“SILVER WINGS AND GOLDEN RINGS”

CASE LAW UPDATE

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"SILVER WINGS AND GOLDEN RINGS" CASE LAW UPDATE

During the past year, there have been several interesting cases handed down by both the federal and state courts which provide helpful analysis and determinations on various unsettled issues in environmental law. The cases also provide new authority on various issues that were previously believed to be settled law. Below is a summary of these key cases since August 2012 along with a summary of a few interesting cases from other jurisdictions that might also have an impact on a Texas environmental practitioner.

I. U.S. SUPREME COURT

A. Water from Concrete-lined Portions of Waterway

In *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, No. 11-460, 133 S.Ct. 710 (U.S. Jan. 8, 2013), environmental groups filed a citizen suit against the Los Angeles County Flood Control District and others under Section 505 of the CWA, 33 U.S.C. § 1365, alleging, among other things, that water-quality measurements from monitoring stations within the Los Angeles and San Gabriel Rivers demonstrated that the District was violating the terms of its permit. The District Court granted summary judgment to the District on these claims, concluding that the record was insufficient to warrant a finding that the Municipal Separate Storm Sewer System (MS4) had discharged storm water containing the standards-exceeding pollutants detected at the downstream monitoring stations. The Ninth Circuit reversed in relevant part. The court held that the District was liable for the discharge of pollutants that, in the court's view, occurred when the polluted water detected at the monitoring stations flowed out of the concrete-lined portions of the rivers, where the monitoring stations are located, into lower, unlined portions of the same rivers. The Supreme Court held that the flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway does not qualify as a "discharge of a pollutant" under the CWA and reversed and remanded the Ninth's Circuit opinion.

B. Stormwater Runoff from Logging Operations

In *Decker v. Northwest Environmental Defense Center*, No. 11-338, 133 S.Ct. 1326 (U.S. March 20, 2013), an environmental organization brought action against Oregon officials and timber companies, alleging that they violated the Clean Water Act by discharging stormwater from ditches alongside logging roads without National Pollutant Discharge Elimination System (NPDES) permits. The lower court dismissed the case, but the Ninth Circuit reversed, ruling that the discharges were "associated with industrial activity" under the Industrial Stormwater Rule, 40 CFR §122.26(b)(14). The Supreme Court deferred to EPA's interpretation that the Industrial Stormwater Rule excludes the type of stormwater discharges at issue in this case and held that stormwater runoff from logging roads that is collected by and then discharged from a system of ditches, culverts, and channels is not a point source discharge for which an NPDES permit is

required. The Court then reversed the Ninth Circuit's opinion to the contrary.

C. Agency Deference

In *City of Arlington, Texas v. Federal Communications Comm'n*, No. 11-1545, 133 S.Ct. 1863 (U.S. May 20, 2013), the Supreme Court considered whether an agency's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The Court held that it was. When a court reviews an agency's interpretation of a statute the agency administers, the question is always, simply, whether the agency has stayed within the bounds of its statutory authority. The Court stated that there is no distinction between an agency's "jurisdictional" and "nonjurisdictional" interpretations. The Court reasoned that where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to puzzle over whether the interpretive question presented is "jurisdictional." If "the agency's answer is based on a permissible construction of the statute," that is the end of the matter.

D. Water Rights

In *Tarrant Regional Water District v. Herrmann*, No. 11-889, 2013 WL 2631063 (U.S. June 13, 2013), the Tarrant Regional Water District, which is responsible for providing water to north-central Texas, brought action against Oklahoma Water Resources Board (OWRB), seeking to enjoin enforcement of Oklahoma water statutes by the OWRB, alleging that the statutes, and the interpretation of them adopted by Oklahoma's attorney general, were preempted by federal law and violated the Commerce Clause by discriminating against interstate commerce in water. The Supreme Court held that Oklahoma statutes that favor in-state water appropriation permit applicants over out-of-state permit applicants do not violate the Commerce Clause and are not preempted by the Red River Water Compact, which is an interstate water compact that allocates water among Texas, Oklahoma, Arkansas, and Louisiana. The water district argued that the statutes discriminated against interstate commerce in violation of the Commerce Clause by preventing water left unallocated under the compact from being distributed out of state. But the Court reasoned that the Oklahoma water statutes cannot discriminate against interstate commerce with respect to unallocated waters because the compact leaves no waters unallocated. The water district also argued that the statutes were preempted by federal law because they prevent Texas from exercising its rights under the compact. However, the Court held that the compact does not create any cross-border rights in signatory states.

