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In 1990, the Environmental and Natural Resources Law Section of the State Bar of Texas reached an agreement with a student group at The University of Texas School of Law for the students to coproduce the Journal as the Texas Environmental Law Journal. The students' involvement began with the summer issue of 1990.

Anyone interested in submitting a manuscript for publication should contact either the Solicitation Editor or the Editor-in-Chief of the Journal as listed on the facing page. Manuscripts for publication must be typed double-spaced with footnotes placed at the end of the manuscripts as endnotes. Manuscripts must be provided electronically in MS Word. (PC-compatible floppy disks are appreciated).

FROM THE EDITORS

Dear Readers,

Welcome to Issue Number Four and the last of the 2005-06 publication year! The editorial board would like to apologize for the delays in publication throughout the year. However, we trust that you found the issues informative, free of serious errors, and useful.

In this issue, **Jed Anderson** exposes an ongoing battle in the air quality field. Jed discusses the struggles and challenges facing the Texas State Implementation Plan. Most directly, Jed argues for the cessation of the plan because it has become redundant and ineffective when coupled with federal mandates and EPA regulation. Jed's argument has caught the attention of the Texas Commission on Environmental Quality and Congress and may be a catalyst for positive change in this complex issue.

Cory Pomeroy, a 2006 graduate of The University of Texas School Law, and former staff member of the *Journal* writes our student note. Cory examines arranger liability and tolling agreements under the Aceto lines of cases and the Texas Solid Waste Disposal Act after *R.R. Street & Co. v. Pilgrim Enterprises, Inc.*, 166 S.W.3d 232 (Tex. 2005). For principal manufacturers doing business in Texas, Cory advises that these companies should structure tolling agreements according to the R.R. Street and Aceto factors to ameliorate the likelihood of exposure to liability as an arranger.

At this time, we would also like to proudly announce the 2006-2007 student editorial board. This group brings strong talent to the board and will do an excellent job.

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Peipey Tang	Recent Developments Editor

As we say adios, please enjoy issue number four, it has been our pleasure to serve you with Volume 36!

Andrew M. Abrameit
Student Editor-in-Chief

Jimmy Alan Hall
Editor-in-Chief

REVISITING THE SIP PROCESS: FINDING A BETTER APPROACH TO CLEANER AIR

BY JED ANDERSON

The State Implementation Plan (SIP) process is becoming a complicated, costly, and largely ineffective way to further improve air quality in the United States. We spend millions of dollars and thousands of hours on a paper exercise with diminishing environmental returns. The problem in the SIP process lies not with its goals, but with the premise that air pollution is a localized phenomenon best handled at the state level with minimum federal involvement. The fact is that states are now federally preempted from regulating most emission sources, the role of transport has increased, and stronger controls at the federal level continue to marginalize SIP effectiveness. The premise upon which the SIP process was built has eroded. A paradigm shift is needed—a shift away from the declining effectiveness of the SIP process toward a process involving greater emission reductions at a lower cost to the public. Such a solution would not reduce state and local control; on the contrary, it would free-up state and local control to pursue greater emission reductions.

I. HOW THE SIP PROCESS WORKS

A SIP is a state's plan on how it will achieve the National Ambient Air Quality Standards (NAAQS) for any area designated in the state as "nonattainment."¹ The U.S. Environmental Protection Agency (EPA) sets the NAAQS for criteria pollutants such as ozone.² Once the EPA establishes a NAAQS, the EPA reviews data from monitors across the country to determine what areas are not in attainment for that standard. For example, the EPA has determined that the Houston-Galveston area, the Dallas-Fort Worth area, and the Beaumont-Port Arthur area are in "nonattainment" for the 8-hour ozone standard.

Once the EPA makes these designations, states must develop SIPs demonstrating to the EPA how the areas will achieve attainment by a given date.³ Many

states such as Texas conduct photochemical modeling to make this demonstration. Under this process, the state analyzes a date by inventorying emissions that occurred on that day and the resulting monitor values. The state then projects forward to the attainment date to determine the necessary level of emission reductions to achieve attainment. The modeling includes emission inventory changes expected to occur (such as reductions from cleaner cars and fuels). The state must then find control measures to satisfy any shortfall. For some parts of the country, a shortfall does not exist; for other parts, a significant shortfall exists. The Texas Commission on Environmental Quality's (TCEQ) initial modeling for the Houston 8-hour SIP found that the area requires an additional 50% to 85% nitrous oxide (NO_x) reduction from state and local measures to achieve the attainment deadline of 2010.⁴

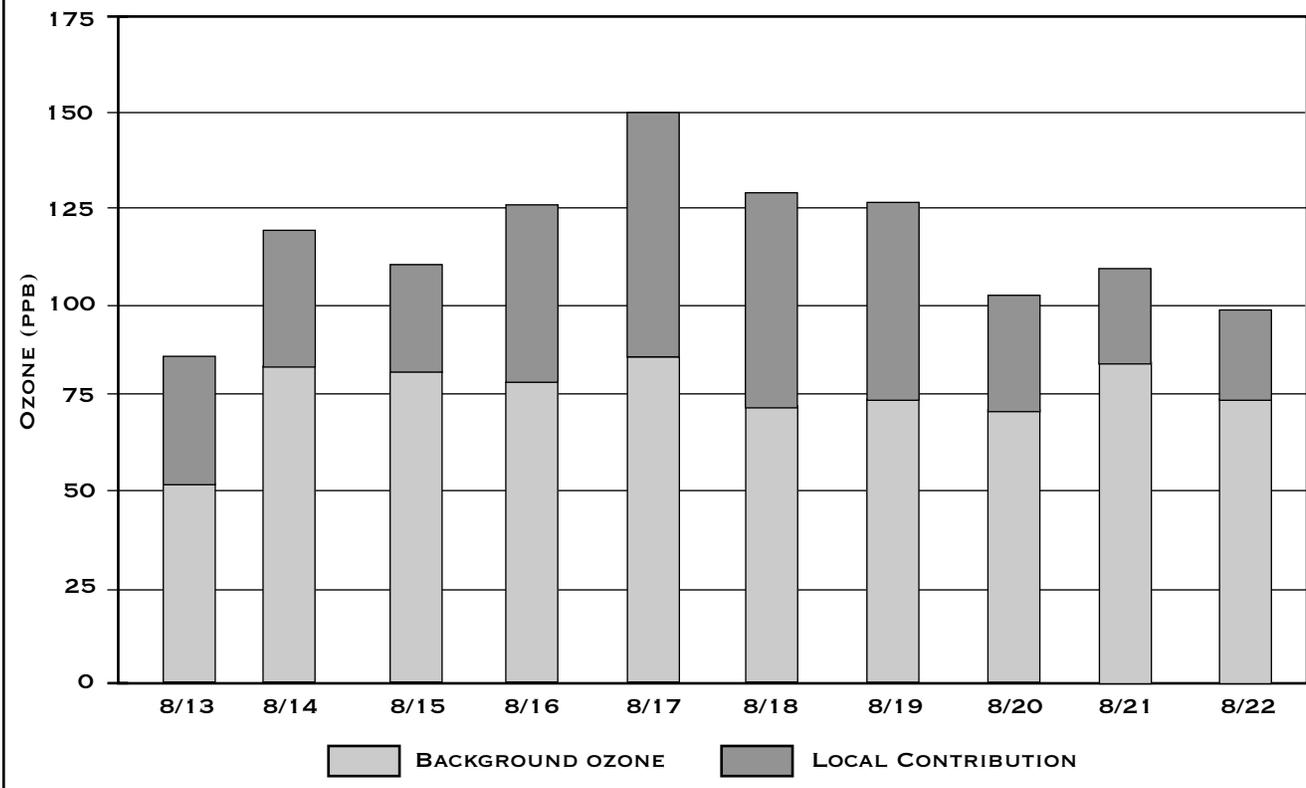
A. PROBLEMS WITH THE SIP PROCESS

1. ASKING STATES TO BUILD A BARN WITHOUT A HAMMER AND NAILS

One of the biggest problems with the SIP process is that the federal government asks states to develop plans to reduce emissions, but does not give them the tools to do the job. States are generally preempted from adopting engine standards on mobile sources.⁵ Preemption actually makes great sense because it is more economical, efficient, and effective to regulate engines uniformly at the federal level. That being said, the federal government cannot expect states to build a barn with a couple of 2 x 4s. Because mobile source emissions now comprise most of the emissions in nonattainment areas and the federal government rightfully holds the largest and cheapest tools to attainment—the SIP process results at best in a needlessly expensive and awkward structure that resembles a barn. At worst it is a bulging morass of taped-together 2 x 4s.

For example, as stated above, the Houston area needs a NO_x emission reduction of approximately

FIGURE 1: DALLAS/FORT WORTH DAILY MAXIMUM OZONE — AUGUST 13-22, 1999



50% to 85% to achieve attainment with the 8-hour ozone standard.⁶ However, approximately 60% of its emissions are federally preempted.⁷ The state cannot reduce 50% to 85% because the states' only effectively control 40%. Yet the SIP process demands that the state find a way to build the "SIP barn" or face potential sanctions. The state is therefore forced to pursue a number of inefficient, ineffective, and likely unsuccessful means in an attempt to meet SIP goals and to justify the need for additional attainment time.

