ENVIRONMENTAL LAW

BY MICHAEL R. GOLDMAN, JEAN M. FLORES, AND CARRICK BROOKE-DAVIDSON

The year 2014 has been an exciting time for significant environmental law holdings from Texas, state, and federal courts. Some decisions were long-anticipated while others came as something of a surprise.

U.S. Supreme Court

The U.S. Supreme Court reviewed two significant rulemakings issued by the U.S. Environmental Protection Agency under the Clean Air Act. In both cases, the State of Texas was one of the challengers. In *EPA v. EME Homer City Generation,* 134 S. Ct. 1584 (2014), the court upheld the EPA's Cross-State Air Pollution Rule, which requires pollution reduction in upwind states that contribute to air quality violations in downwind states. The court held that the EPA's allocation method for reductions, based on cost-effectiveness rather than proportional allocation, was a permissible construction of the CAA.

The EPA was not as successful in the second case. In *Utility Air Regulatory Group v. EPA,* 134 S. Ct. 2427 (2014), the court overturned the EPA's regulations promulgated to extend permitting under the Prevention of Significant Determination program to sources emitting greenhouse gases. The court held that the CAA neither required nor permitted extension of PSD permitting to sources of GHG. Moreover, the EPA's attempt to limit the number of sources affected by a regulatory altering of the statutory emissions thresholds that trigger PSD was impermissible. The court did not uphold control technology review for GHG for sources otherwise subject to PSD.

In a third case out of the U.S. Supreme Court, *CTS Corp. v. Waldburger,* 134 S. Ct. 2175 (2014), the court held that CERCLA does not preempt state statutes of repose, only statutes of limitations, based on the statutory language as well as the policy differences underlying statutes of limitations versus statutes of repose.

Federal Courts

In *Sierra Club, et al. v. EPA,* 754 F.3d 995 (D.C. Cir. 2014), the court held that the Sierra Club lacked standing to challenge an EPA memorandum to regional directors on next steps following the vacature of the 2011 Cross-State Air Pollution Rule. The court found that the risk to individual Sierra Club members relied on a highly attenuated chain of possibilities and, therefore, failed the criteria for associational standing.

In *Luminant, et al. v. EPA,* 757 F.3d 439 (5th Cir. 2014), two power plants challenged the legal sufficiency of a CAA notice of violation issued by the EPA. The EPA amended the NOV and moved for dismissal of the judicial action based on lack of jurisdiction. The court found that the NOVs were not "final actions" under the Administrative Procedure Act and dismissed the suit for lack of subject-matter jurisdiction.

We saw a redo with respect to the Endangered Species Act. Last year we reported on *Aransas Project v. Shaw,* 930 F.Supp.2d 716 (S.D. Tex. 2013), in which the district court enjoined the Texas Commission on Environmental Quality from granting any water permits affecting the Guadalupe or San Antonio rivers until it provides reasonable assurances that such permits will not harm the world's only self-sustaining, wild whooping crane population in the Aransas National Wildlife Refuge. The 5th Circuit reversed on the basis that the Aransas Project could not establish that the TCEQ's issuance of permits proximately caused the deaths of the whooping cranes. *Aransas Project v. Shaw,* 756 F.3d 801 (5th Cir. 2014).

Texas Courts

In *Houston Unlimited Inc. Metal Processing v. Mel Acres Ranch,* No. 13–0084, 2014 WL 4116810 (Tex. Aug. 22, 2014), the Texas Supreme Court declined to decide whether stigma damages are ever recoverable under Texas law, on the basis that the plaintiff's expert failed to provide legally sufficient evidence to prove the damages.

In *Texas Comm'n on Envt'l Quality v. Bonser-Lain, et al.,* 438 S.W.3d 887 (Tex. App.—Austin 2014, no pet. h.), the court held that trial courts lacked subject matter jurisdiction to review state agency orders denying petitions for rulemaking. The court reasoned that, by their "deliberate silence," the Administrative Procedures Act and the Texas Water Code do not waive TCEQ's sovereign immunity for agency decisions on petitions for rulemaking. Consequently, there was no jurisdiction allowing judicial review of TCEQ's decision.

Litigation over hydraulic fracturing continues to evolve. The Texas Supreme Court is currently considering whether a trespass claim can be based solely on the migration of fluids in the deep subsurface. *FPL Farming Ltd. v. Envtl. Processsing Sys., L.C.,* 383 S.W.3d 274 (Tex. App.—Beaumont 2012), pet. granted, 57 Tex. Sup. Ct. J. 53 (Nov. 22, 2013). In November, both the Texas Oil & Gas Association and Texas General Land Office filed separate actions against the city of Denton on grounds that its recent ordinance, which bans hydraulic fracturing, is preempted by Texas state law and is therefore unconstitutional.

We expect all of the above issues to be further addressed, challenged, and refined in 2015.

MICHAEL R. GOLDMAN

JEAN M. FLORES

CARRICK BROOKE-DAVIDSON

are shareholders in the environmental law firm of Guida, Slavich & Flores. Goldman and Flores practice in the firm's Dallas office, and Brooke-Davidson practices in the Austin office.