E. Property Takings Protections for Permit Denials

In *Koontz v. St. Johns River Management District*, No. 11–1447, 2013 WL 3184628 (U.S. June 25, 2013), a landowner brought action in Florida state court against a water

management district, alleging that district's denial of land use permits unless they funded offsite mitigation projects on public lands amounted to a taking without just compensation. The Supreme Court held that denials of environmental permits can be challenged as a constitutional taking of private property and that conditions that require either real property or financial contributions to offset the rejected permit's impacts can be subject to compensation claims. In this regard the Court stated that: "Extortionate demands for property in the land use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury."

II. DC COURT OF APPEALS

A. Transport Rule

In *EME Homer City Generation, L.P v. EPA*, 696 F.3d 7 (C.A. D.C. 2012), the D.C. Circuit Court of Appeals vacated the Cross-State Air Pollution Rule (CSAPR, also known as the "Transport Rule"), which sets sulfur dioxide and nitrogen oxides emissions limits for 28 upwind states based on those states' contributions to downwind states' air quality problems. The court held that that EPA exceeded its statutory authority under the "good neighbor" provision of the Clean Air Act in implementing the Transport Rule, which defined each State's emissions reduction obligations under the good neighbor provision and prescribed Federal Implementation Plans (FIP) to implement those obligations at the State level. The court reasoned that the Transport Rule restrictions could require upwind States to reduce emissions by more than the amount of their contribution to downwind State's nonattainment area, and the Transport Rule made no attempt to calculate upwind States' required reductions on a proportional basis that took into account contributions of other upwind States to the downwind States' nonattainment problems. Finally, the Transport Rule did not ensure that the collective obligations of the various upwind States, when aggregated, did not produce unnecessary over-control in the downwind States. The court then vacated the Transport Rule and the Transport Rule FIPs and remanded the proceeding to EPA with the instruction that EPA must continue administering the Clean Air Interstate Rule (CAIR) pending the promulgation of a valid replacement.

B. Greenhouse Gas Tailoring Rule

In *Coalition for Responsible Regulation v. EPA*, D.C. Cir., 684 F.3d 102 (C.A. D.C. 2012), a three-judge panel with the U.S. Court of Appeals for the District of Columbia Circuit dismissed challenges from industry groups and some states to EPA's tailoring rule, which limits greenhouse gas permitting to the largest industrial sources. The court found the petitioners lacked standing to challenge the regulation because it was intended to ease their permitting burden by limiting the number of sources that need to have permits. Additionally, the court denied challenges to EPA's endangerment finding for greenhouse gases and subsequent

emissions standards for cars and light-duty trucks.

III. FIFTH CIRCUIT

A. Similar Source Standard

In *Luminant Generation Company, LLC, et al. v. EPA*, 675 F.3d 917 (5th Cir. 2012) the State of Texas, among others, sought review of the EPA's disapproval — which was more than three years tardy — of state regulations that provided for standardized permits of certain projects that reduced or maintained current emission rates. Petitioners contended that the EPA acted arbitrarily and capriciously and in excess of its statutory authority by applying three different incorrect legal standards. First, Petitioners argued that EPA improperly reviewed the regulations for compliance with Texas law, when the EPA's only authorized function was to review for compliance with the CAA. Second, Petitioners argued the EPA's so-called "similar source" requirement does not exist in any CAA provisions. Third, Petitioners argued that the applicable federal law imposes no "replicability" requirement and, therefore, the EPA had no basis to determine that the State's Director's discretion violated the CAA. The Fifth Circuit agreed with each of the Petitioner's arguments and held that the three purported extra-statutory standards were "created out of whole cloth" and that EPA's disapproval of the regulations was arbitrary and capricious.

B. State Implementation Plan (SIP) Flexible Permit Program

In *State of Texas, et al. v. EPA*, 690 F.3d 670 (5th Cir. 2012), the State of Texas, among others, sought review of EPA's disapproval — this time sixteen years tardy — of the State's revision of its SIP's Flexible Permit Program for Minor New Source Review (NSR). According to the court, the untimely disapproval unraveled approximately 140 permits issued by Texas under the revision's terms, and required regulated entities to qualify for pre-revision permits or risk federal sanctions. The Fifth Circuit held that EPA's proffered reason for disapproval which was that it might allow Major NSR evasion was arbitrary and capricious and based upon "demands for language and program features of the EPA's choosing, without basis in the CAA or its implementing regulations." In addition, the Fifth Circuit stated that EPA's final rule disapproving Texas's Flexible Permit Program transgresses the CAA's delineated boundaries of cooperative federalism. The court then vacated the agency's final rule and remanded for the EPA's further consideration.

