in a contested-case hearing on the merits. . ."[85] The court found that United Copper had confused the question of standing and the affected person requirement for requesting a contested case hearing with the ultimate question of whether a hearing requestor will prevail on the merits.[86] Because Grissom lived two miles downwind of the proposed facility and because Grissom and his sons suffer from serious asthma, the court was convinced that Grissom "is more likely than other members of the general public to be adversely affected by the facility."[87] Accordingly, the court ruled that Grissom had satisfied the affected person requirement.[88]

b. The TNRCC Must Provide a Hearing Requestor a Meaningful Opportunity to Demonstrate that His Hearing Request is Reasonable and to Present Competent Evidence

United Copper and the TNRCC also argued that Grissom's hearing request was unreasonable and that the hearing request was not supported by competent evidence.[89] For permit applications not subject to HB 801, a hearing request will only be granted if the request is reasonable and supported by competent evidence.[90] The Austin Court of Appeals concluded that the Commission's decision to deny Grissom's hearing request "denied Grissom a *meaningful opportunity* to offer evidence in support of his request and a chance to refute the proof offered by United Copper."[91] The court rejected the argument that Grissom's failure to submit evidence of the reasonableness of his request resulted from Grissom's own mistake and failure to satisfy the burden of offering evidence in support of his hearing request. The court observed that the published notice instructing how to request a contested case hearing, the TNRCC's response to Grissom's hearing request, and the TNRCC's letter describing the basis on which the Commission would decide to grant or deny the hearing request all failed to indicate that the Commission's decision could depend upon whether Grissom offered specific evidence in support of his request. In addition, the TNRCC rules did not require hearing requestors to submit evidence in conjunction with their hearing request.[92] Accordingly,

84. *Grissom*, 17 S.W.3d at 803.
85. United Copper Indus. V. Grissom, 17 S.W.3d 797, 803 (Tex. App.—Austin 2000, pet. dism'd).
86. *Id.*
87. *Id.*
88. *Id.* at 803-04.
89. *Id.* at 804.
90. *Id.*; *see also* 30 TEX. ADMIN. CODE § 55.27(b)(2).
91. United Copper Indus. V. Grissom, 17 S.W.3d 797, 804 (Tex. App.—Austin 2000, pet. dism'd).
92. *Id.*

the court held that "the Commission acted unreasonably in not granting Grissom a preliminary hearing affording him a meaningful opportunity to present evidence."[93]

2. *Grissom May Not Extend to Permit Applications Subject to HB 801*

HB 801 and the TNRCC rules implementing HB 801 modified the public participation process for permitting applications and replaced the reasonableness standard for hearing requests with the HB 801 standard requiring relevant and material disputed issues of fact.[94] Although the pre-HB 801 statute and rules may not have afforded an affected person a meaningful opportunity to present competent evidence absent a preliminary hearing, HB 801 and the public participation rules were created to for the purpose of facilitating public involvement and participation in the environmental permitting process.[95] HB 801 and the TNRCC rules provide the public several opportunities to voice their concerns about a proposed permit and to raise specific issues regarding a proposed project.[96] Under HB 801 and the amended TNRCC rules, if the Commission finds that a hearing request raises disputed issues of fact that are relevant and material to the Commission's decision of whether the permit applicant has satisfied all substantive law requirements governing issuance of the permit, a contested case hearing will be granted on those specific issues.[97] Accordingly, a preliminary hearing is probably not required under the HB 801 process, which affords the public a meaningful opportunity to present evidence regarding whether the issues raised are disputed, relevant, and material.

E. UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER

In *FM Properties Operating Co. v. City of Austin*, the Texas Supreme Court ruled that section 26.179 of the Texas Water Code ("TWC") is an unconstitutional delegation of legislative power.[98] Section 26.179, enacted in 1995, allows private landowners of at least 500 contiguous acres within certain municipalities' extraterritorial jurisdictions ("ETJs") to designate water quality protection zones on their property.[99] The crea-

93. *Id.* at 805-06. Justice Jones filed a dissenting opinion, in which he disagreed that Grissom had not been provided a meaningful opportunity to present competent evidence in support of his hearing request. *Id.* at 807-08.

94. *See* TEX. HEALTH & SAFETY CODE § 382.056(n); TEX. WATER CODE § 5.556(d); *see, e.g.*, 30 TEX. ADMIN. CODE § 55.201(d)(4).

95. *See generally*, 24 Tex. Reg. 9015 (Oct. 15, 1999).