2. THE SIP PROCESS CANNOT EFFECTIVELY ADDRESS THE GROWING RELEVANCE OF INTERSTATE AND INTERNATIONAL POLLUTANT TRANSPORT

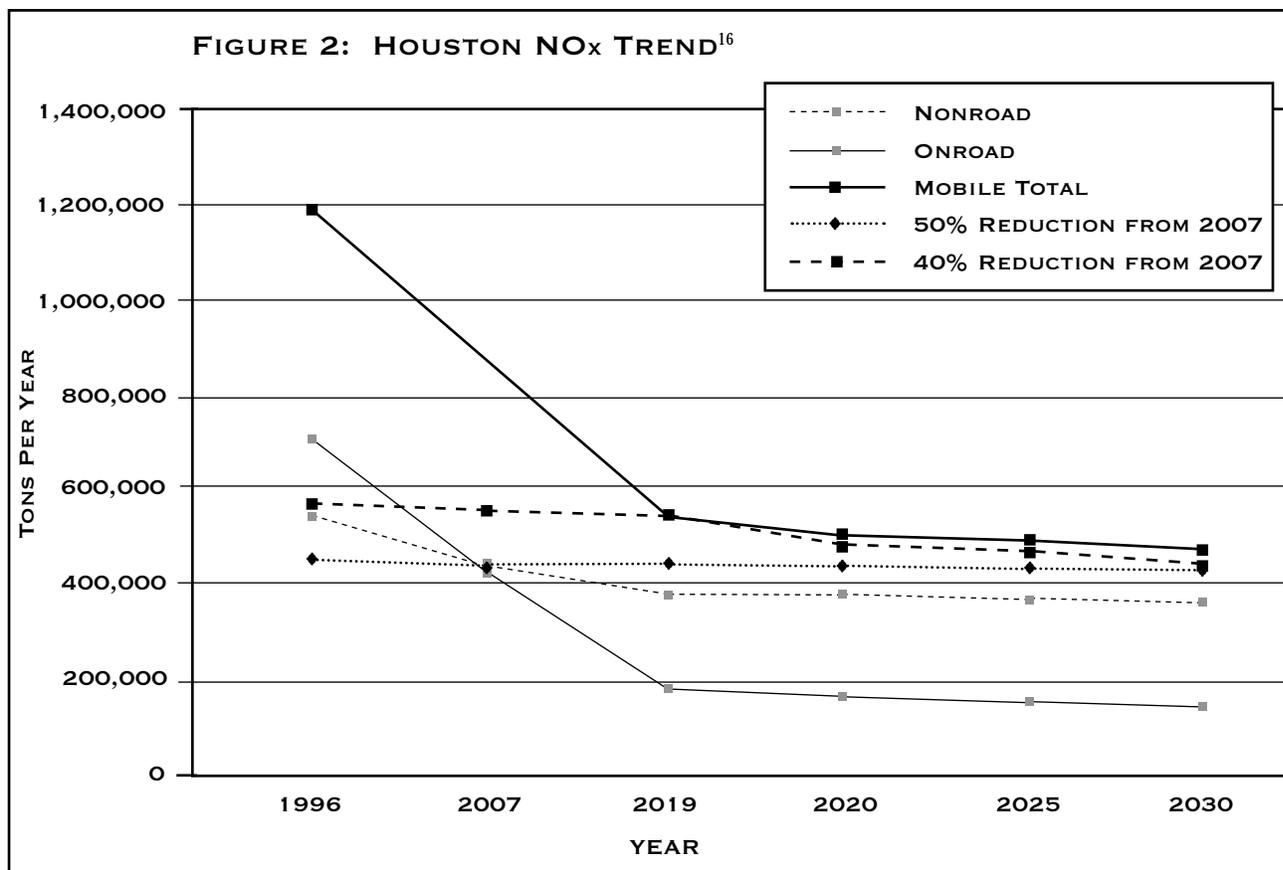
The SIP process cannot effectively address interstate and international transport. One state cannot control the policies and actions of another state. Addressing interstate pollution through negotiated settlements between states, in the alternative, is time-consuming and inefficient.

The relevance of interstate transport is continuing to grow—making the SIP process even less efficient at addressing this problem. In the EPA's recent promulgation of the Clean Air Interstate Rule for example, the EPA found that the State of Arkansas significantly contributes to the ozone problem in Houston, Texas.⁸ Texas is only subject to the Clean Air Interstate Rule because Texas pollution impacts two counties in Illinois.⁹ In Dallas-Fort Worth, over 50% of the ozone is typically "background" pollution (see Figure 1).¹⁰

Transport has become increasingly more relevant in solving the ozone problem. State autonomy leaves the dissolution or combination of states as the only way for the SIP process to efficiently address the transport problem. Needless to say, developing the "Republic of Tex-Illinois" would be problematic.

3. THE SIP PROCESS DOES LITTLE MORE THAN CONFIRM FEDERAL CONTROLS IN MANY NONATTAINMENT AREAS

Unlike Dallas-Fort Worth and Houston, many 8-hour nonattainment areas will achieve the 8-hour ozone standard using federal controls only.¹² The



EPA acknowledged this fact on its website: “EPA is taking a wide range of national clean air actions that will help all areas across the country significantly improve ozone air quality. Many of these clean air actions will bring local areas into attainment without any additional local controls.”¹³ If this result is indeed the case, why are SIPs necessary?

II. AS FEDERAL CONTROLS

CONTINUE TO PENETRATE THE

MARKETPLACE, THE SIP PROCESS

WILL BECOME EVEN LESS EFFECTIVE

Federal controls on motor vehicles, equipment, fuel, and stationary sources are projected to provide even greater emissions reductions in the future. For example, the heavy duty diesel vehicle rule is expected to reduce emissions by 95% when fully realized in 2030.¹⁴ As emissions continue to decrease with federal controls, the reliance and need for local

and state controls will be further marginalized (*see* Houston example in Figure 2).¹⁵

The EPA acknowledges a trend—through voluntary or mandatory bump-ups, litigation, delay tactics, or just the passage of time—of states relying further on federal measures to achieve attainment. This trend results in a continued decrease in the importance of the SIP process. In the EPA’s final rulemaking on Phase 1 of the 8-hour ozone implementation rule, the EPA stated:

Congress enacted subpart 2 with the understanding that all areas (except marginal areas, for which few, if any, controls for existing sources were required) would have to employ additional local controls to meet the 1-hour ozone NAAQS in a timely fashion. Since then, many local, regional and national control measures have been implemented, our understanding of the importance of interstate pollution transport has improved, and we have promulgated interstate NO_x transport rules to address transported pollution. . . [. . .] Today, regional modeling by

TABLE 1: POLICY COST EFFECTIVENESS TNRCC SIP²¹

	ANNUALIZED 2007 COST (\$MILLIONS)	NOX DAY REDUCTION (TONS)	COST EFFECTIVENESS (\$/TON)
FEDERAL.....	140.....	166.....	2,306
STATE			
POINT SOURCE.....	1,446.....	599.....	58,924
INSPECTION MAINTENANCE.....	52.....	42.....	3,400
CONSTRUCTION.....	1,512.....	7.....	618,220
TEXAS CLEANER DIESEL FUEL.....	75.....	7.....	29,989
LAWN SERVICE.....	7.....	1.....	16,627
ACCELERATED TIER 2/3.....	341.....	12.....	76,672
AIR CONDITIONERS.....	204.....	13.....	43,063
55 MPH SPEED LIMIT.....	196.....	18.....	29,460
DIESEL EMULSION FUEL.....	72.....	11.....	18,487
VEHICLE IDLING RESTRICTIONS.....	11.....	1.....	32,676
OTHER STATE.....	56.....	24.....	6,388
LOCAL.....	126.....	22.....	15,572

EPA indicates that the majority of potential 8-hour nonattainment areas that fall into the gap will attain the 8-hour NAAQS by 2007 based on reductions from the NO_x SIP Call, the Federal Motor Vehicle Emissions Control Program, and other existing Federal and State control measures, without further local controls.¹⁷

The importance of SIPs will continue to decrease and result in even less environmental returns in the future. This begs the question: why does the nation continue to invest further in the SIP process knowing the process will be increasingly less effective in the future? Further investment is akin to buying a poorly performing stock knowing that the stock's price is decreasing. No one would make such an investment with their own money, and it should not be done with the public's money.

A. LOCAL AND STATE SIP CONTROLS ARE MUCH MORE EXPENSIVE THAN FEDERAL CONTROLS

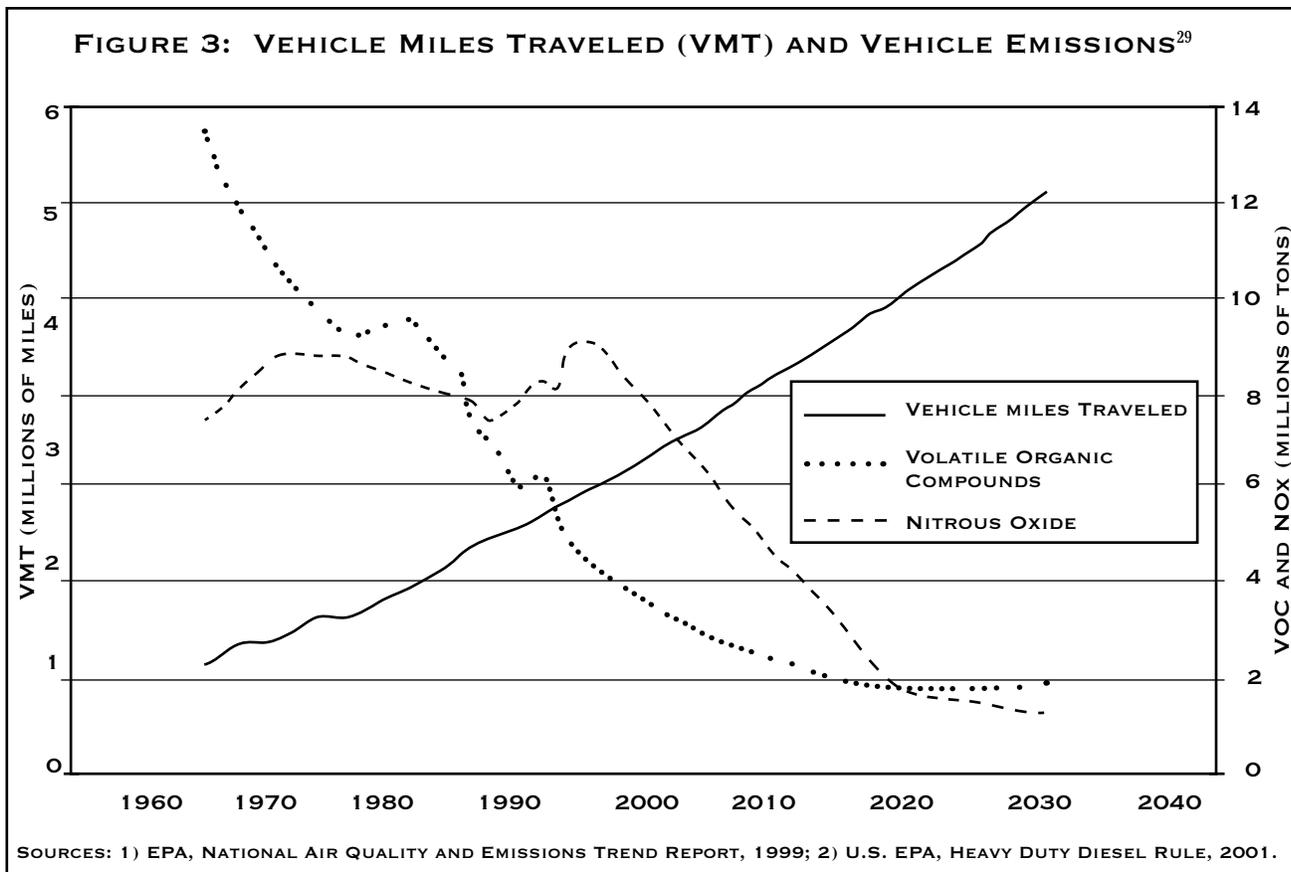
Reducing SIP-related emissions is generally much cheaper at the federal level than the state/local level. The cost-effectiveness of federal controls for the 2000 Houston-Galveston SIP was \$2,306 per ton.¹⁸ The projected cost effectiveness of state

and local controls was much higher on average. For example, the "local morning hour construction equipment ban" (delaying the use of diesel equipment until later in the day to reduce the formation of ozone), was \$618,220 per ton.¹⁹ That's almost 300 times less benefit for the same amount of money. Table 1 shows other cost-effectiveness comparisons from an economic study conducted for the Houston-Galveston area 1-hour Ozone SIP.²⁰

It makes more financial and environmental sense to invest in federal controls than requiring states to develop less efficient state and local controls through the SIP process.