C. Insurance

In *Louisiana Generating L.L.C. v. Illinois Union Insurance Co.*, No. 12-30651, 2013 WL 2096382 (5th Cir. May 15, 2013), the insurer argued that the forms of relief covered by the policy–including relief for property damage and remediation costs–are unavailable to EPA as a matter of law because the CAA only allows EPA to seek prospective relief and does not allow the Agency to seek compensatory damages. However, the Fifth Circuit held that reading all of

the provisions of the policy together and giving them their plain meaning, the underlying EPA suit includes allegations and prayers for relief that could potentially result in covered remediation costs. In particular, "remediation costs" were defined very broadly to include expenses incurred to redress pollution in compliance with environmental law, including, *inter alia*, costs associated with investigating, mitigating, or abating pollution. As such, EPA's requests for mitigation, offsetting, and remediation suggest a reasonable possibility of coverage under the policy. Accordingly, the Fifth Circuit held that under New York law, an insurance company has a duty to defend a power company in an underlying lawsuit filed against it by EPA and Louisiana's environmental agency for alleged CAA and state law violations.

D. Preemption

In *Ass'n of Taxicab Operators USA v. City of Dallas*, No. 12-10470, 2013 WL 2661413 (5th Cir. June 13, 2013), the Fifth Circuit held that the CAA does not preempt a local ordinance that allows taxicabs certified to run on compressed natural gas (CNG) to cut ahead of gasoline-powered taxis in the queue for picking up passengers at Love Field Airport in Dallas. The ordinance does not create an enforceable standard to convert cabs from gasoline to CNG power. Nor do its indirect effects create a mandatory, de facto standard. Although the ordinance may have its intended effect and substitute CNG cabs for traditional cabs at Love Field, Dallas cab drivers do not face "acute economic coercion" to switch vehicles.

E. Res Judicata

In *Comer v. Murphy Oil USA, Inc.*, No. 12-60291, 2013 WL 1975849 (5th Cir. May 14, 2013), the Fifth Circuit affirmed a lower court decision that the doctrine of res judicata bars individuals' trespass, nuisance, and negligence claims against numerous oil, coal, electric, and chemical companies for damages stemming from Hurricane Katrina. The individuals asserted that the companies' activities are among the largest sources of greenhouse gases that cause global warming, and that global warming led to high sea surface temperatures and sea level rise that fueled Hurricane Katrina, which in turn damaged their property. They also alleged that global warming has caused them to incur higher insurance premiums and has lowered the resale value of their homes, and that the defendants' emissions constitute an unreasonable invasion of the plaintiffs' property rights. However, because the current lawsuit is nearly identical to the individuals' 2005 lawsuit, the court held that their claims were barred by res judicata.

IV. TEXAS FEDERAL DISTRICT COURT OPINIONS

A. Due Process

In *National Solid Wastes Management Ass'n v. City of Dallas*, 903 F.Supp.2d 446 (N.D. Tex. 2012), solid waste collection franchisees filed suit against city, mayor, and city council members, in their official capacities, seeking permanent injunctive relief against enforcement of an allegedly unconstitutional flow control ordinance which required franchisees to transport solid

waste to city-owned landfills, rather than franchisee-owned landfills as authorized under franchise agreements with city. The district court enjoined the City of Dallas from enforcing the ordinance because it was unreasonable exercise of city's police powers in violation of the Due Course of Law Clause of the Texas Constitution, where city implemented ordinance to raise revenue to advance its own economic and proprietary interests at expense of franchisees' vested rights, rather than to improve air quality, implement "green" technologies, provide new jobs, or address any fiscal or other significant problem.

B. Whooping Cranes under the Endangered Species Act

In *Aransas Project v. Shaw*, No. 2:10-cv-075, 2013 WL 943780 (S.D. Tex. Mar. 11, 2013), an environmental conservation organization brought an action against Texas Commission on Environmental Quality (TCEQ) and its officials, alleging that agency violated Endangered Species Act (ESA) by failing to properly manage freshwater flows into the San Antonio bay, causing an unlawful "take" of endangered whooping cranes, and seeking declaratory and injunctive relief to ensure that the flock had sufficient water resources to prevent future takings. The district court held that the TCEQ violated Section 9 of the ESA by failing to properly manage freshwater inflows into the San Antonio and Guadalupe bays during the 2008-2009 winter, thereby causing an unlawful take of the world's only self-sustaining, wild Whooping Crane population 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 making it hyper-saline. The hyper-saline conditions caused a reduction in the availability of wolfberries and blue crabs, the cranes' primary food resources, as well as in fresh drinking water. In total, the court found that the adverse modification of the cranes' critical habitat effectively caused the death of at least 23 Whooping Cranes during the 2008-2009 winter season, constituting a "take" under the ESA. The court therefore enjoined the agency from approving or granting new water permits affecting the Guadalupe or San Antonio Rivers until it provides reasonable assurances that such permits will not take Whooping Cranes in violation of the ESA. The court also ordered the agency to prepare an incidental take permit and corresponding habitat conservation plan (HCP) which would require the agency to address freshwater flows and to reduce and mitigate adverse impacts of water diversions and related practices on the crane population.