96. *See generally*, TEX. HEALTH & SAFETY CODE § 382.056; TEX. WATER CODE §§ 5.552 - .556; 30 TEX. ADMIN. CODE §§ 39.411, 39.418, 39.419.

97. TEX. HEALTH & SAFETY CODE § 382.056(n); TEX. WATER CODE § 5.556(d); 30 TEX. ADMIN. CODE § 55.201(d)(4).

98. 22 S.W.3d 868, 870 (Tex. 2000).

99. *Id.*; TEX. WATER CODE § 26.179. Water quality protection zones are generally established to facilitate development and to protect the quality of water within the zone. *FM Props. Operating Co.*, 22 S.W.3d at 870. When a zone exists, the city is powerless to collect fees, exercise eminent domain, and enforce ordinances and other requirements. *Id.* at 872.

tion of water quality protection zones in effect exempts landowners from applicable regulations, including those pertaining to water quality, and insulates landowners from certain city fees and the city's eminent domain authority.[100]

1. The Authority to Designate Water Quality Protection Zones Under Section 26.179 of the Texas Water Code Constitutes a Delegation of Legislative Power to Private Landowners

In evaluating the constitutionality of TWC section 26.179 on its face, the Texas Supreme Court first determined whether the statute delegated legislative powers to private landowners. The supreme court found that TWC section 26.179 delegates legislative powers to certain landowners, including the power to regulate water quality on their property by creating water quality protection zones and the power to avoid enforcement of municipal regulations.[101] The court explained that under the statute, certain landowners were given the legislative power "to decide whether and how to apply section 26.179 to their property, to make rules to implement section 26.179, and to ascertain conditions upon which the statute may operate."[102] The court applied the test for delegation of legislative power outlined in *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen.*[103] If the *Boll Weevil* weigh against the constitutionality of the statutory delegation of legislative authority, the statute is unconstitutional.[104] The supreme court found that "there is no meaningful governmental review of the landowners' actions, there is inadequate representation of those affected by the landowners' actions, the landowners have pecuniary inter-

100. *FM Props. Operating Co.*, 22 S.W.3d at 870, 872.

101. *Id.* Under TWC § 26.179, landowners may exempt themselves from enforcement of water quality ordinances, land use ordinances, nuisance abatement, platting and subdivision requirements, pollution control and abatement programs or regulations, and "any environmental regulations." *Id.* (citing and quoting TEX. WATER CODE § 26.179(i)).

102. *Id.* at 876.

103. 952 S.W.2d 454, 472 (Tex. 1997). The test for analyzing the constitutionality of a private delegation includes the following factors:

> 1. Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government?
> 2. Are the persons affected by the private delegate's actions adequately represented in the decisionmaking process?
> 3. Is the private delegate's power limited to making rules, or does the delegate also apply law to particular individuals?
> 4. Does the private delegate have a pecuniary or other personal interest that may conflict with its public function?
> 5. Is the private delegate empowered to define criminal acts or impose criminal sanctions?
> 6. Is the delegation narrow in duration, extent, and subject manner?
> 7. Does the private delegate possess special qualifications or training for the task delegated to it?
> 8. Has the legislature provided sufficient standards to guide the private delegate in its work?

Id.

104. *Id.* at 875 (citing *Boll Weevil*, 952 S.W.2d at 475).

ests that may conflict with their public function, and the delegation is broad in duration and extent."[105] Therefore, the court concluded that section 26.179 delegates legislative powers to private landowners.[106]

2. *Section 26.179 of the Texas Water Code Is an Unconstitutional Delegation of Legislative Powers to Private Landowners*

Based on the *Boll Weevil* eight-factor test, the court concluded that TWC section 26.179 is an unconstitutional delegation of legislative power.[107] Under the court's analysis, two *Boll Weevil* factors weighed in favor of the delegation, four factors weighed against the delegation, and two factors neither weighed for or against the delegation.