B. LOCAL CONTROLS ARE GENERALLY LESS EFFECTIVE AND ENFORCEABLE THAN FEDERAL CONTROLS

Local controls are also generally less effective and enforceable than federal controls. Because the state is preempted from regulating most emission sources directly (*i.e.*, mobile sources), the state is forced to try to build the "SIP barn" with less effective means—such as use-restrictions. Use-restrictions are inherently less effective and enforceable because they rely on human behavior. Vehicle idling restrictions, speed limit restrictions, and time-of-day equipment/vehicle restrictions all depend on human



behavior—requiring significant resources to properly enforce. Fortunately and unfortunately, humans are clever. In Mexico City when the City restricted car usage to even/odd days, some people purchased a second car for the alternate day.²²

Use-restrictions also face a greater chance of public disapproval. The State of Texas spent approximately \$1 million erecting new 55 mph speed limit signs.²³ Just a few short months later, the State removed those same signs. Citizens and politicians were upset enough to even pass legislation prohibiting the state from developing speed limit restrictions for environmental reasons in the future.²⁴

Use-restrictions also face considerable enforcement concerns. The vehicle idling restriction in Houston was pulled from the rulebooks because enforcement was an issue and the reductions could not be properly substantiated.²⁵ These examples point to the fact that technological controls at the federal level are more effective and enforceable at reducing SIP-related emissions than behavioral controls at the state and local level.

C. DEMONSTRATING THAT TRANSPORTATION PLANS CONFORM TO THE SIP PROVIDES LITTLE IF ANY AIR QUALITY OR TRANSPORTATION BENEFIT

Demonstrating conformity to the SIP is a problem because cars continue to get cleaner. The purpose of the transportation conformity requirements is to ensure that growth in the transportation system does not prevent attainment.²⁶ Transportation growth, population growth, and vehicle miles traveled growth have not out-paced the speed of emission reductions from cars and trucks (see Figure 3).²⁷ This results in a conformity exercise that amounts to little more than an administrative check mark. A U.S. Government Accountability Office (GAO) survey found that a majority of planning organizations surveyed felt that transportation conformity was “ineffective in helping their areas achieve air quality goals.”²⁸ According to one planner, transportation conformity has never affected transportation planning choices and has cost over a million dollars a year to perform. Using that money

instead in an incentive program such as the Texas Emissions Reduction Plan program could have reduced NO_x by over 800 tons in the last five years.

III. SIPS ARE HUGE, COMPLEX

DOCUMENTS THAT REQUIRE

CONSTANT REVIEW AND REVISION

Many SIPs run to thousands of pages, and more than a thousand state and federal regulators around the country spend most or all of their time creating, maintaining, amending, and reviewing SIPs. Thousands more people at regulated businesses and non-profits closely follow and attempt to influence SIPs. Even minor changes to regulatory provisions or projects that are incorporated into a SIP can trigger the need to run the complete SIP gauntlet of state notice-and-comment rulemaking and subsequent federal notice-and-comment rulemaking. This administrative burden serves no benefit.

A. SIPS PLACE EMPHASIS ON PROCESS OVER RESULTS

The SIP process places an emphasis on demonstrating or modeling attainment over achieving attainment. Failure to submit a SIP results in potential sanctions such as the removal of federal highway funding, while failure to attain gets a bump-up and more time.³⁰ Although modeling is an excellent tool, it should be a means to an end, not the end itself. Because states receive SIP credit up-front through the modeling demonstration, states also have little incentive to perform a valid evaluation of real-world control effectiveness. A more results-oriented approach is needed.

B. SIP PROCESS FOCUSES STATES MYOPICALLY ON SHORT-TERM CONTROL STRATEGIES WHEN LONGER TERM STRATEGIES MAY BE BETTER FOR THE ENVIRONMENT AND THE COMMUNITY

Attainment deadlines for almost all 8-hour ozone areas are within three years of SIPs being due. Because the SIP process requires states to utilize controls that can be implemented within three years, states are discouraged from looking at long-term control strategies that could be more effective at reducing pollution. For example, new transportation

infrastructure such as high-occupancy vehicle lanes or additional transit lines cannot be considered because design, approval, and construction of such infrastructure requires more than three years.

C. SIPS LEND THEMSELVES TO LITIGATION, POLITICAL WRANGLING, AND DELAY

The Houston-Galveston area again needs an additional 50% to 85% reduction in NO_x and VOC to achieve the 8-hour standard by 2010.³¹ Only about 40% of the area's emissions come from sources that are not federally preempted (*e.g.*, refineries, power plants, etc.).³² Logically, even if the State reduced emissions to zero from these sources, the area still could not achieve the 2010 attainment deadline. The SIP process does not provide a means to address this problem. The process demands that the State create a SIP demonstrating attainment or face sanctions.

So what will the State of Texas do? The State must create a SIP with controls it knows will never face the light of day or request a voluntary bump-up. Because requesting a voluntary bump-up is probably not viewed as politically acceptable, the choice of creating a SIP with controls that never face the light of day is likely (unless a fortuitous event occurs). Millions of dollars and thousands of hours of time otherwise utilized to reduce pollution will now go into creating control strategy ideas that will eventually be thrown out because they are illegal, lack the will of the people, or are impractical (*e.g.*, limiting car usage to even or odd days, banning "drive-thrus" during certain times, limiting commercial operating hours, etc.). While a few control strategies may stick, all will be excessively expensive due to the unwieldiness of the SIP process and the cheaper methods of federal controls.

The benefit to the State from all this rigmarole is that the "will-not-see-the-light-of-day" controls will make a bump-up more popular, place pressure back on the EPA to provide more time or controls, push industry to come up with substitute controls, and tie-up the SIP process in months or years of litigation outside the State's control. The resulting delays and political wrangling should provide the State more time to assess new science developments and allow federal controls to further penetrate the marketplace.

**IV. WHAT ARE NATIONAL AIR
QUALITY LEADERS SAYING ABOUT
THE SIP PROCESS?**

Here is what others are saying about the SIP process:

The SIP process now mandates extensive amounts of local, state, and federal agency time and resources in a legalistic, and often frustrating, proposal and review process, which focuses primarily on compliance with intermediate process steps. This process probably discourages innovation and experimentation at the state and local levels; overtaxes the limited financial and human resources available to the nation's AQM system at the state, local, and federal levels; and draws attention and resources away from the more germane issue of ensuring progress toward the goal of meeting the NAAQS.³³

National Research Council

The CAA and its associated amendments specify a number of deadlines that proved to be unrealistic. A prime example is the specification of attainment deadlines that proved to be infeasible for O₃ in the CAA Amendments of 1970 and 1977 (It remains to be seen if the more liberal attainment deadlines specified in the CAA Amendments of 1990, which extend to 2010, are feasible). Setting unrealistic deadlines can lead to frustration for local and federal agencies that do not see any reasonable way to achieve the requirements of the Act. It can also introduce an aura of fiction to the entire SIP process as agencies endeavor to meet the letter of the law by promulgating attainment demonstrations that have little likelihood of accurately forecasting future air quality trends.³⁴

National Research Council

The best estimates are that we could have achieved the present level of environmental quality at a quarter of the direct cost.³⁵

David Schoenbrod (Law Professor
and former Natural Resources
Defense Council Litigator)

The committee makes five interrelated recommendations to be implemented through specific actions [. . .] Transform the SIP process into a more dynamic and collaborative performance-oriented, multipollutant air quality management plan.³⁶

Committee on Air Quality Management
in the United States,
National Academy of Sciences

When federal regulations are delayed or modified, states are forced to make important policy decisions in a reduced timeframe. [. . .] Consequently, states are often forced to employ less cost-effective measures.³⁷

National Governor's Association

**V. WHY NOT WORK WITHIN THE
CURRENT SIP PROCESS?**

Sometimes the initial path to solving a problem becomes the wrong path or outlives its usefulness. What is needed are not band-aids and bailing wire, but a wrecking ball and some fresh clay. We understand and apply this principle in our personal lives. We tell our child "look at the pretty airplane" instead of telling them for the fourth time to stop screaming. We dump old habits rather than continuing down self-destructive paths. We dream new dreams instead of miring ourselves in what could have been. Great innovators throughout history have applied this same principle of looking at a problem from a new vantage to solve large-scale societal problems. Thomas Edison conquered darkness with the light bulb, not by attempting to build a better lantern. Salk conquered polio by developing a vaccine, not by continuing to look for a better treatment. Ghandi brought revolution to India using civil disobedience, not by condoning violence. To better solve a problem sometimes requires a complete paradigm shift. The SIP process is in need of such a paradigm shift. Although most environmental regulatory schemes are effective and can be tweaked for improvement, the SIP process cannot due to the eroding of its premise. The SIP process is the screaming child, the bad habit, and the dream of what could have been.

A. MOVING TOWARD A BETTER SOLUTION

This article does not attempt to forge a specific solution. The first step in any problem is to recognize a problem exists. Problem recognition is the primary intention of this article. The second intention of this article is to suggest that fixing the SIP process is not the appropriate path due to the erosion of its premise. It is time to stop re-engineering the "Ford Pinto" and look for a better vehicle to cleaner air. The final intention of this article is to suggest a few general goals for any path forward and to provide examples of potential solutions.

