ENVIRONMENTAL LAW

By Michael R. Goldman, Carrick Brooke-Davidson, and Jean M. Flores

2013 was an exciting year for significant environmental law holdings from Texas state and federal courts. Some decisions were long-anticipated while others came as a surprise. Hot topics included standing, preemption, expert testimony, stigma damages, regulatory takings, and a takings claim under the Endangered Species Act. Although space allows only a brief mention of the cases below, for the environmental practitioner, all are worth reading in full.

Texas Supreme Court

This year we saw an expected do-over on the topic of standing—with a somewhat unexpected result. Last year we reported on *City of Waco v. TCEQ*, 346 S.W.3d 781 (Tex. App.—Austin 2011), *rev'd*, 2013 WL 4493018 (Tex. 2013), which concerned the City of Waco and an upstream dairy farm that sought to modify its water-quality permit due to an increase in its total number of cattle. The 3rd Court of Appeals of Texas held that the Texas Commission on Environmental Quality abused its discretion in denying the city's request for a contested case hearing in the permit proceeding on the basis that it was an "affected person." The Supreme Court reversed on the basis that the Water Code gives the TCEQ discretion to deny a request for a hearing when, *inter alia*, the applicant does not seek to significantly increase or materially change its authorized discharge.

In *Southern Crushed Concrete, LLC v. City of Houston*, 398 S.W. 3d 676 (Tex. 2013), the Supreme Court held that a local ordinance requiring a concrete crushing facility to obtain a municipal permit was preempted by the Texas Clean Air Act because the facility had already obtained a permit from the TCEQ. The court reasoned that to hold otherwise would allow a city to nullify a permit granted by the TCEQ, which is forbidden under the TCAA.

In *Natural Gas Pipeline Company of America v. Justiss*, 397 S.W.3d 150 (Tex. 2012), the Supreme Court held that homeowners' testimony concerning the diminution of value of their properties as a result of a nearby gas plant was insufficient to support an award of damages. The court reasoned that such testimony was conclusory, speculative, and lacked foundation as to how the homeowners' arrived at their damages. However, the court remanded for further determination because the current legal standard may have resulted in the homeowners' failure to present adequate evidence of damages.

Texas Court of Appeals

In *FPL Farming Ltd. v. Environmental Processing Systems, L.C.*, 383 S.W.3d 274 (Tex. App.—Beaumont 2012, pet. filed), a landowner brought a tort action against a wastewater injection well operator, alleging that wastewater migrated onto his property and contaminated his water. The 9thCourt of Appeals in Beaumont officially recognized a common law claim for subsurface trespass on the basis that the Supreme Court, by implication, had previously held that the law of trespass can apply to an invasion that impacts an adjacent property at a level beneath the surface.

Stigma damages were permitted for the first time in *Houston Unlimited Inc. Metal Processing v. Mel Acres Ranch*, 389 S.W.3d 583 (Tex. App.—Houston [14th Dist.] 2012, pet. granted). The 14th Court of Appeals in Houston held that a landowner could recover lost market value due to stigma, as a form of permanent damage, even if the contamination of its property had been fully remediated.

Following last year's monumental opinion, *Edwards Aquifer Authority v. Day*, it remained unclear whether a groundwater district's rules limiting groundwater usage could support a constitutional taking claim. That question was answered in *Edwards Aquifer Authority v. Bragg*, No. 04–11–00018–CV, 2013 WL 4535935 (Tex. App.—San Antonio Aug. 28, 2013, no pet.), which held that commercial pecan growers suffered a regulatory taking when the EAA denied and limited the growers' request for water permits for their pecan orchards.