The court found that the third and fifth *Boll Weevil* factors weighed in favor of the delegation. Under the third factor, the court found that the limit of landowners' power to apply the law only to themselves and their successors in interest weighed in favor of the delegation.[108] Section 26.179 does not give landowners the authority to apply a water quality plan or decision to designate a water quality protection zone to individuals other than themselves or their successors in interest.[109] Similarly, under the fifth factor, the court found that landowners' lack of power to define criminal acts or impose criminal sanctions weighs in favor of the delegation.[110]

Under the court's analysis, the first and fourth *Boll Weevil* factors weighed heavily against the constitutionality of the delegation in section 26.179. The court also determined that the second and fourth factors weighed against the delegation. Under the first factor, the court determined that there is no meaningful TNRCC review of the landowners' powers under section 26.179.[111] Though water quality plans are subject to some form of review by TNRCC, the court found that the landowners could in many cases circumvent monitoring requirements, requirements to modify water quality plans, and requirements to modify existing operational and maintenance practices.[112] In addition, landowners' decisions to exempt themselves from enforcement of municipal regulations are not subject to any TNRCC review.[113] Because meaningful governmental review of landowners' powers could not be identified, the court found that the first *Boll Weevil* factor weighed heavily against the constitutionally of the delegation.[114] Under the fourth factor, which is also emphasized in determinations regarding delegations to private interested parties, the court found that landowners' pecuniary interests, which could conflict

105. *FM Props. Operating*, 22 S.W.3d at 878.
106. *See id.* at 877.
107. *Id.* at 880.
108. *Id.* at 885.
109. *Id.*
110. *Id.* at 886.
111. *Id.* at 883.
112. FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 882-84 (Tex. 2000).
113. *Id.* at 884.
114. *Id.*

with their public function, weighed heavily against the delegation.[115] The court noted that landowners' have a pecuniary interest in maximizing profit and minimizing costs, which could be at odds with the landowners' public function to regulate water quality and decide which municipal regulations could or could not be enforced on their property.[116] Under the second *Boll Weevil* factor, the court determined that the persons affected by the landowners' actions are not afforded adequate representation in the decision-making process.[117] Neighbors, downstream water users, and the general public could be adversely affected by landowners' designation of water quality protection zones.[118] However, public hearings on water quality plans cannot be required and no parties are given the right to appeal TNRCC approval of water quality plans or the designation of water quality protection zones.[119] In addition, affected persons are not involved in any way in landowners' decisions regarding which municipal regulations cannot be enforced in the water quality protection zones.[120] For these reasons, the court concluded that the second *Boll Weevil* factor also weighed against the delegation.[121] Finally, under the sixth factor, the narrow subject matter of the delegation, broad extent and potentially indefinite duration of the delegation were determined to weigh against finding the statute constitutional.[122]

The court found that neither the seventh nor the eighth *Boll Weevil* factor weighed in favor of or against the delegation. Under the seventh factor, the court analyzed whether landowners must possess any special qualifications or training in land use planning, water quality management, or public health, safety, and welfare management.[123] Although TWC section 26.179 does not require landowners to have any special qualifications, it does require landowners to hire registered professional engineers to review the water quality plans and amendments.[124] The statute requires that professional engineers evaluate certain things, providing a check on the discretion of landowners.[125] However, engineers do not take part in the landowners' decisions about which municipal regulations the water quality protection plan and land use plans will comply with and thus be enforceable on the landowners' property.[126] Accordingly, the court found that the seventh *Boll Weevil* factor did not weigh for or against the constitutionality of the delegation. Under the eight factor, the court analyzed whether the sufficient legislative standards exist to guide

115. *Id.* at 885.
116. *Id.*
117. *Id.* at 884.
118. FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 884 (Tex. 2000).
119. *Id.*
120. *Id.* at 885.
121. *Id.*
122. *Id.* at 886.
123. *Id.*
124. FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 886-87 (Tex. 2000).
125. *Id.* at 887.
126. *Id.*

landowners in their decision-making.[127] The court noted that section 26.179 provides detailed standards for water quality plans, including the option of maintaining background levels of water quality or retaining the first 1.5 inches of rainfall from developed areas.[128] However, section 26.179 does not specify what occurs if background water quality levels are not maintained and how landowners are to exercise their broad authority regarding modification of water quality plans.[129] Section 26.179 also lacks sufficient standards to guide landowners in deciding which municipal regulations can be enforced on their property.[130]

As a whole, the court concluded that the *Boll Weevil* factors weighed against the constitutionality of the delegation.[131] Accordingly, the court held that "section 26.179 of the [Texas] Water Code is an unconstitutional delegation of legislative power to private landowners."[132]

F. City's Discharge of Treated Wastewater into Stream above Landowners' Property Did Not Constitute Taking Absent Flooding in Violation of City's Discharge Permit

In an interesting case brought by landowners seeking to prevent the discharge of treated sewage effluent into what was at best an intermittent stream, the Austin Court of Appeals ruled in favor of the City of Georgetown.[133] The court held that discharging treated wastewater into the stream was within the City of Georgetown's rights. Much of the opinion hinged upon the meaning of watercourse and whether this particular part of the property met the definition. The court viewed the issues as (1) whether the stream was a watercourse belonging to the State of Texas, rather than to plaintiffs, the Domels, and (2) if the stream was a watercourse, whether the City's discharge of the treated wastewater into the stream that flowed through the Domels' property would constitute a constitutional taking of the Domels' property absent flooding of their property or a violation of the City's discharge permit.