V. TEXAS SUPREME COURT

A. Inverse Condemnation

In *Hearts Bluff Game Ranch, Inc. v. State of Texas*, 381 S.W.3d 468 (Tex. 2012), a landowner, who was denied its application with the United States Army Corps of Engineers (USACE) for a federal mitigation banking permit because the State had identified the site as a potential reservoir, brought an inverse condemnation action in federal court against USACE, the Texas Water Development Board (TWDB) and the State. On remand from federal court, the state district court denied State's plea to the jurisdiction. The State of Texas was successful on

appeal and the landowner filed a petition for review. The Texas Supreme Court held that landowner failed to establish inverse condemnation claim against the State, where the USACE, not the State, had the regulatory authority to grant or deny the federal permit required for a mitigation bank.

B. Statute of Limitations and Damages for Nuisance Claims

In *Natural Gas Pipeline Company of America v. Justiss*, 397 S.W.3d 150 (Tex. 2012), several homeowners brought an action against a gas company alleging that noise and odors from its gas plant constituted permanent nuisance. The Texas Supreme Court held that evidence that the gas plant's noise and odor escalated over time and that the gas company received citation from Texas Commission on Environmental Quality (TCEQ) based on the plant's noise and odor six years after the plant opened was legally sufficient to support the jury's determination that a permanent nuisance began on the date of citation in the homeowners' permanent nuisance claim against gas company, even though the homeowners had made complaints to the gas company about plant's noise and odors several years earlier. In addition, the Court held that testimony of the homeowners concerning the diminution of value of their properties resulting from the noise and odor from the nearby gas plant was insufficient to support an award of damages in the homeowners' permanent nuisance action against the gas company, where testimony was conclusory and speculative and lacked any factual explanation supporting how the homeowners' arrived at their damages calculations. The Court then remanded the homeowners' permanent nuisance claim against the gas company for a new trial on liability and damages, because the homeowners relied on a standard concerning valuation of their properties that had not before been explained by the Supreme Court.

C. Preemption

In *Southern Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676 (Tex. 2013), the operator of a portable concrete crushing facility, which had received an air quality permit from the Texas Commission on Environmental Quality (TCEQ), brought action against the city after it denied the operator a municipal permit, seeking a declaration that the ordinance was preempted by the Texas Clean Air Act (TCAA). The Texas Supreme Court held that the TCAA provides that a municipal ordinance may not prohibit any acts approved or authorized by the Texas Commission on Environmental Quality (TCEQ). Here, the TCEQ had previously issued a permit authorizing construction of the facility at the proposed location. Because the ordinance made it unlawful to build a concrete-crushing facility at a location that was specifically authorized by the Commission, the ordinance was preempted.

VI. TEXAS COURT OF APPEALS DECISIONS

A. Temporary Restraining Order

In *In re: Sierra Club*, 2012 WL 5942912 (Tex. App.—El Paso 2012, no pet.), an

environmental organization petitioned for mandamus seeking to compel the district court to withdraw a temporary restraining order (TRO) prohibiting the organization from seeking injunctive relief to prohibit shipments of low-level radioactive waste to a disposal facility in county where underlying action was pending. The El Paso Court of Appeals determined that the mandamus petition was moot, because the TRO had expired by its terms before the mandamus petition was heard. The Court also determined that the "capable of repetition yet evading review" exception to mootness doctrine did not apply because the organization was not likely to be subjected to a similar TRO prior to the temporary injunction hearing. The collateral consequences exception also did not apply because the organization was not claiming the continued effects of an unconstitutional judgment.