In *City of Houston, Texas v. BCCA Appeal Group, Inc.*, No. 01-11-00332-CV, 2013 WL 4680224 (Tex. App.—Houston [1st Dist.] Aug. 29, 2013, no pet.), the 14th Court of Appeals in Houston, in distinguishing the *Southern Crushed Concrete* case above, held that municipal ordinances that adopted state air quality regulations issued pursuant to the TCAA were not preempted. The court held that the city's ordinances did not create more onerous standards than the state standards, and that the Legislature had not explicitly prohibited municipal regulation of air quality under the TCAA. The Supreme Court may get another opportunity to address this preemption issue as the parties are contemplating filing a petition for review.

Federal Courts

In *Aransas Project v. Shaw*, 930 F.Supp.2d 716 (S.D. Tex. 2013), the U.S. District Court, Southern Division of Texas, Corpus Christi Division enjoined the TCEQ 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, which is located in the Aransas National Wildlife Refuge. The court found that the agency's water management practices during 2008-2009--combined with the severe drought--drastically modified the cranes' critical habitat by making it hyper-saline, which affected the cranes' primary food resources.

We expect all of the above issues to be further addressed, challenged, and refined in 2014.



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FAMILY LAW

By Georganna L. Simpson and Steven R. Morris

In 2013, the Texas Supreme Court issued several opinions with important implications for the family law practitioner.

Trial courts have no authority to conduct broad best interest reviews of MSAs.

A mother and father entered into a properly executed Marital Settlement Agreement under Family Code Section 153.0071.[1] Before entering judgment on the MSA, the trial court heard evidence that the mother's husband was a registered sex offender and had slept naked with the mother's child. The trial court refused to render judgment on the MSA, based on the child's best interest, which the 14th Court of Appeals in Houston affirmed on mandamus. On further mandamus review, the Supreme Court held that a court may not decline to enter judgment on a properly executed MSA based on a best interest finding alone. Rather, a court may refuse to render judgment on an MSA only when a best interest finding is combined with family violence findings under Family Code Section 153.0071(e-1).

A pre-birth divorce/SAPCR does not provide jurisdiction under the UCCJEA.

A father filed a pre-birth divorce/Suit Affecting the Parent-Child Relationship in Texas.[2] Without telling the father, the mother moved to New Mexico where she gave birth and filed a New Mexico SAPCR. The New Mexico court determined that New Mexico was the child's home state but deferred to the Texas court, which determined it had jurisdiction because the father filed his Texas SAPCR first. On mandamus review, the Supreme Court held that unless a court finds it has jurisdiction under one of the enumerated grounds in the Texas Uniform Child Custody Jurisdiction and Enforcement Act, Family Code 152.201(a), it cannot exercise jurisdiction over a custody determination. The fact that the father filed a pre-birth divorce/SAPCR in Texas first was irrelevant. Therefore, under the UCCJEA, the New Mexico court had jurisdiction because New Mexico was the child's home state. The Supreme Court rejected the father's constitutional arguments that the UCCJEA violated the separation of powers doctrine, due course of law, and the father's equal protection rights.

An obligor must be current on his child support as of the date of the enforcement hearing, not just as to the amount set forth in the motion to enforce.

The trial court held a hearing eight months after the Office of the Attorney General filed a motion to enforce alleging a father was delinquent in child support.[3] The father paid his arrearage the same month that the OAG filed its motion but fell behind again by the time of the hearing. At the hearing, the court found the father in contempt. On mandamus review, the father successfully argued that the court should not have found him in contempt because he had satisfied his arrearage, as alleged in the OAG's motion. On further review, the Supreme Court held the plain language of Family Code Section 157.162(d) requires the obligor to be current on all payments as of the date of the court hearing—not the amount pleaded in the enforcement motion.

Estoppel is no longer a defense to a child support enforcement proceeding.

A father and mother agreed that the father's child support obligation would cease if he voluntarily relinquished his parental rights.[4] The father signed an affidavit of relinquishment, but the mother never filed the affidavit with the court. Nine years later, the OAG sought to modify the father's child support and confirm arrearages. On appeal, the father argued the OAG was estopped from seeking child support because the mother led him to believe his parental rights were terminated. The Supreme Court held that although the father and mother had an