B. GOALS OF AN ALTERNATIVE PATH

The goals of an alternative path should be to reallocate state and local resources from the highly administrative, inefficient, and speculative SIP process to the following results-oriented endeavors:

- More emission reductions
- Addressing community multi-pollutant concerns historically overshadowed by demands to focus on ozone (e.g., toxics, particulate matter)
- Find it and fix it (e.g., increased compliance assistance and enforcement)
- Increased monitoring and measurements to validate and direct control efforts
- Improving emission reduction technologies for all sectors

The purpose of this reallocation is to reduce more pollution at less cost to the public and business.

VI. SIP REPLACEMENT STRATEGIES

FOR POTENTIAL CONSIDERATION

It will take a group of smart and courageous people to find and champion a solution. The solution can and must be a win-win for both the environment and business. The complete removal of the SIP process and replacement of the SIP process or redirection of SIP resources resulting in more emissions reductions at less cost to the public is one suggested framework. Below are three potential solutions for consideration:

A. STATE-WIDE AIR QUALITY MANAGEMENT PLAN

As an alternative to the SIP, states could develop state-wide air quality management plans. These plans would include all pollutants and all cities in one plan. The benefit of this alternative is the significant reduction in the amount of administrative work associated with preparing multiple plans for multiple pollutants in multiple parts of the state. A state-wide air quality management plan would also better address intrastate pollution matters and the multi-pollutant impact of controls. The drawback of a state-wide air quality management plan is that it still faces the problems resulting from federal pre-emption and interstate transport.

B. EMISSIONS REDUCTION TARGET

A second potential solution is to replace the SIP process with a bubble-type concept or generalized cap-and-trade program. Such a concept requires a specific emissions reduction or declining emissions reduction for certain sources or source sectors. Those sources or source sectors could then determine for themselves how to best achieve the prescribed limits. This idea is already occurring nationally for certain pollutants and sources—and also regionally in certain parts of the country. The federal Acid Rain Program, for example, provides a national cap and trade program to reduce sulfur emissions from power plants.³⁸ California and Texas also have industrial-source based cap and trade programs to help achieve the ozone standard.³⁹ The idea behind this alternative solution is to use these highly effective programs as a model to create a more generalized cap-and-trade program to replace the SIP process.

C. FEDERAL SYSTEM AND REALLOCATION OF STATE/LOCAL RESOURCE

A third, and perhaps the best, solution is to remove the SIP process and give the EPA primary responsibility for achieving the NAAQS. The EPA now controls most SIP-related emission sources. The EPA can also address interstate transport by various means (unlike states). Giving the EPA primary responsibility does not mean throwing out the idea of cooperative federalism. It simply means moving the point along the continuum between state and federal control from the state side toward the federal side to allow cooperative federalism to work

more effectively. The current SIP process gives the state the façade of power and control to develop a SIP, but not the actual power and control. Most emissions sources again are federally preempted or more appropriately controlled at the federal level. The result is not effective cooperation, but a passing of responsibility that would be more appropriately retained. Shifting the responsibility back to the EPA would allow states to spend their time and resources on issues they can more efficiently and properly control rather than on justifying what they cannot effectively do. Hundreds of millions of dollars could be liberated to focus on localized public health concerns, compliance, enforcement, monitoring, and developing innovative emission reduction solutions.

Whatever solution is selected, inspiring the nation to find the courage to change is not a simple task. As Martin Luther King once said however, “human progress never rolled in on the wheels of inevitability.” It is time to make a paradigm shift—a shift away from a process that favors paperwork, toward a process that favors public health.

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STUDENT NOTE

ARRANGER LIABILITY UNDER TOLLING AGREEMENTS: HOW WILL TEXAS COURTS “ARRANGE FOR” LIABILITY?

BY CORY POMEROY

I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),¹ as the title suggests, is the most comprehensive federal approach to environmental protection since the enactment of the National Environmental Policy Act of 1969 (NEPA).² CERCLA, a congressional response to the infamous Love Canal incident of 1978,³ authorizes the federal government to respond to a release of a hazardous substance into the environment, or a substantial threat of release.⁴ In addition, CERCLA allows the federal government to respond to a “release or substantial threat of release into the environment of *any* pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare”⁵

Congress created CERCLA with two main objectives in mind.⁶ First, Congress intended to equip the federal government with the appropriate and necessary resources to respond to the nation’s increasing problems associated with hazardous waste disposal.⁷ Second, Congress aimed to hold persons responsible for the disposal of hazardous products, and the resultant public endangerment, by placing the burden of remediation costs on them.⁸

CERCLA provides the federal government with two methods of responding to a hazardous substance release or threat of release.⁹ One method allows the federal government to apply funds from the “Superfund”¹⁰ to clean up the site if it is on the National Priority List. The government may then initiate a cost-recovery action against a potentially responsible party (“PRP”).¹¹ Second, the federal government may order any party liable under Section 9606(a) to remediate the site.¹²

CERCLA authorizes suit against four enumerated categories of PRPs, which include: (1) the owners and operators of a facility at which a release or threatened release of hazardous substances exists; (2) the owners and operators of such a facility any time in the past when hazardous substances were disposed of; (3) any person or entity who *arranged for* the treatment or disposal of a hazardous substance at the facility; and (4) any persons who transported hazardous substances to the facility, if they selected the site for disposal.¹³

The determination of “arranger liability” is based on Section 9607(a)(3), which establishes liability for:

[A]ny person who by contract, agreement, or *otherwise arranged for* disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.¹⁴

CERCLA, notorious for its poor draftsmanship, left many of its key terms without meaningful definition; for example, Congress did not define “otherwise arranged for.”¹⁵ Because CERCLA is the product of a last-minute compromise of a lame-duck Congress and President, CERCLA’s legislative history provides little guidance on congressional intent on this definition.¹⁶

The lack of definition for an “arranger” has led to various court interpretations. In fact, more than twenty-five years have elapsed since Congress first created CERCLA, yet the courts are still not using

the same standards by which to hold a person liable as an arranger.¹⁷ While the United States Supreme Court has not issued any opinions on the proper interpretation on this issue, the federal circuits have adopted three varying approaches to determining arranger liability.¹⁸ Interestingly, the most modern approach is also the most expansive interpretation of CERCLA and has broadened the scope of arranger liability under CERCLA.¹⁹

The Texas Legislature enacted the Texas Solid Waste Disposal Act (SWDA)²⁰ to enable the Texas state government to pursue enforcement actions for *solid waste* disposal much as CERCLA enabled the federal government to deal with *hazardous waste* disposal.²¹ The SWDA was modeled after CERCLA and provides an alternative basis for liability.²²

The Texas analog to CERCLA's arranger liability provision states that a person is liable if the person: [B]y contract, agreement, or otherwise, *arranged* to process, store, or dispose of, or *arranged* with a transporter for transport to process, store, or dispose of, solid waste owned or possessed by the person, by any other person or entity at: (A) the solid waste facility owned or operated by another person or entity that contains the solid waste; or (B) the site to which the solid waste was transported that contains the solid waste.²³

Similar to CERCLA, the SWDA does not define "otherwise arranged."²⁴ Accordingly, in a case of first impression, the Supreme Court of Texas turned to established federal case law for guidance in interpreting the scope of arranger liability.²⁵ An interesting category of federal arranger liability cases, with which none of the Texas courts have yet to confront, involves tolling arrangements.

II. OVERVIEW

This Note will attempt to delineate how a Texas court will determine arranger liability, under the SWDA, in the context of tolling agreements. First, it will discuss the history of arranger liability under CERCLA, including the various approaches that the federal courts of appeals have taken in interpreting its statutory language and broadening the scope of arranger liability. After describing what a tolling agreement is, the Note will turn to a specific analy-

sis of federal cases regarding arranger liability in the context of tolling agreements.

Next, this Note will report on how the Supreme Court of Texas has interpreted the SWDA in determining arranger liability, in a case of first impression. It then compares the factors that the federal courts have used to decide arranger liability with those employed by the first Texas court to decide on the issue. Finally, the Note provides an analysis of how the Texas courts might determine arranger liability when the factual situation involves a tolling agreement and concludes by offering suggestions for how a business entity might structure a tolling agreement as to seek avoidance of arranger liability under the SWDA.

III. FEDERAL CASE LAW ON

CERCLA ARRANGER LIABILITY

Modern courts have adopted three approaches in determining arranger liability under CERCLA: (1) strict liability; (2) specific intent; and (3) "totality of the circumstances."²⁶

A. STRICT LIABILITY APPROACH

The strict liability approach was annunciated in *United States v. Aceto Agricultural Chemicals Corp.*²⁷ by the Eighth Circuit and is considered the broadest interpretation of CERCLA.²⁸ In *Aceto*, the United States and the State of Iowa alleged that pesticide manufacturers who contracted with a processing company to formulate their technical-grade pesticides into a commercial-grade product "arranged for" the disposal of hazardous substances.²⁹ The court noted that the pesticide manufacturers maintained ownership of the technical-grade pesticide and commercial-grade product at all points along the formulation process, despite the processing company's possession of the substances during the process.³⁰

The *Aceto* court stated that most courts have held that CERCLA imposes strict liability.³¹ The court noted that to establish a prima facie case of liability, the plaintiffs must prove that: (1) the site in question is a "facility" as defined in Section 9601(9); (2) a release or threatened release of a hazardous substance from the site has occurred; (3) the release or threatened release has caused the federal government to incur response costs; and (4) the de-

defendants fall within at least one of the four classes of PRPs.³² The mere existence of these four prima facie elements triggers strict liability, without regard to the defendant's culpability or mental state.³³

Relying on legislative history, the court declined to require that the pesticide manufacturers have an intention to arrange for the disposal of a hazardous substance to be held liable under CERCLA.³⁴ The court noted that original language of Senate Bill 1480, which extended liability to "any person who caused or contributed to a release of hazardous substances," was discarded in favor of current statutory language, which provides liability to "any person who by contract, agreement or otherwise arranged for" hazardous substance disposal.³⁵ The court stated that Congress's preference for "arranged for," as opposed to "caused or contributed to," is consistent with the imposition of strict liability.³⁶ The court iterated that Congress used broad language to provide liability for parties who "by contract, agreement, or otherwise arranged for" hazardous waste disposal,³⁷ and courts have concluded that a "liberal judicial interpretation is consistent with CERCLA's 'overwhelming remedial' statutory scheme."³⁸