The Domels owned their property for more than fifty years. Development north of Austin had begun to surround their farmland. A private entity had owned land upstream of the Domels and had obtained a permit from the Texas Water Commission to discharge into a "stream" that passed through their property. The private entity never constructed a treatment plant and the City purchased the land and successfully applied to the TWC for transfer of the permit. The City then applied to the TWC to amend the permit to increase the maximum daily discharge volume

127. *Id.*
128. *Id.*
129. *Id.* at 887.
130. FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 887 (Tex. 2000).
131. *Id.* at 888.
132. *Id.* Justice Abbott filed a dissenting opinion, in which he was joined by Justices Hecht and Owen. Justice Owen filed a separate dissenting opinion, in which she was joined by Justices Hecht and Abbott.
133. Domel v. City of Georgetown, 6 S.W.3d 349, 361 (Tex. App. Civ.—Austin 1999).

from 250,000 gallons per day to 2.5 million in advance of actually constructing a wastewater treatment plant.

In the course of the permit amendment process before the TWC, the Domels and other downstream landowners protested the permit amendment application on the basis that the stream was dry six months out of the year and would become a flowing stream with the discharge of the City's effluent, causing interference with the use of the protestants' use of their land. The Domels argued that the City should be required to pipe the treated wastewater past their land and into a stream below their land. On consideration of the landowners' arguments and factual positions, the hearings examiner ruled that the stream was a "watercourse" and therefore was property of the State. The State has the power to grant parties the right to discharge into a watercourse if the applicant for the discharge permit can meet the requirements of that permit and show that the discharge will not adversely affect the quality of the water in the watercourse. The court determined that the discharge would not affect the quality of the watercourse.

The hearings examiner's determinations were then passed to the Commissioners of the TWC, which ruled in favor of the City of Georgetown. The Commissioners ruled that the discharge would not pose a threat to water quality. Some of the specific rulings were that the discharge would not result in an odor, would not adversely affect the designated uses of the stream segment of public recreation, public water supply, and high quality aquatic habitat, and that the stream had sufficient carrying capacity to contain the discharge. Based upon these and other findings the Commissioners ruled that the protestants had no basis for requesting that the TWC order that the discharge be piped past their land rather than being discharged into the stream.

Subsequent to the issuance of the amended permit, the City constructed the wastewater treatment plant and in 1993, began discharging into the stream. The City operated the wastewater treatment plant without any violation of its permit. In 1994, the Domels sued the City claiming the discharge resulted in a taking of or damage to their property without compensation, in violation of the Texas Constitution. The Domels contended that the discharge of effluent diminished the value of their land. It is perhaps worth noting that in 1997, the same year the jury trial took place, the Texas Natural Resource Conservation Commission ("TNRCC") issued a renewed permit for the City.

A trial occurred, but through a series of procedural decisions, the trial court ultimately granted a motion for summary judgment for the City. The City's motion was supported by evidence that the tributary or stream meets the definition of watercourse, including evidence from the TWC hearing.

1. Definition of Watercourse Determines Ownership of Water

After ruling that the City failed to raise the issue of collateral estoppel based upon decisions before the TWC, the Appeals Court turned to the first question of whether the uncontroverted summary judgment evidence established the stream was in fact a "watercourse." The import of this proof is that a watercourse belongs to the state and what is referred to as "diffuse water" belongs to the landowner before it flows into a watercourse.[134] The court noted that the parties agreed upon the seminal case and the factors set forth therein to determine whether a stream is a watercourse or diffuse water. The determinative case was a 1925 decision in *Hoefs v. Short.*[135] In this decision, the Texas Supreme Court created a three part test for determining if water on land was in fact a watercourse: the stream must have (1) a defined bank and beds, (2) a current of water, and (3) a permanent source of supply. With respect to the first element, the court allows that the bed and banks of the stream be "'slight, imperceptible, or absent'" in some instances without the stream losing its character as a watercourse.[136] With respect to the second element, stream flow may be intermittent as opposed to continuous, and can be dry for long periods of time. The latter may have been seen by courts as necessary since many streams in arid parts of Texas are dry for substantial parts of the year. With respect to the third element, the question of supply, again, did not require a continuous supply. "This . . . means that the stream must be such that similar conditions will produce a flow of water, and that these conditions recur with some regularity, so that they establish and maintain a running stream for considerable periods of time."[137] In *Hoefs*, the stream at issue ran for two days or so after a heavy rain, and did so on average five or six times a year.