B. Exhaustion of Administrative Remedies

In Harris County Fresh Water Supply District No. 61 v. FW Development, Ltd., 2013 WL 326318 (Tex. App.—Houston[14th Dist.] 2013, pet. filed), a developer brought a breach of contract action against fresh water supply district. Pursuant to their agreement, the developer agreed to pay for and construct specific water facilities necessary for development of property it owned and wished to develop within the water district. In return, the water district agreed to issue bonds necessary to reimburse the developer for certain costs associated with construction of the facilities. A dispute arose between the parties on whether the developer was also entitled to interest on costs it incurred. The developer filed suit and the water district moved for summary judgment on jurisdictional grounds claiming the developer failed to exhaust its administrative remedies through an appeal to the TCEQ. The trial court denied the motion which was affirmed on appeal. The Houston Court reasoned that the relevant statutory scheme does not indicate that the legislature has expressly conferred on the TCEQ the power or duty to determine whether the water district breached its contract with the developer. Indeed, the rules explicitly provide that they shall not be construed to relieve a district of its legal duties, obligations, or liabilities relative to its responsibilities as defined in the Texas Water Code 30 Tex. Admin. Code § 293.2. As a result, the TCEQ has not been vested with exclusive jurisdiction to determine this contract dispute, and the developer was not required to exhaust its administrative remedies before filing suit.

C. Whistleblower Claim

In *Resendez v. Texas Commission on Environmental Quality*, 391 S.W.3d 312 (Tex. App.—Austin 2012, pet. filed), a former employee brought a whistleblower claim against Texas Commission on Environmental Quality (TCEQ) on her belief that her supervisors violated the law by failing to report fraud being committed by applicants in the Texas Emissions Reduction Plan (TERP). The TCEQ filed a plea to the jurisdiction, arguing that sovereign immunity had not been waived because Resendez failed to allege a valid whistleblower claim. The trial court granted the plea to the jurisdiction and dismissed Resendez's suit. On appeal, Resendez claimed that the trial court erred in granting the plea to the jurisdiction because her petition sufficiently alleges a valid cause of action. The Austin Court of Appeals reversed the trial court's order

finding that a fact issue existed on whether Resendez reported the incident to a person she in good faith believed was an appropriate law enforcement authority as required to qualify for the limited waiver of immunity under the Texas Whistleblower Act.

D. Intervention and Substantial Evidence

In *Northeast Neighbors Coalition and TJFA, LP v. Texas Commission on Environmental Quality, et al.*, 2013 WL 1315078 (Tex. App.—Austin 2013, pet. filed), a dispute arose concerning Texas Commission on Environmental Quality's (TCEQ) order modifying BFI Waste Systems of North America, L.L.C.'s solid-waste-disposal permit. TJFA, L.P. appealed from the district court's order striking its intervention in the case. TJFA attempted to intervene into this matter after its separate lawsuit was dismissed for failing to serve the TCEQ within 30 days of filing suit as required by TEX. HEALTH & SAFETY CODE ANN. § 361.321(c). BFI opposed TJFA's intervention arguing that TJFA should not be allowed to intervene in Northeast Neighbors Coalition's (NNC's) case if TJFA's own case was dismissed for failure to timely execute service on TCEQ. The Austin Court of Appeals reasoned that assuming without deciding that TJFA had a justiciable interest in NNC's case that was not otherwise eliminated by the mandatory dismissal, the district court nevertheless had the discretion to strike the intervention on other grounds, so long as its action in doing so were not arbitrary and capricious. Because the intervention included at least eleven additional separate issues and sub-issues, the Court reasoned that the trial court did not abuse its discretion in striking the intervention on the basis that it would have complicated the case by an excessive multiplication of the issues.

Northeast Neighbors Coalition also appealed the district court's order that that TCEQ's grant of BFI's permit amendment was supported by substantial evidence in the record. Specifically, NNC argued (1) that the substantial-evidence standard of review for agency decisions requires an examination of the actual content of evidence rather than just the volume of evidence submitted. It then asserted that (2) TCEQ's findings of land-use compatibility; (3) TCEQ's approval of 24/7 landfill operations; and (4) TCEQ's finding of "no substantial alteration of natural drainage patterns" were not supported by substantial evidence. With regard to NNC's argument regarding the type of evidence necessary to support a substantial-evidence inquiry, the court emphasized that section 2001.174(2)(E) limits its consideration to the "reliable and probative evidence in the record as a whole." The APA provides that the rules of evidence apply to a contested case. The APA also requires that "evidence that is irrelevant, immaterial, or unduly repetitious" be excluded from the record of a contested-case hearing. Accordingly, the court held that the APA itself answers NNC's question of whether the substantial-evidence standard of review requires examination of the actual content of evidence, and that answer is clearly yes.