The *Aceto* court ultimately affirmed the district court's denial of the defendant's motion to dismiss for failure to state a claim upon which relief could be granted, determining that arranger liability could attach to the principal manufacturers.³⁹ The court emphasized that the pesticide manufacturers' authority to control the disposal was underpinned by their continued ownership of the chemicals.⁴⁰ In addition, the court placed importance on the fact that the release or spillage constituted an inherent part of the formulation process.⁴¹ The court concluded that an ultimate holding to the contrary would "allow defendants to simply 'close their eyes' to the method of disposal...[.]"⁴²

B. SPECIFIC INTENT APPROACH

The specific intent approach is considered a narrower⁴³ and much more conservative interpretation of arranger liability.⁴⁴ Judge Richard Posner of the Seventh Circuit announced this narrow approach in *Amcast Industrial Corp. v. Detrex Corp.*⁴⁵

In *Amcast*, the plaintiff was a manufacturer of copper fittings who used the solvent trichloroethylene (TCE) in its manufacturing process.⁴⁶ The defendant supplied the TCE to the plaintiff through the use of a transportation company, and the evidence established that the transportation company

sometimes accidentally spilled TCE on the plaintiff's property while filling the plaintiff's storage tanks.⁴⁷ The spilled TCE percolated down to the groundwater, leading to an action by the plaintiff seeking contribution for response costs incurred in the environmental cleanup.⁴⁸

Thus, the issue before the court was whether the defendant, a supplier of TCE, was a PRP within the meaning of Section 9607(a)(3): specifically, whether the defendant "arranged with a transporter for transport for disposal or treatment" of TCE.⁴⁹ Conceding that the defendant supplier *did* hire a transporter, the *Amcast* court held that the defendant was not liable as an arranger because "it did not hire [the transporter] to spill TCE on [the plaintiff's] premises."⁵⁰ The court emphasized that, regardless of the fact that "spilling" is included in the definition of "disposal,"⁵¹ the "critical words" for establishing arranger liability are "arranged for," which "imply intentional action."⁵²

The court noted that the language "arranged with a transporter for transport for disposal or treatment" contemplates a case in which the shipper employs a transporter to carry its waste to a disposal site, not a situation in which the shipper hires a transporter to move its useful product.⁵³ The court iterated that "it would be an extraordinary thing to make shippers strictly liable under the Superfund statute for the consequences of accidents to common carriers or other reputable transportation companies that the shippers had hired in good faith to ship their products."⁵⁴ The *Amcast* court concluded that CERCLA language allows this interpretive result⁵⁵ but does not mandate it, and did not find any evidence that this interpretation was intended.⁵⁶

C. TOTALITY OF THE CIRCUMSTANCES/ CASE-BY-CASE APPROACH

In *South Florida Water Management District v. Montalvo*,⁵⁷ the Eleventh Circuit reiterated its adherence to a "totality of the circumstances" or case-by-case approach, which it first established in *Florida Power & Light Co. v. Allis Chalmers Corp.*⁵⁸ The Eleventh Circuit's analysis in *Montalvo* takes a middle ground between the *Aceto* and *Amcast* decisions.⁵⁹

In *Montalvo*, an aerial pesticide spraying service sought contribution for response costs incurred in environmental cleanup from landowners with whom the defendant had contracted for services.⁶⁰ Interestingly, the contamination occurred on the property of the spraying service as a result of accidental spillage

when filling the plane tanks for application and rinsing out the storage tanks after application.⁶¹

The court held that “when determining whether a party has ‘arranged for’ the disposal of a hazardous substance, courts must focus on all of the facts in a particular case.”⁶² The court noted that factors such as a party’s knowledge of the disposal, ownership of the hazardous substances, and intent are relevant in determining arranger liability, but they are not determinative in every case.⁶³ The court iterated that it had previously rejected “any attempt to substitute a *per se* rule for the phrase ‘arranged for’ as used in Section 9607(a)(3)’s text.”⁶⁴

The court reasoned that the landowners must have done more than merely contract for the spraying of pesticides and that the sprayers must have established that the landowners took “some affirmative act to dispose of the wastes.”⁶⁵ Emphasizing that “CERCLA liability . . . is not boundless,”⁶⁶ the *Montalvo* court concluded that the pesticide sprayers did not prove that the landowners had sufficient knowledge of or control over the disposal practices as to give rise to arranger liability.⁶⁷

IV. BROADENING THE SCOPE OF ARRANGER LIABILITY

The statement and reasoning in *Aceto* that CERCLA imposes strict liability⁶⁸ begs the question of why the *Amcast* court discarded that approach in favor of a specific intent approach and the *Montalvo* court adopted the “totality of the circumstances” approach. While the *Aceto* court relied on legislative history to employ its strict liability method, the *Amcast* court used canons of statutory interpretation and relied solely on the language of the statute.⁶⁹ “Opponents of this approach cannot square the legislative intent of strict liability.”⁷⁰

The *Amcast* “specific intent” approach opened the door to the *Montalvo* court’s “totality of the circumstances” approach.⁷¹ This method is based on the belief that the “strict liability” and “specific intent” approaches are inappropriate: that imposing strict liability stretched the meaning of “arranged for” too far, while requiring specific intent was too limited and did not account for the broad remedial nature of CERCLA.⁷²

If it is high time to reconcile these three approaches, this Note does not attempt to do that.

Indeed, “the sponsors of CERCLA crafted the liability scheme with anticipation that the common law would provide guidance in interpreting the legislation.”⁷³ This Note recognizes that this evolution of the law involves a continued broadening of the scope of CERCLA arranger liability.⁷⁴ Several commentators have argued that current CERCLA jurisprudence is well beyond the bounds of congressional intent,⁷⁵ despite the fact that federal courts have said that arranger liability under Section 9607(a)(3) is not without limits.⁷⁶

Understandably, what gives rise to the judicial activism and inconsistencies may be the multitudinous factual situations with which the courts are presented. Indeed, the term “otherwise arranged for” certainly does not limit the sphere of creative argument. A practical consequence of this judicial inconsistency and expansion of arranger liability is that persons entering into any transactions involving hazardous substances may be uncertain of their liabilities. The upside of this situation is that it “injects environmental considerations into many transactions previously lacking such consideration.”⁷⁷ The downside is that judicial fuzziness decreases business activity and investment in businesses involving transactions of hazardous substances.⁷⁸ Until the Supreme Court or Congress resolves the scope of liability, litigants must advocate within the framework of the approach that the courts have adopted in their respective jurisdiction.

The three federal circuit approaches can be applied to various relationships in which a distribution, transfer, or disposition of hazardous substances occurs. One such specific arrangement relationship involves tolling agreements. In *Aceto*, the parties involved in the dispute had entered into a tolling arrangement, and this factual consideration governed the court’s analysis.⁷⁹ The following section will discuss what a tolling agreement is.

V. TOLLING AGREEMENTS

A tolling agreement is a business arrangement between a principal manufacturer of raw materials and a toll manufacturer who processes the raw materials into a finished product.⁸⁰ The processing company receives a “toll,” or a compensation for services rendered, for the production or formulation of the product and thereafter returns the product to the principal manufacturer.⁸¹ The principal generally

retains ownership of the raw materials at all points in the process—the raw material, the materials being processed, and the finished product.⁸² A classic example of a tolling agreement is a wheat farmer sending off his wheat to a mill to be processed into flour by a toll manufacturer, after which processing the farmer receives back the flour.⁸³

Tolling agreements are common arrangements in the chemical industry in which a chemical manufacturer delivers a raw product to another manufacturer for further processing into a more commercial product.⁸⁴ A widely-known instance of a tolling agreement between chemical manufacturers involved the production of Kepone, a very potent pesticide, from its constituent raw parts.⁸⁵

The reason for the common existence of tolling contracts in the chemical industry is that they offer economic advantages to raw chemical manufacturers.⁸⁶ Engaging a toll manufacturer in a tolling agreement allows principal manufacturers to forgo modifying or installing equipment that would be necessary to produce a final product.⁸⁷ By avoiding the retooling or installation of equipment, the principal manufacturer “can start production earlier, save time, and lower operating costs” as well as “[free] up its own production capacity for other products.”⁸⁸

However, tolling agreements do have disadvantages.⁸⁹ The toll manufacturer may acquire from the principal certain proprietary technology or formulas necessary to produce the finished product.⁹⁰ Also, toll manufacturers may, in the interest of increased profits, compromise safety procedures and environmental conditions.⁹¹

Because the existence of a tolling agreement may change the way in which a court analyzes arranger liability, the next section will discuss the courts’ analyses in tolling agreement cases.

VI. CERCLA ARRANGER LIABILITY

IN TOLLING AGREEMENTS: ACETO

LINE OF CASES

As mentioned above, one method of determining arranger liability is the strict liability approach. The Eighth Circuit employed approach *Aceto*, the seminal tolling agreement case under CERCLA.⁹² The foundation for the court’s ruling in *Aceto* was laid down by

the district court and Eleventh Circuit’s decisions in *Florida Power & Light*.⁹³

A. “USEFUL PRODUCTS” EXCEPTION

In *Florida Power & Light*, the seminal “useful products” case, the Eleventh Circuit held that the seller of a useful product was not liable for the buyer’s ultimate disposition of the waster, both because transfer of ownership of the products had occurred and because the seller was neither aware of nor involved with the disposition of wastes after the sale.⁹⁴ The court reasoned that the manufacturer and seller of electric transformers that contained trace amounts of polychlorinated biphenyls (PCBs) was too far removed from the disposal to have control over the release of hazardous substances to be deemed an “arranger.”⁹⁵

The situation in which a manufacturer *sells a useful product* to a willing buyer must be distinguished from the traditional tolling arrangement in which a principal manufacturer provides a technical-grade product to a tolling manufacturer for formulation into a commercial-grade product.