The test then for a watercourse is not terribly stringent. Again, this test undoubtedly reflects the nature of streams in Texas, where in fairly arid regions, streams flow on an intermittent basis. The court then applied this test to the facts introduced to the trial court in its summary judgment motion. The city offered the evidence entered at the TWC permit hearings, excerpts from one of the plaintiff's depositions, U.S. Geological Survey maps, and the affidavit of the a City employee involved in its utilities department. The affidavit stated that the stream had defined bed and banks. Aerial and ground level photographs showed a defined bed and banks. However, Mrs. Domel in her deposition disagreed with this view.

In addressing the first element, the Appeals Court determined that Mrs. Domel's testimony that the stream was a drainage area and did not have defined banks was merely conclusury. Changes in the course of the

134. *Id.* at 353 (citing TEX. WATER CODE § 11.021(a); Turner v. Big Lake Oil Co., 96 S.W. 2d 221, 228 (Tex. 1936); Goldsmith & Powell v. State, 159 S.W.2d 534, 535 (Tex. Civ. App.—Dallas 1942, writ ref'd); S. Tex. Water Co. v. Bieri, 247 S.W.2d 268, 272 (Tex. Civ. App.—Galveston 1952, writ ref'd n.r.e.)).

135. 273 S.W.3d 785 (Tex. 1925).

136. Domel, 6 S.W.3d at 353 (citing *Hoefs*, 273 S.W. at 787).

137. *Id.*

stream did not establish the lack of bed and banks, because as the court noted, watercourses may change their course over time. Finally, the court ruled that beds and banks may be absent at times. The court then looked to another case which involved a wide valley or drainage area of one-fourth to one-half mile wide. The lack of flooding and the narrow area in which the water flowed, convinced the court that the plaintiffs had not raised an issue of material fact. The court concluded that the evidence showed that a defined bed and banks existed.

As to the second and third elements, Mrs. Domel admitted that before the wastewater treatment plant was constructed, the stream had an intermittent flow, flowing after rainfall, and dry for about half the year. Thus, the court ruled that she had admitted that the tributary has a current and a permanent supply of water, and all three elements of the test for a watercourse had been met.

It should be noted that the Chief Justice dissented in the case based upon the facts presented in the summary judgment motion. Chief Justice Aboussie believed that a fact issue had been created that should have been tried. She concluded that the affidavit of Mrs. Domel should have been considered true and every inference given in her favor and resolving all doubts over the bed and banks question. Thus, a fact question would have been created between her stated observations and those of the City employee and the other evidentiary documents submitted.

2. *Constitutional Taking or Damage Claim for Discharge into a Watercourse*

The court then turned to the plaintiffs' claim that even if the stream is a watercourse, the discharge of treated effluent constitutes a taking of private property without compensation under the Texas Constitution. The city argued that there was no property right for the city to take. In addressing this issue, the court applied the three part test to determine whether a taking occurred. A taking is (1) an intentional act of the government, (2) accomplished for a public purpose, (3) that damages or takes property from a private citizen.[138]

The court reviewed the history of Texas law on ownership of watercourses or the water within those streams. In addition to historical decisions regarding the State's ownership of larger watercourses and the reservation of unappropriated rights in water of rivers and natural streams within arid portions of the state, in 1913 the Texas Legislature amended the Water Code to declare the unappropriated water of flowing rivers and streams, among many other surface waters "the property of the State . . . ."[139] In 1917, the Texas Constitution was amended to provide that the conservation and development of various natural resources, in-

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138. *See id.* at 357 (citing Steele v. City of Houston, 603 S.W.2d 786, 788-92 (Tex. 1980); Bennett v. Tarrant County W.C.I.D. No. 1, 894 S.W. 441 (Tex. App.—Fort Worth 1995, writ denied)).

139. TEX. WATER CODE § 11.021(a).

cluding rivers and streams, are public rights and duties, and that the Legislature shall pass laws to carry out those rights and duties.[140] Thus, the court concluded that while a landowner may own the land under an unnavigable watercourse, the State retains the right to use the watercourse to transport water and to otherwise conserve and develop such water resources. The court noted otherwise the State would be required to obtain a right or easement every time it exercised this power and duty, or each time the State used a watercourse across private lands a taking of private property requiring compensation would result.