NNC also argued that the proposed vertical expansion of the landfill would not be compatible with surrounding land uses because of continuing odor issues with the landfill. However, the Court noted that odor is not a specifically delineated factor for land-use compatibility determinations. Thus, even if the evidence was established that there was an

ongoing odor problem, it would not preclude the TCEQ from determining that the landfill was compatible with existing land uses. With regard to TCEQ's approval of the 24/7 landfill operations, the Court found that there was substantial evidence to support such allowance. With regard to the final issue, the Court held that NNC did not overcome the presumption that TCEQ's findings of fact regarding drainage flow was supported by substantial evidence.

E. Operator Defined and Substantial Evidence

In *Heritage on the San Gabriel Homeowners Association, et al. v. Texas Commission on Environmental Quality*, 393 S.W.3d 417 (Tex. App.—Austin 2012, pet. denied), a homeowners association, citizens groups, and landowners appealed a district court judgment which affirmed a decision of Texas Commission on Environmental Quality (TCEQ) to grant a permit to Williamson County to expand its landfill. The Austin Court of Appeals held that: (1) the waste management company's submission of application on behalf of county satisfied TCEQ rules because the rule established that it was an operator's duty to submit an application when the owner did not operate the facility; (2) TCEQ's findings regarding natural drainage patterns were supported by substantial evidence and were not arbitrary and capricious; (3) substantial evidence supported TCEQ's findings of fact about land-use compatibility. However, the Court held that TCEQ failed to provide the required explanation for overturning the recommendation of the Administrative Law Judges about the landfill's operating hours and remanded the case to the TCEQ for an explanation and reasoning on its grounds for changing the operating hours.

F. Felony Violations of the Texas Water Code

In *Wolf v. State of Texas*, 2012 WL 4741078 (Tex. App.—Houston [1st Dist.] 2012, no pet.), Clair Audrey Wolf was indicted for nine felony violations of the Texas Water Code, the Solid Waste Disposal Act, and pertinent regulations promulgated by the Texas Commission on Environmental Quality (TCEQ) relating to the improper storage of hazardous materials and leakage of hazardous waste on two parcels of private property in Harris County, Texas. A jury found Wolf guilty in all nine cases and assessed a sentence and fine against Wolf for each which included fines of $256,000 and 25 years of incarceration. The judgment recites that the sentences are to run concurrently. On appeal, Wolf contended that his trial counsel rendered constitutionally ineffective assistance by failing to object and request a limiting instruction on testimony divulging that Wolf had a criminal history. The Houston Court of Appeals concluded that Wolf failed to meet his burden of proof to show that: (1) his counsel's performance was deficient and (2) a reasonable probability exists that the result of the proceeding would have been different.

G. Standing to Sue and Consent to Trespass

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 wastewater injection well operator, alleging that wastewater migrated onto the landowner's property and

contaminated the landowner's water supply. On remand, the Beaumont Court found that FPL proved that it had standing to sue for trespass to its subsurface by placing the deeds to the tracts at issue into evidence. The Court stated that the owner of the surface is also considered the owner of the water below the tract including saltwater. The Court also found that that the Texas Supreme Court, by implication, has recognized that the law of trespass applies to invasions occurring on adjacent property but at a level beneath the surface. Accordingly, FPL had a cause of action for trespass at common law against Environmental Processing Systems for its impacts on subsurface briny water on FPL's property. Since the jury instruction improperly placed the burden of proof on FPL to prove that it did not consent to the presence of wastewater plume on its tracts, the Court reversed and remanded to the trial court for a new trial.

H. Pollution Control Property Exemption for Ad Valorem Taxes

In *Mont Belvieu Caverns, LLC v. Texas Commission on Environmental Quality*, 382 S.W.3d 472 (Tex. App.—Austin 2012, pet. filed), a taxpayer brought an action against the Texas Commission on Environmental Quality (TCEQ) seeking to challenge agency's final order determining that a new brine-pond system the taxpayer had installed at one of its facilities used for storing natural gas did not qualify for the "pollution control property" exemption from ad valorem taxes. The Austin Court of Appeals stated that the tax code reflects the Legislature's intent that TCEQ distinguish pollution-control property—property qualifying for the tax exemption—from "property that is used to produce goods and services." *See* Tex. Tax Code Ann. § 11.31(g). Since the brine-pond system was part of the process by which the taxpayer produced its gas-storage services for its customers, and it conceded at least some portion of property's value was attributable to its productive activity, the system did not qualify as a 100% pollution-control property for the exemption from ad valorem taxes.