B. TOLL PRODUCTS CASES

In *Aceto*,⁹⁶ the Eleventh Circuit distinguished *Florida Power & Light*, in holding that because the manufacturer owned the technical-grade pesticides provided to the processor company, the commercial-grade pesticide that the processor company produced, and the work in process, and because the manufacturer knew that the generation of pesticide-contaminated waste was inherent in the formulation process, the manufacturers could be deemed to have implicitly arranged for the disposal of hazardous substances at the processor company’s facility.⁹⁷

In *Jones-Hamilton Co. v. Beazer Materials & Services, Inc.*,⁹⁸ the Ninth Circuit relied on *Aceto* to impose liability on a principal manufacturer that provided raw materials to a formulator that produced wood preservation compounds.⁹⁹ The factual situation in *Jones-Hamilton* was almost identical to that in *Aceto*.¹⁰⁰ In finding arranger liability, the court emphasized that the principal retained ownership of the materials during formulation and the inherent generation and disposal of waste during the processing.¹⁰¹

By contrast, in *United States v. Consolidated Rail Corp.*,¹⁰² the district court found the defendant not liable as an arranger when it transported raw material to a toll manufacturer and purchased the

end product.¹⁰³ The court emphasized that the record did not have any evidence that the defendant “controlled or had the authority to control the hazardous substances disposed or treated” at the contamination site.¹⁰⁴

The common thread in the Aceto line of cases is twofold. Important to the imposition of liability is the knowledge that release or spillage constituted an inherent part of the formulation process.¹⁰⁵ The other important factor in imposing liability under tolling agreements is the fact that the defendant had continued ownership and possession throughout the process, which evidences an actual or imputed authority to control the disposition of the hazardous substances.¹⁰⁶ This Note will now discuss the judicial approach taken by the first Texas court to determine arranger liability under the SWDA.

VII. TEXAS CASE LAW ON SWDA

ARRANGER LIABILITY

*R.R. Street & Co. v. Pilgrim Enterprises, Inc.*¹⁰⁷ is a case of first impression for Texas courts interpreting the SWDA in the context of arranger liability.¹⁰⁸ In this case, the Texas Supreme Court followed the law of the Fifth Circuit,¹⁰⁹ and adopted the “totality of the circumstances” approach, which the Fifth Circuit firmly established in *Montalvo*.¹¹⁰

In *R.R. Street*, Pilgrim, a dry cleaning facility, filed suit under the SWDA seeking cost recovery from Street, its supplier of chemical products and services, after Pilgrim incurred costs in its voluntary environmental cleanup of perchloroethylene (PCE).¹¹¹ Because the SWDA places responsibility for solid waste cleanup costs on persons who “arranged” to dispose of solid waste, the issue before the *R.R. Street* court was to determine the intended scope of “arranger liability” under the SWDA.¹¹²

The term “otherwise arranged” to dispose of solid waste is not defined in either CERCLA or the SWDA.¹¹³ In the absence of statutory definition and a Texas case evaluating the scope of arranger liability, the Texas Supreme Court turned to federal case law for guidance.¹¹⁴ The court observed that the SWDA is modeled after CERCLA, “which the federal courts have given a liberal interpretation consistent with Congress’s ‘overwhelmingly remedial statutory scheme.’”¹¹⁵ Noting the SWDA’s similarly broad purpose “to safeguard the health, welfare, and physical

property of the people and to protect the environment by controlling the management of solid waste, including accounting for hazardous waste that is generated,” the court stated that it would “interpret the SWDA liberally to give effect to its remedial purpose.”¹¹⁶ The court reasoned “[w]hen the Legislature adopts a federal statute, [courts] presume that it knew of the federal court’s construction of the federal statute when it adopted the statute and intended to adopt that construction.”¹¹⁷

The *R.R. Street* court recognized the parties’ agreement that the courts have declined to assert a bright-line test in determining arranger liability,¹¹⁸ but acknowledged that “the courts generally agree that there must be a nexus between the party’s conduct and the disposal of the hazardous substance.”¹¹⁹ While the nexus is discussed in different terms, such as authority, involvement, and obligation, the court quoted the Second Circuit for the observation that “almost all courts that have held defendants liable as arrangers have found that the defendant had *some actual involvement* in the decision to dispose of waste.”¹²⁰

The court then concluded that the use of the “totality of the circumstances” approach under the guidelines that the federal cases have established “is the most faithful to the statutory language and purposes of [the SWDA].”¹²¹ Emphasizing that “the facts of each case must be examined to determine whether the requisite causal nexus exists,” the court delineated the following factors to take into consideration: “[w]hether [the] defendant [(1)] owned or possessed the solid waste in question; [(2)] had the authority to make disposal decisions; [(3)] had the obligation to make disposal decisions; [(4)] exercised control over decisions regarding the waste’s disposal; or [(5)] actually disposed of the solid waste.”¹²² The court cautioned that “any single factor may or may not be dispositive, depending on the circumstances presented.”¹²³

The court placed emphasis on the common law duty of care owed by a general contractor to a subcontractor’s employees in establishing that a court’s evaluation of arranger liability “should focus on the degree of the defendant’s *actual control* over the decision regarding the specific method or manner of disposal.”¹²⁴ Even though ownership, authority, and knowledge of disposal methods are factors that the federal courts consider in arranger liability cases, the court noted that none of them were held to be dispositive.¹²⁵ Thus, the court asserted that the

“actual control” consideration “provides some degree of uniformity under the law, while at the same time allowing courts to consider the totality of the circumstances presented in any given case so that needed flexibility is allowed in effectuating SWDA’s broad remedial purpose.”¹²⁶

Using the totality of the circumstances approach with a focused concentration on the defendant’s actual control of the method and manner of disposal, the Texas Supreme Court disagreed with the court of appeals’ conclusion that the Street’s provision of technical services and advice relating to waste disposal rendered Street a PRP under the SWDA as an “arranger.”¹²⁷ In addition, the higher court remanded to a trial court the determination of whether Street arranged for solid waste disposal by pouring a PCE mixture down Pilgrim’s sinks and toilets after performing concentration tests on Pilgrim’s cleaning agents, as certain facts were in dispute.¹²⁸ The Texas Supreme Court did not address the court of appeals’ holding that “Street’s role in Pilgrim’s choice of waste disposal companies was not an independent basis for Street to qualify as an arranger,” as Pilgrim did not dispute it.¹²⁹

A. A CLOSER LOOK AT THE R.R. STREET COURT’S ANALYSIS

In considering the issue of whether Street was an arranger for providing technical services and advice to Pilgrim, the Texas Supreme Court observed that none of the federal cases provide any direct guidance.¹³⁰ The court did find helpful two federal cases with facts similar to the one at bar.¹³¹

In *Edward Hines Lumber Co. v. Vulcan Materials Co.*,¹³² the district court held a chemical supplier not to be an arranger despite that fact that the supplier sold chemicals to a lumber treatment plant, designed, constructed, and installed the chemical treatment system, trained the plant employees to run the system, had access to the facility (although its employees did not visit the plant on a regular basis), and provided technical information and assistance to the plant. The wood treatment plant “maintained sole responsibility for the plant’s operation, maintenance, and compliance with government regulations.”¹³³

The *Hines* court concluded that the chemical supplier’s mere knowledge of the method in which the treatment plant disposed of the chemical waste was not relevant. However, the important inquiry was “who decided the location and method of dis-

posal or treatment of the hazardous substance.”¹³⁴ The *Hines* court further determined that the chemical supplier was not an arranger under CERCLA, because it did not “decide how the [chemicals] would be disposed after its use in the...treatment process.”¹³⁵

The *R.R. Street* court also considered *Jordan v. Southern Wood Piedmont Co.*,¹³⁶ a case in which the defendant, a supplier of chemicals used at a wood treatment plant, escaped arranger liability even though it had sent technical bulletins and offered advice to the wood treatment plant regarding the safe handling of the chemicals and conducted tests and surveys at the plant.¹³⁷ In *Jordan*, the district court determined that the record did not contain any evidence that the defendant actually gave advice concerning chemical disposal and that the defendant merely sought to ensure that the chemicals were safely handled and did not arrange for disposal.¹³⁸ The district court also held that the record did not contain any evidence that the tests and surveys performed by the chemical supplier related to disposal.¹³⁹

The Texas Supreme Court noted the factual similarities between its case and *Hines* and *Jordan*, such as that Pilgrim retained ultimate authority and responsibility for operating its facilities, which included waste disposal.¹⁴⁰ The court did acknowledge that *R.R. Street* was a closer case than *Hines* and *Jordan* “due to the extent of [Street’s] involvement with Pilgrim over the years, the fact that [Street] gave Pilgrim advice regarding a disposal method for the [waste], and the fact that Pilgrim followed [Street’s] recommendations most of the time.”¹⁴¹ However, the court placed significance on the fact that Street did not actually control Pilgrim’s waste disposal method and manner, but simply responded to Pilgrim’s questions regarding disposal with the advice that Pilgrim could dispose of its waste in the “same way everybody else was doing it, pouring it down the drain.”¹⁴² Neither Street’s provision of PCE and equipment to Pilgrim, maintenance of the equipment supplied, knowledge of the manner in which Pilgrim disposed of the waste it generated, nor sending technical bulletins relating to waste disposal was enough to qualify Street as an arranger.¹⁴³

The court stated that “[a]lthough the authority to make disposal decisions is not necessarily a prerequisite for arranger status, such as when a party physically disposes of solid waste with no authority to do so, it is a key factor when arranger

status is based on mere advice regarding disposal that another party is free to ignore."¹⁴⁴ In light of Street not having the authority to make disposal decisions, the court could not recognize how Street could have made the disposal decision or "exercised sufficient control over the disposal method such that the causal nexus between Street's conduct and the disposal of solid waste was established."¹⁴⁵ The court concluded that, given Street's lack of obligation to make disposal decisions, lack of ownership of or authority over the disposed chemicals, and the fact that Pilgrim never gave control of disposal operations to Street, Street's advice did not render it an arranger under the SWDA.¹⁴⁶

Another relevant issue considered by the Texas Supreme Court was whether Street's physical disposal of waste produced from tests run on cleaning agents at Pilgrim's facility rendered Street an arranger.¹⁴⁷ However, the court did not reach an ultimate conclusion on the issue because of the lack of undisputed facts as to whether the waste was subject to the "domestic sewage exclusion,"¹⁴⁸ which is beyond the scope of this Note. Presumably, without a factual issue in dispute, the court would have held Street responsible as an arranger for *actually disposing* of the solid waste.

B. IMPLICATIONS OF THE R.R. STREET HOLDING

Because *R.R. Street* did not discuss arranger liability in the context of tolling arrangements and none of the other Texas courts has confronted this issue, this Note will analyze below how a Texas court will likely determine arranger liability in such arrangements.