The court then turned to case law and found no cases which would prohibit the state from using its watercourses to transport water. The court ruled that if the state's use flooded a person's land, their such use might result in a taking.[141] In this case, the court noted that the Domels did not allege that their property had been flooded and the City did not claim any right to flood their land. The City did not argue that it has the right to use the watercourse to transport untreated wastewater, which the court would apparently view as a taking.[142]

The Domels next tactic was to argue that the law for use of watercourses only applied to "natural" flow, not flow created by human acts. The appellate court disregarded the cases set forth by the Domels because they concerned the diversion of surface water before entering a water course, rather than water in water course.

Moreover, the court considered treated wastewater to be a valuable resource under Texas law. It concluded that based on several statutory and regulatory provisions that man-induced flow was not distinguishable from natural flow, both were included in the measurement of stream flow and that the man-made flow was encouraged. The court noted that under the TNRCC's definition of "baseline or normal flow" "accountable effluent discharges from municipal, industrial, irrigation or other uses of ground or surface waters may be included at times."[143] For water taken from a stream and returned, "return water or return flow" is specifically defined to include wastewater effluent, and the regulations require that it be returned to a water supply or watercourse at a point designated by a permit in conformance with the parameters set forth by the State.[144]

The final attack by the Domels was to argue that the statutory language and permit language required permission from downstream landowners to allow the discharge. The relevant section of the Texas Water Code provides:

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140. TEX. CONST. art. XVI, § 59.

141. 6 S.W.3d at 359 (citing Brazos River Auth. v. City of Graham, 354 S.W.2d 104-05 (Tex. 1962); City of Odessa v. Bell, 787 S.W.2d 787 S.W.2d 525, 527-28 (Tex. App.—El Paso 1990, no writ)).

142. *Id.* at 359 (citing Abbott v. City of Kaufman, 717 S.W. 2d 927, 929 (Tex. App.—Tyler 1986, writ dism'd)).

143. TEX. ADMIN. CODE § 297.1.

144. *Id.* §§ 297.1, .45(b).

> Nothing in this chapter affects the right of a private corporation or individual to pursue any available common law remedy to abate a condition of pollution or other nuisance, to recover damages to enforce a right, or to prevent or seek redress or compensation for the violation of a right or otherwise redress an injury.[145]

The Domels also cited provisions in the permitting regulations stating that the permit does not create a property right and that the permit does not grant the permittee any right to use public or private property to convey the discharge, and that the permittee must obtain the right to use the discharge route.[146] In construing these provisions, the court concluded that the provisions only stated the permit itself did not create a right for the permittee, but did not create a substantive right in other parties either. Thus, it did not address the question of whether the Domels' had a property right, but the court had to look at other law to make this determination.

The case was not limited to briefing by the City of Georgetown, although it was the only litigant. Other municipal organizations filed amicus briefs. These parties pointed out, in addition to their legal arguments, that there are over 1200 cities in Texas operating wastewater plants and about 500 discharge into small watercourses. The Amici pointed out the large expense that would be imposed on these municipalities if they had to obtain easements from landowners even when the water meets the discharge parameters approved by the state as meeting water quality standards.

The court noted that this did not address the legal question, but that the concern expressed by the Domels was a classic NIMBY, not in my backyard, syndrome. "[T]he City is responsible for providing clean and safe water to its residents for domestic use. Part of that process includes recycling used water by cleaning it and returning it to a watercourse or water source pursuant to state law." The Domels argued the water has a "stigma," "no matter how clean the wastewater is." The court said that it did not believe that the law recognized a cause of action based upon this "stigma." Thus, the court concluded that the legislative scheme and the constitutional provisions, precluded the Domels' claim.

G. Statutes of Limitations in Environmental Tort Suits

Knowledge of a potential claim has been a key issue in many environmental lawsuits. The application of statutes of limitations is often the basis of much pre-trial discovery and motion practice. Many of these controversies have revolved around the discovery rule. The discovery rule has generally been applied to environmental claims, particularly those involving contamination of soil and groundwater.

The discovery rule provides that a claim accrues and the statute of limitations begins to run when the prospective plaintiff knows or through the

145. Tex. Water Code § 7.004.
146. Tex. Admin. Code § 305.122(b).

exercise of reasonable due diligence should know of the injury. Often times the issue of "should have known" is central to whether or not the plaintiff or plaintiffs' claims have expired.

