

ENVIRONMENTAL LAW

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



The year 2015 was an exciting one for significant environmental law holdings from state and federal courts. Although space allows only a brief mention of the following cases, for the environmental practitioner, all are worth reading in full.

U.S. Supreme Court

In *Michigan v. EPA*,¹ the U.S. Supreme Court reversed and remanded the Environmental Protection Agency's rule limiting mercury emissions from power plants, holding that the agency interpreted the Clean Air Act unreasonably when it deemed cost irrelevant to the decision to regulate power plants. On remand, the EPA must consider costs before issuing regulations.

Federal Courts

In *United States v. Citgo Petroleum Corp.*,² the 5th Circuit reversed an oil company's convictions for violating the CAA and Migratory Bird Treaty Act in connection with its wastewater treatment system at a Texas refinery. The company's CAA convictions were reversed because the jury instruction was erroneous in describing the scope of the regulations. The court overturned the MBTA convictions because the statute does not criminalize omissions that unintentionally kill birds.

In *In re Environmental Protection Agency*,³ the 6th Circuit issued a nationwide stay enjoining the "waters of the United States" rule pending the court's determination as to whether it has subject matter jurisdiction. The court concluded that a nationwide stay would restore uniformity of regulation pending judicial review.

In *Vine Street, LLC v. Borg Warner Corp.*⁴—following the U.S. Supreme Court's reasoning in *Burlington Northern & Santa Fe Railway Co. v. United States*⁵—and reversing a lower court opinion, the 5th Circuit held that a company selling dry cleaning equipment and a perc supply did not take "intentional steps to dispose of a hazardous substance" and therefore did not qualify as an "arranger" under section 107(a)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act.

In *MEMC Pasadena, Inc. v. Goodgames Industrial Solutions, LLC*,⁶ the court held that a waste broker was liable for cleanup costs under CERCLA and the Texas Solid Waste Disposal Act as an "arranger" on the basis that it suggested and coordinated with a waste disposal site, arranged for transport of the generator's waste to the site, received invoices directly from the disposal site, and delivered them to the generator with markups for the broker's service.

Texas State Courts

In *Environmental Processing Systems v. FPL Farming, Ltd.*,⁷ the Supreme Court sidestepped the question of whether a subsurface trespass claim exists in Texas and instead reversed on the basis that the plaintiff failed to prove that the entry was unauthorized or without its consent. As a matter of first impression, the court recognized that lack of consent was an element of a trespass cause of action and not an affirmative defense.

In *Sciscoe v. Enbridge Gathering*,⁸ the Amarillo court held that the mere migration of airborne particulates across one's property can constitute an actionable trespass.

In *Cerny v. Marathon Oil Corp.*,⁹ the San Antonio court held that the plaintiff's nuisance and negligence claims concerning air emissions from nearby oil and gas operations were in the nature of toxic tort claims that required the stringent proof requirements imposed by the Texas Supreme Court in *Havner* and its progeny.

We expect many of the above issues to be further addressed, challenged, and refined in 2016.

Notes

1. 135 S. Ct. 2699, 192 L. Ed.2d 674 (2015).
2. 801 F.3d 477 (5th Cir. 2015).
3. 803 F.3d 804 (6th Cir. 2015).
4. 776 F.3d 312 (5th Cir. 2015).
5. 556 U.S. 599 (2009).
6. 2015 WL 6473385 (S.D. Tex. Oct. 27, 2015).
7. 457 S.W.3d 414 (Tex. 2015).
8. 2015 WL 34663490 (Tex. App.—Amarillo [7th Dist.] 2015, no pet. h.).
9. 2015 WL 5852596 (Tex. App.—San Antonio [4th Dist.] 2015, no pet. h.).



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FAMILY LAW

By Georganna L. Simpson and Beth M. Hearn

The U.S. Supreme Court's 2015 decision in *Obergefell v. Hodges* greatly impacted our nation, and its effects on Texas family law are still unfolding.

Same-sex couples may exercise fundamental right to marry in all states. In *Obergefell*, 14 same-sex couples and two men whose partners are deceased sought the right to marry or to