A Texas court will presumably turn to federal cases on arranger liability under tolling agreements for guidance in interpreting the SWDA in this situation.¹⁴⁹ The court will likely start its analysis under the authority of the *Aceto* line of cases, the most direct precedent. Under *Aceto* and its progeny, arranger liability in the context of tolling agreements is premised on a person's authority to control the disposal of the hazardous waste, underpinned by its continued ownership or possession of tolled product, and the fact that the disposal is an inherent part of the toll manufacturing process. Two of these *Aceto* considerations are also *R.R. Street* factors: a defendant's authority to make or control the disposal decision and ownership or possession of the waste.

However, it is important to note that the *Aceto* line of cases employed the strict liability approach, not the case-by-case approach adopted in *R.R. Street*. As previously stated, the case-by-case analysis is the most modern judicial approach, and the courts have developed this approach with CERCLA's strict liability nature in mind. Unlike the Houston First Court of Appeals,¹⁵⁰ however, the Texas Supreme Court did not make any attempt in *R.R. Street* to reconcile these two approaches. In fact, the latter court did not even explicitly mention CERCLA's or the SWDA's strict liability structure.

The *R.R. Street* court cited various sources of federal case law without regard to the particular approach under which the respective court evaluated arranger liability. For example, the court cited *Aceto* for the proposition that ownership or possession of the hazardous waste is a factor but not a prerequisite for arranger status, without noting that the *Aceto* court operated under the strict liability approach.¹⁵¹ Similarly, the court referenced the *Montalvo* court—without noting that the Eleventh Circuit employed the totality of the circumstances approach in that case—in listing additional factors to consider in determining arranger status, namely "a party's knowledge (or lack thereof) of the disposal" and "whether a defendant made the 'crucial decision' to place hazardous substances in the hands of a particular facility."¹⁵²

Following the lead of the Texas Supreme Court on the issue, it is possible that a future Texas court faced with a tolling agreement factual situation will consider arranger liability under a totality of circumstances approach, while using federal case law for guidance without reference to the particular "approach" employed by the federal court. In other words, a federal court's use of the "strict liability," "specific intent," or "totality of the circumstances" approach might not be a consideration in a Texas court's search for relevant federal authority.

VIII. A COMBINATION OF R.R.

STREET FACTORS AND ACETO

FACTORS

A Texas court will likely observe the five *R.R. Street* factors while using the *Aceto* factors for guidance in a tolling agreement case. As noted, those

Aceto factors include knowledge of the inherent nature of release or spillage in the formulation process and the continued ownership or possession of the chemicals, and resultant authority to control the disposal. The consideration that *R.R. Street* and *Aceto* have in common is whether the defendant had ownership or possession of the waste and the authority to control the disposal. *Aceto* and its progeny collapsed these two factors, which makes sense as an owner of the waste certainly has authority to control its disposal. A court would likely consider these two factors in tandem in a tolling agreement case as the principal manufacturer owns and possesses the materials and waste throughout the formulation process, and therefore, would seemingly have the authority to control its disposition.

The *R.R. Street* court implicitly questioned the relevance of the second *Aceto* factor of the “inherent nature of release or spillage in formulation process.” The court cited as significant *E.S. Robbins Corp. v. Eastman Chem. Co.*,¹⁵³ a case in which the plaintiff argued that a chemical supplier, who arranged for transportation of chemicals by a common carrier, was liable as an arranger because it knew that chemicals had been spilled in the past as a result of transportation.¹⁵⁴ The court agreed with *E.S. Robbins* that the chemical supplier did not arrange for disposal simply because it had knowledge of the risk that spills can occur during transportation.¹⁵⁵ In addition, the court stated that Street’s knowledge of how Pilgrim was disposing of the waste that was generated was “clearly not enough to establish arranger liability.”¹⁵⁶ Of course, the court established this conclusion in the context that Street did not own or possess the waste and did not have any authority to control the disposal.

Conflicting with these two considerations was the *R.R. Street* court’s attention to *Montalvo*, in which “a party’s knowledge (or lack thereof) of the disposal” was considered an additional factor in determining arranger liability. Thus, a Texas court faced with determining tolling agreement-arranger liability might consider this factor as dicta in *R.R. Street*, but the Texas Supreme Court’s opinion certainly does not provide any answers.

IX. SWDA ARRANGER LIABILITY IN TOLLING AGREEMENTS

In the context of a tolling agreement case, a Texas court will use a totality of circumstances approach and authority from the *Aceto* line of cases, while looking to the facts of the case to determine whether the requisite causal nexus exists between the defendant’s conduct and the disposal of the waste. While examining the facts of the case, this court will likely observe the five factors mentioned in *R.R. Street*,¹⁵⁷ which allows for the needed flexibility in effectuating the SWDA’s broad remedial purposes.¹⁵⁸ While how this court would come down on the issue is uncertain, it is plausible that the court would impose liability on a principal manufacturer as an arranger.

In a traditional tolling arrangement, the principal does not normally exercise control over the disposal decision or actually dispose of the solid waste. Hence, these *R.R. Street* factors will not be at issue. The interesting question is whether a Texas court will place an emphasis on this lack of actual control of disposal, a factor on which the *R.R. Street* court focused, or more heavily rely on the *Aceto* and its progeny. In other words, the court will have to reconcile the tendency of federal courts to find principal manufacturers under tolling agreements responsible as arrangers and the *R.R. Street* court’s attention to the degree of the defendant’s actual control of the disposal decision. Focusing on the actual control of the disposal would not likely render a principal manufacturer an arranger, which goes against the holding in *Aceto*.

In addition, the fact that the Texas Supreme Court did not find dispositive Street’s knowledge of the manner of Pilgrim’s disposal raises a question of the importance that a court will place on the fact that a principal manufacturer typically has knowledge that release or spillage of waste is inherent in the formulation process. In light of these important considerations in *R.R. Street*, a court might not find a sufficient nexus between the principal’s conduct and the waste disposal.

However, considering the deference that the *R.R. Street* court paid to federal case law on arranger liability and its own opinion that any single factor is not necessarily dispositive, it is reasonable that a Texas court deciding a tolling agreement case would adhere to *Aceto*. Therefore, the most impor-

tant factors for a court's consideration would be the principal's continued ownership of the materials (and the work in progress, *i.e.*, all by-products, including the waste), and the resultant authority to control the disposal decisions. In combination with this continued ownership, the court would likely consider the defendant's knowledge of the inherent risk of release or spillage in the formulation process of a tolling arrangement, or alternatively, its knowledge of the disposal. Emphasizing these factors, a Texas court deciding tolling agreement-arranger liability would impose arranger liability on a principal manufacturer.

X. CONCLUSION

The "totality of circumstances" approach employed in *R.R. Street* certainly allows a court to consider a number of factors in assessing arranger liability in accordance with the SWDA's broad remedial powers. However, an argument can be made that the *R.R. Street* court narrowly applied the broad "totality of the circumstances" approach and began to stem this evolution with its focus on the degree of the defendant's actual control of the disposal decision. Still, a business entity that is in close association with solid waste would be well-served to ensure that it does not participate in any of the *R.R. Street* or *Aceto* factors when engaging in business transactions. Accordingly, a principal manufacturer might consider including relevant contractual provisions in tolling agreements into which it enters.¹⁵⁹

A problem with structuring a tolling agreement as to avoid the likelihood of being a PRP may be that "courts have not hesitated to look beyond defendants' characterizations to determine whether a transaction in fact involves an arrangement for the disposal of a hazardous substance."¹⁶⁰ Therefore, a principal manufacturer must make significant alterations to the traditional tolling agreement, if it seeks to avoid arranger liability.

First, a principal might consider relinquishing all ownership and possession of the materials once the materials are shipped to the tolling manufacturer. To achieve this result, the principal might evaluate the feasibility of selling a "useful product" to avoid arranger liability as in *Florida Power & Light*.¹⁶¹ In such an agreement, the principal would sell, and transfer ownership of, the product to the toll manufacturer and simply buy back the product

once it reaches final form under the ownership of the formulating manufacturer. However, this arrangement may impose significant transactions costs.

Another way to relinquish ownership is to simply transfer title each time the product switches hand. However, the toll manufacturer would not likely agree to this arrangement because of the implication of generator liability and the principal would not likely agree to this because of proprietary interests in the technical-grade product. These methods do solve the problem of the principal's continued ownership and authority or obligation to make the disposal decisions, while minimizing the possibility of a court bootstrapping the "knowledge of disposal" factor.

If the above situations are impracticable, the principal may seek to ensure in contract that once the materials leave the possession of the principal, then the toll manufacturer obtains complete control of the materials including disposal of wastes, despite continued ownership by the principal. The agreement would set forth that the tolling manufacturer will formulate the technical-grade product into a commercial-grade one and will maintain control of the product-in-process at all points. Because the "actual control" factor was such an important consideration for the Texas Supreme Court in *R.R. Street*, if the principal could relinquish control of the product by contract, then it would have a good argument against arranger liability. The principal will also want to ensure by contract that both the toll manufacturer and the transporter of the raw-grade materials adhere to the best industry practices in spill prevention.

To the extent that a toll manufacturer would agree to these proposed contractual arrangements, the principal would at least have arguments against being held liable as an arranger if it becomes subject to an enforcement or cost-recovery action. What is certain is that courts recognize the broad remedial purposes of CERCLA and thus the SWDA. To meet that end, the methods employed by the courts have been wide-ranging. Unless the United States Supreme Court takes up the issue, the inter-circuit and interstate conflict of judicial interpretations will continue, which Texas state courts will follow.

For a principal manufacturer doing business in Texas, it is advisable that it structures tolling agreements according to the *R.R. Street* and *Aceto* factors to ameliorate the likelihood of being held liable as

an arranger. Otherwise, the principal may reconsider its use of tolling agreements and evaluate the cost-effectiveness of restructuring its processes to enable *itself* to produce commercial-grade products. In this way, the manufacturer could select the manufacturing, formulation, treatment, and disposal options, monitor their implementation with care,¹⁶² and minimize the threat of arranger liability.