I. Stigma Damages Permitted

In *Houston Unlimited Inc. Metal Processing v. Mel Acres Ranch*, 389 S.W.3d 583 (Tex. App.—Houston [14th Dist.] 2012, pet. filed), landowner brought trespass, nuisance, and negligence action against metal-processing neighbor based on environmental contamination. A jury found that the defendant did not create a permanent nuisance on the property or commit trespass. However, the jury found that the defendant's negligence proximately caused "the occurrence or injury in question" and assessed $349,312.50 as the difference in market value of the property before and after "the occurrence." The Houston Court of Appeals affirmed and held that the landowner could recover lost market value due to stigma, as a form of permanent damage, even if the contamination of its property had been remediated and was only temporary. The Court also held that the evidence was sufficient to establish that landowner suffered stigma damages that were permanent, irrespective of whether the contamination was remediated or ongoing. With respect to plaintiff's expert, the Court stated that it was unnecessary for landowner's appraiser to articulate what particular constituents contaminated landowner's property in order to link lost market value to contamination and the evidence was sufficient to

attribute neighbor's contamination to landowner's stigma damages. The Court stated that any flaws in the methodology of landowner's appraiser went to credibility rather than admissibility.

VII. SIGNIFICANT ENVIRONMENTAL DECISIONS FROM OTHER JURISDICTIONS

A. Hydraulic Fracturing

1. NEPA Review in the Delaware River Basin

In *New York v. United States Army Corps of Engineers*, 896 F.Supp.2d 180 (E.D. New York 2012), a district court dismissed a lawsuit filed by the State of New York and several environmental groups challenging the federal government's decision not to conduct an environmental review under NEPA while the Delaware River Basin Commission drafts and considers regulations that would allow hydraulic fracturing in the Basin. The court reasoned that although the plaintiffs provided a great deal of support for how their interests may be threatened if natural gas development is allowed in parts of the Basin, as of now it is not allowed, and the mere existence of proposed regulations is not sufficient to demonstrate that their interests are at risk. Accordingly, there is no injury in fact and the plaintiffs lack standing.

2. Closed-Loop System Not Required

In *Teel v. Chesapeake Appalachia, LLC*, 906 F.Supp.2d 519 (N.D. W. Va. 2012), a district court dismissed a landowner's trespass claim against an energy company for waste stemming from natural gas drilling operations on the property. The company owned the mineral rights underlying the land. As part of its drilling operations, the company deposited drilling waste and other material in pits on the landowners' property for which the landowner argued that the company's use of pits is a trespass. But under West Virginia law, the owner of subsurface has the right to use the surface of the land in such a manner as would be fairly necessary for the enjoyment of the subsurface estate. Here, the company's use of the land was fairly necessary for the extraction of the natural gas and the existence of a closed-loop system as an alternative did not render the company's use of the pits unreasonable.

3. Trade Secrets

In *Powder River Basin Resource Council v. Wyoming Oil & Gas Conservation Commission*, No. 94650-C, 43 ELR 20072 (D. Wyo. Mar. 21, 2013), a district court held that individual ingredients of hydraulic fracturing formulas are trade secrets and do not need to be publicly disclosed. The court stated that although the Wyoming Public Records Act does not define trade secrets, the Wyoming Oil and Gas Commission's policy for evaluating trade secrets is reasonable and complies with the Act. In addition, the environmental group seeking disclosure failed to establish that the commission's decision to grant trade secret protection requests were arbitrary, capricious, or not in accordance with the law.

4. BLM Violated NEPA

In *Center for Biological Diversity v. Bureau of Land Management*, No. C 11-06174 PSG, 2013 WL 1405938 (N.D. Cal. Mar. 31, 2013), a district court held that BLM violated NEPA when it sold four oil and gas leases on approximately 2,700 acres of federal land in Monterey and Fresno counties without considering impacts from hydraulic fracturing. The leases are located in California's Monterey Shale Formation, which is estimated to contain over 15 billion barrels of oil, most of which is not retrievable through conventional drilling techniques. BLM argued that its obligation to conduct NEPA analysis had not yet accrued, and even if it did, it satisfied this obligation by conducting an EA and finding the proposed action carried no significant environmental impact requiring a full EIS. But the court determined that BLM's EA unreasonably relied on an earlier single-well development scenario. That scenario did not adequately consider the development impact of hydraulic fracturing techniques when used in combination with technologies such as horizontal drilling.