In two cases decided during the Survey period, this issue was decided against the plaintiffs. The first case because the press coverage of the relevant events should have brought the alleged injury to the plaintiffs' attention. The second case because the advice of the plaintiffs' own expert or the environmental agency put the plaintiffs on notice of their injury and potential claims.

1. *Constructive Notice May Be Sufficient to Start the Running of Statutes of Limitations*

The first case, *Crofton v. Amoco Chemical Co.*,[147] the court considered whether the constructive notice to the plaintiffs made the injury not inherently undiscoverable. The claims arose with respect to the Motco Superfund Site in La Marque, Texas. Plaintiffs were residents of two subdivisions, a trailer park, or employees of a freight company, all of which were adjacent to the Motco site. The waste disposal company was ordered to clean up the site in 1976. In 1983, the site was declared a "Superfund" site and listed on the National Priorities List. Three years later, the United States government sued the persons it contended were liable to address the contamination at or emanating from the site.

Almost ten years later, the plaintiffs filed suit for personal injuries and property damage allegedly resulting from the chemical wastes disposed of at the site. The claims that were brought were public nuisance, private nuisance, nuisance per se, and trespass. The issue for alleged property damages was one the trial court reviewed in deciding on the defendant's motion for summary judgment, the trial court considered whether the claim for alleged property damages was barred on limitations grounds. The trial court ruled that all of plaintiffs' claims for permanent injury to land were barred by limitations and that for temporary damages, all of plaintiffs' claims *arising more than two years prior to filing suit* were barred.

The first issue the appellate court reviewed was the question of constructive notice of plaintiffs' alleged injuries to their property. The court cited prior Texas Supreme Court precedent on two issues. One was that constructive notice means that a person is deemed to have actual notice of certain matters[148] through an irrebuttable presumption.[149] The defendants had relied upon a 1991 case that was also before the Fourteenth District Court of Appeals in Houston. That case, *Hues v. Warren Petroleum Co.*,[150] had upheld a summary judgment based upon constructive notice arising from news reports of gas leaks and disposal of brine. In

147. No. 14-98-01412-CV, Fourteenth Dist. Houston, Dec. 9, 1999.
148. HECI Expl. Co. v. Neel, 982 S.W.2d 881, 887 (Tex. 1988)
149. *Id.*; Mooney v. Harlin, 622 S.W.2d 83, 85 (Tex. 1981).
150. 814 S.W.2d 526, 531 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

Hues, the plaintiffs filed suit in 1985 for negligence, nuisance, and trespass for gas leaks that occurred in 1980 and brine disposal that started in 1956. The defendants had attached to their motion for summary judgment filed with the trial court newspaper articles reporting on these events. The appellate court concluded that these newspaper articles and surrounding publicity of the gas leaks were such that the plaintiffs were put on notice of the events.[151]

In the *Crofton* case, the defendants attached an affidavit of one of their attorneys and several newspaper articles from six local newspapers. Plaintiffs challenged this evidence as hearsay. The court concluded that the newspapers were not hearsay because they were not being offered to prove the matter asserted in these articles, but only to show notice of the site's existence. The court further concluded that newspapers do not require authentication under the Texas Rules of Evidence.

Several of the plaintiffs filed affidavits claiming that they do not read newspapers and were not aware of any news coverage of the site. The court concluded that regardless of whether the newspapers were actually read, the site received widespread notice in the area. Thus, the plaintiffs were put on notice because of the publicity. The court reviewed this issue in the context of the discovery rule, which, it should be remembered, is based on the concept that the plaintiff new or reasonably should have known of the injury based upon exercise of reasonable diligence.

What the court went on to say is that the discovery rule only applies when the nature of the injury is inherently undiscoverable and the injury itself must be objectively verifiable.[152] The court concluded that the inherently undiscoverable aspect of the application of the discovery rule is that "accrual of the cause of action is delayed when the wrong and the injury were unknown to the plaintiff because of the very nature and not because of the fault of the plaintiff." The plaintiffs conceded at oral argument before the court that the claims of nuisance and trespass by their nature cannot be inherently undiscoverable because the causes of action require the plaintiff to prove the interference with the use and enjoyment of their property. The court went on to conclude that the widespread publicity of the site made it impossible to allege that the injuries claimed were inherently undiscoverable. Thus, the court refused to apply the discovery rule to the case.