5. Property Damages

In *Magers v. Chesapeake Appalachia, L.L.C.*, No. 5:12CV49, 2013 WL 1558647 (N.D. W. Va. Apr. 10, 2013), a district court denied a motion to dismiss landowners' lawsuit against a gas company for alleged contamination of their well water resulting from adjacent gas drilling activity. The court held that the landowners sufficiently alleged the company's connection with the alleged contamination as well as the statutes which created a duties owed by the company which were allegedly breached. The court found that these claims, as well as others, were sufficient to support the landowners' claims for compensatory and punitive relief at this stage of the case. Nonetheless, the court granted the company's alternative motion for a more definite statement pursuant to FED. R. CIV. P. 12(e).

6. Zoning Law

In *Norse Energy Co. v. Town of Dryden*, 964 N.Y.S.2d 714 (N.Y. App. Div. 2013), a New York appellate court held that the state's Oil, Gas and Solution Mining Law (OGSML) does not preempt, either expressly or impliedly, a municipality's power to enact a local zoning ordinance banning all activities related to the exploration for, and the production or storage of, natural gas and petroleum within its borders. The case arose after a town amended its zoning ordinance due to growing local concern over the proposed use of hydraulic fracturing to recover natural gas from underground shale deposits. Norse Energy Co. argued that the amendment was preempted by state law. But based upon the plain meaning of the OGSML's supersession clause, and the relevant legislative history and the purpose and policy of OGSML as a whole, the court held that OGSML does not expressly preempt the town's authority to enact a local zoning ordinance prohibiting oil, gas, and solution mining or drilling within its borders. The ban, therefore, was upheld.

B. Environmental Insurance

1. Duty to Indemnify for Repair and Replacement Costs

In *H&M Petro Mart, Inc. v. Zurich American Insurance Co.*, No. 11-13140, 42 ELR 20242 (E.D. Mich. Nov. 15, 2012), a district court held that an insurance company need not indemnify its insured for certain repair and replacement costs it incurred cleaning up the release of contaminants from an underground gasoline storage tank. The court stated that the plain language of the policy indicates the company was not required to pay for services associated with updating and repairing the storage tank systems and gasoline dispenser islands. The insurer was required to remediate the surrounding environmental area, but not to update and replace the insured's business equipment. Specifically, requiring the insurer to repair and replace the dispenser islands, recalibrate the dispenser islands, reinstall all of the electrical components of the system, and install a new sewer system is unreasonable and excluded by the policy language. In addition, the cost of replacing 5,800 square feet of excavated concrete did not qualify as cleanup costs under the policy. The policy unambiguously excluded coverage for costs associated with restoring the entire premises back to its original condition.

2. Subrogation for CERCLA claims

In *Chubb Custom Insurance Co. v. Space Systems/Loral, Inc.*, 710 F.3d 946 (9th Cir. 2013), the Ninth Circuit upheld the dismissal of an insurance company's subrogation suit for recovery of insurance payments made to its insured for environmental response costs it incurred cleaning up pollutants on its property. The company claimed that the defendants should be held jointly and severally liable for the response costs because they released hazardous substances that migrated onto the insured's property. But the insurance company lacked standing to bring a claim under CERCLA §107(a) because it did not incur any response costs related to the removal or remediation of a polluted site, and because the common law principle of subrogation does not apply to §107(a).

C. CERCLA Response Costs

In *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161(4th Cir. 2013), the Fourth Circuit affirmed a lower court decision allocating response costs to various PRPs in connection with the cleanup of hazardous substances at a former fertilizer manufacturing site in Charleston, South Carolina. After incurring response costs, the current owner of a portion of the site brought a cost recovery action under CERCLA against the corporate successor to a former owner of the site. The corporate successor counterclaimed and also brought third-party contribution actions against parties with past and current connections to the site. The lower court found that the corporate successor was a PRP jointly and severally liable for response costs at the site. It also ruled that the current owner and some of the other parties were PRPs liable for an allocated portion of the site's response costs.

D. Offer of Judgment for Attorney's Fee in Citizen Suits

In *Interfaith Community Organization v. Honeywell International, Inc*., 11–3813, 2013 WL 2397338 (3d Cir. June 4, 2013), the Third Circuit determined that offers of judgment pursuant to Fed. R. Civ. P. 68 may be made in attorney fee disputes in RCRA citizen suits. In this case, the defendant agreed to pay certain fees and costs in connection with the environmental group's monitoring costs for remediation of certain sites. A dispute arose as to amount of attorney's fees sought by the environmental group. Defendant served offers of judgment as to the disputed fees for which the district court held were null and void in a RCRA citizen. The Third Circuit disagreed and overturned the decision below.

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