This case stands for an important proposition: for environmental cases, particularly groundwater contamination cases, a claim for nuisance or trespass inherently requires interference with the quiet enjoyment of the plaintiff's land; thus, to argue the injury is inherently undiscoverable is contradictory to interference with the enjoyment of the land. By virtue of the very nature of these causes of action, the court appeared to conclude the discovery rule would not apply to such claims.

151. *Id.* at 528.
152. *HECI Exploration*, 982 S.W.2d at 886.

Plaintiffs also lost their claims for fraudulent concealment because they failed to present any proof. Additionally, the minor plaintiffs lost their claims because they failed to properly plead their minority status.

2. *Communications with Parties Regarding Potential Contamination May Start Running of Limitations Period*

In another case, the Court of Appeals of El Paso ruled that plaintiffs had lost their claims due to the running of the statute of limitations.[153] In this case, plaintiffs were also alleging their groundwater had been contaminated due to the actions of defendants. Several issues on statutes of limitations were before the court. First, a question arose as to whether some of the defendants had properly raised in the trial court and obtained a ruling on whether the plaintiffs' alleged injuries were temporary or permanent. The City of Midland had filed a motion for summary judgment prior to the one ultimately ruled upon by the trial court. The other defendants had not filed such a motion and did not take the necessary action to adopt the motion on their own. The City of Midland had asked the trial court to take judicial notice of the prior motion, but did not obtain a ruling on that motion. The trial court had previously denied that motion, and no request was made to reconsider the ruling. Thus, the appellate court ruled the granting of summary judgment on temporary damages was in error, and reversed this decision.

The court also ruled that the City had failed to properly attack the plaintiff's claim for a continuing tort and that the other defendants had failed to properly plead their motion with respect to the plaintiff's claim for injunctive relief.

The court then turned to the motion for summary judgment filed by a group of environmental consultants who were named as defendants, which the court referred to as the "Professional Defendants." This motion was filed as a no evidence motion under Texas Rules of Civil Procedure 166(a)(I). The motion asserted that the plaintiff did not have any evidence that the Professional Defendants caused their injury. Plaintiff did not identify any evidence supporting causation, even though he attached 500 pages of documents to his response to the motion for summary judgment. Plaintiff did not specify which documents supported causation, and the court was not required "sift through a record of this size to find Appellant's evidence for him."[154]

The court then moved to the question of permanent damages and the applicability of the statute of limitations. The question of the date plaintiff's claim accrued hinged upon letters or notices received from other parties. The plaintiff claimed that his cause of action did not accrue until he received a report in November 1994 from the Texas Railroad Commission ("TRRC") that the contamination of his groundwater did not arise

153. Walton v. City of Midland, 24 S.W.3d 853, 861 (Tex. Civ. App.—El Paso 2000 pet.).
154. *Id.* at 858 (citing Rogers v. Ricane Enters., Inc., 772 S.W.2d 76, 81 (Tex. 1989)).

from oil field sources. The defendants argued that his cause of action accrued in 1987 when he contacted the TRRC regarding a blow down pit on his property. From 1987 to 1994, plaintiff contacted or corresponded with the TRRC and the Texas Water Commission ("TWC") about concerns of soil and groundwater contamination. In 1988, plaintiff received a letter from an environmental consultant he hired that based on TRRC reports of soil testing in the blow down pit, stating that some the chemicals may have migrated to the groundwater. In 1993, the TWC advised him that groundwater testing was necessary to determine if the groundwater was contaminated. In November of 1994, the plaintiff was told that the groundwater contamination at this property was not caused by oil field sources.

The appellate court in reviewing these and other notices and communications held that the plaintiff's claims accrued no later than November 18, 1994, as he agreed. Thus, suit for permanent damages to land would have to have been filed by November 19, 1996 to fall within the limitations period. One defendant was not sued until after that date. For other defendants, the court ruled that the plaintiff knew or should have known no later than 1993 that there was an actionable injury to his land and groundwater. The TWC advised him that contamination extended to a depth of 17 feet in the soil and that a groundwater monitoring well should be installed to determine if the groundwater were contaminated. The court ruled that based upon this advice or notice, a reasonable person should have investigated the groundwater. The court further ruled that the plaintiff contacted the TRRC for further information and the plaintiff "simply chose to wait until more evidence had been developed before he filed his claim. This is not permissible."

The plaintiff could not toll his cause of action because the TRRC did not take action to investigate the groundwater. The court ruled that the plaintiff could have taken independent action to investigate the groundwater underlying his property. Finally, the court ruled that he did not have to know the source of the contamination before the statute began to run.