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ENDNOTES

- 1 42 U.S.C. §§ 9601-9675 (2000).
- 2 PERCIVAL, SCHROEDER, MILLER & LEAPE, ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 224 (4th ed. 2003).
- 3 *Id.* at 223-24. In the Love Canal disaster, a school district obtained title to a piece of property that was contaminated with buried chemicals and upon which a school and homes were built. The chemicals were neither excavated nor remediated before the transfer. During a bout of heavy rain roughly 25 years after the property transfer, the buried chemicals, many of which were known carcinogens, began to surface, and thousands of families were forced to relocate. The event gave rise to national media hysteria. PERCIVAL, *supra* note 2, at 223-24.
- 4 42 U.S.C. § 9607.
- 5 *Id.* § 9604(a)(1)(b) (emphasis added).
- 6 David Brose, Comment, *Ending the Arranger Debate: Integrating Conflicting Interpretations in Search of a Uniform Approach*, 10 Mo. ENVTL. L. & POL'Y REV. 76, 78 (2003).
- 7 *Id.*
- 8 *Id.*
- 9 42 U.S.C. § 9604(a).
- 10 The Superfund is a fund account from which the federal government draws to pay for response and remediation costs. PERCIVAL, *supra* note 2, at 224-25.
- 11 42 U.S.C. § 9607(a).
- 12 *Id.* § 9606(a).
- 13 *Id.* § 9607(a)(1)-(4) (emphasis added).
- 14 *Id.* § 9607(a)(3) (emphasis added).
- 15 Brose, *supra* note 6, at 78.
- 16 United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1380 n. 8 (8th Cir. 1989).
- 17 See Anna Marple DuBoise, Comment, *Expanding the Scope of Arranger Liability Under CERCLA*, 43 KAN. L. REV. 469, 470 (1995).
- 18 Brose, *supra* note 6, at 77 (citing United States v. Gordon Stafford, Inc., 952 F. Supp. 337, 339-40 (N.D.W.Va. 1997)).
- 19 DuBoise, *supra* note 17, at 486.
- 20 TEXAS HEALTH & SAFETY CODE ANN. §§ 361.001-361.808 (Vernon 2004).
- 21 Jeff Civins & Bane Phillippi, *New Federal Brownfields Legislation: Who's Liable Now?*, 65 TEX. B. J. 982, 985 (2002); see also R.R. Street & Co., Inc. v. Pilgrim Enterprises, Inc., 166 S.W.3d 232, 239, n.5 (Tex. 2005) (noting that the SWDA subjects those responsible for the disposal of *solid waste* to liability, whereas, CERCLA imposes potential liability on parties who are responsible for the disposal of *hazardous substances*).
- 22 *Id.*
- 23 TEXAS HEALTH & SAFETY CODE ANN. § 361.271(3) (emphasis added).
- 24 R.R. Street, 166 S.W.3d at 241.
- 25 *Id.*
- 26 Brose, *supra* note 6, at 77 (citing Gordon Stafford, Inc., 952 F. Supp. at 339-40).
- 27 872 F.2d 1373 (8th Cir. 1989).
- 28 Brose, *supra* note 6, at 77.
- 29 872 F.2d at 1376.
- 30 *Id.* at 1375, 1383.
- 31 *Id.* at 1377-78. See also PERCIVAL, *supra* note 2, at 258 (stating the "strict liability relieves the government of the obligation to prove that hazardous substances were released as the result of negligence or that the defendant's conduct was intentional and unreasonable").
- 32 *Id.* at 1378-79.
- 33 See *id.*; PERCIVAL, *supra* note 2, at 258; U.S. v. USX Corp., 68 F.3d 811, 815 n. 4 (3d Cir. 1995) (citing W. PAGE KE-

- ATON, ET AL., PROSSER & KEATON ON THE LAW OF TORTS § 75 at 534 (5th ed. 1984) for the proposition that “strict liability is...liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of a duty to exercise reasonable care, i.e., actionable negligence.”) (internal quotations omitted).
- 34 *Aceto*, 872 F.2d at 1380.
- 35 *Id.* at 1380 n.8.
- 36 *Id.*
- 37 *Id.* at 1380.
- 38 *Id.* (quoting *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 733 (8th Cir. 1986)).
- 39 *Id.* at 1382.
- 40 *Id.* at 1381-82.
- 41 *Id.* at 1379.
- 42 *Id.* at 1381.
- 43 Brose, *supra* note 6, at 80.
- 44 *Gordon Stafford*, 952 F. Supp. at 340.
- 45 2 F.3d 746 (7th Cir. 1993).
- 46 *Id.* at 747.
- 47 *Id.* at 747-48.
- 48 *Id.* at 748 (citing 42 U.S.C. § 9613(f), which provides that “any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) . . . during or following any civil action under section 9606 . . . or under section 9607(a) of this title”).
- 49 *Id.* at 751.
- 50 *Id.*
- 51 *Id.* at 751. See 42 U.S.C. § 9601(29) (providing that “disposal” shall be defined as in Section 1004 of the Solid Waste Disposal Act: “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters”).
- 52 *Id.*
- 53 *Id.*
- 54 *Id.* (citing *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 916 F.2d 1174, 1180-81 (7th Cir. 1990)).
- 55 Although the court did not reason why CERCLA language allows for an interpretation of strict liability, the court did hold that the words “arrange for” imply intentional action. Thus, the court opted for a statutory interpretation of the language, instead of relying on CERCLA legislative history to impose strict liability as the *Aceto* court did.
- 56 *Amcast*, 2 F.3d at 751.
- 57 84 F.3d 402 (11th Cir. 1996).
- 58 893 F.2d 1313 (11th Cir. 1990). See *Gordon Stafford*, 952 F. Supp. at 340.
- 59 *Mathews v. Dow Chem. Co.*, 947 F. Supp. 1517, 1525 (D. Colo. 1996).
- 60 *Montalvo*, 84 F.3d at 404.
- 61 *Id.*
- 62 *Id.* at 407.
- 63 *Id.*
- 64 *Id.* (citing *Florida Power & Light*, 893 F.2d at 1318).
- 65 *Id.* (citing *AM Int’l, Inc. v. Int’l Forging Equip. Corp.*, 982 F.2d 989, 999 (6th Cir. 1993)).
- 66 *Id.* at 409.
- 67 *Id.*
- 68 See discussion *supra* Part III.A.
- 69 Brose, *supra* note 6, at 81-82.
- 70 *Id.*
- 71 *Id.*
- 72 *Id.*
- 73 *Id.* at 84 (citing *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157 (7th Cir. 1988)).
- 74 DuBoise, *supra* note 17, at 486.
- 75 DuBoise, *supra* note 17, at 486; David W. Lannetti, “Arranger Liability” Under the Comprehensive Environmental Response, Compensation, And Liability Act (CERCLA): Judicial Retreat From Legislative Intent, 40 Wm. & Mary L. Rev. 279, 321 (1998)) (also noting that commentators have time and again called for Supreme Court action or further congressional action to clarify the scope of arranger liability under CERCLA).
- 76 *Montalvo*, 84 F.3d 402 at 409.

- 77 DuBoise, *supra* note 17, at 487.
- 78 *Id.*
- 79 United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373, 1375 (8th Cir. 1989).
- 80 Stephen A. Evans, Comment, *Using the Abnormally Dangerous Activity Doctrine to Hold Principals Vicariously Liable for the Acts of Toll Manufacturers*, 21 B.C. ENVTL. AFF. L. REV. 587, 589 (1994).
- 81 *Id.*
- 82 *Id.*
- 83 Jay Sandavos, Comment, *CERCLA Arranger Liability in the Eighth Circuit: U.S. v. TIC Industries*, 24 B.C. ENVTL. AFF. L. REV. 863, 867 n. 27 (1997).
- 84 *Id.*
- 85 William Goldfarb, *Kepone: A Case Study*, 8 ENVTL L. 645, 649 (1978).
- 86 Evans, *supra* note 80, at 589.
- 87 *Id.*
- 88 *Id.*
- 89 *Id.*
- 90 *Id.*
- 91 *Id.*
- 92 See discussion *supra* Part III.A.
- 93 893 F.2d 1313 (11th Cir. 1990).
- 94 *Id.*
- 95 *Id.*
- 96 872 F.2d 1373.
- 97 *Id.* at 1381.
- 98 973 F.2d 688 (9th Cir. 1992).
- 99 *Id.* at 695.
- 100 *Id.*
- 101 *Id.*
- 102 729 F.Supp. 1461 (D. Del. 1990).
- 103 *Id.* at 1470-71.
- 104 *Id.* at 1471.
- 105 Gregory A. Robins, Note, *Catellus Development Corporation v. United States: A "Solid" Approach to CERCLA "Arranger" Liability, or a "Waste" of Natural Resources?*, 47 HASTINGS L. J. 189, 199 (1995) ("Indeed, the [*Jones-Hamilton*] court emphasized the fact that the formulation contract at issue contemplated a 2% spillage of materials"); see also *Catellus Dev. Corp. v. United States*, 34 F.3d 748, 753 (9th Cir. 1994) (noting that "all that is necessary is that the [disposal or] treatment be inherent in the particular arrangement, even though the arranger does not retain control over its details").
- 106 DuBoise, *supra* note 17, at 486.
- 107 166 S.W.3d 232 (Tex. 2005).
- 108 *Id.* at 235.
- 109 See *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 929 (5th Cir. 2001).
- 110 See discussion *supra* Part III.C.
- 111 166 S.W.3d at 235-6.
- 112 *Id.* at 235.
- 113 *Id.* at 241.
- 114 *Id.*
- 115 *Id.* at 238 (referencing *Aceto*, 872 F.2d at 1380).
- 116 *Id.*
- 117 *Id.* at 241 (citing *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000)).
- 118 *Id.*
- 119 *Id.* (citing *Geraghty & Miller*, 234 F.3d at 929; *Gen. Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992)).
- 120 *Id.* at 242 (quoting *AAMCO Transmissions*, F.2d at 286) (emphasis added).
- 121 *Id.* (quoting *Mathews*, 947 F. Supp. at 1525).
- 122 *Id.*
- 123 *Id.*
- 124 *Id.* at 243 (emphasis added).
- 125 *Id.* at 244.
- 126 *Id.*
- 127 *Id.* at 246.
- 128 *Id.* at 250.
- 129 *Id.* at 244, n.10.
- 130 *Id.*
- 131 *Id.*

- 132 685 F.Supp. 651 (N.D. Ill. 1988), aff'd, 861 F.2d 155 (7th Cir. 1988).
- 133 *R.R. Street*, 166 S.W.3d at 245-46 (citing *Hines*, 685 F.Supp. at 654-56).
- 134 *Id.* (citing *Hines*, 685 F.Supp. at 655).
- 135 *Id.* (citing *Hines*, 685 F.Supp. at 656).
- 136 805 F. Supp. 1575 (S.D. Ga. 1992).
- 137 *R.R. Street*, 166 S.W.3d at 245 (citing *Jordan*, 805 F. Supp. at 1580).
- 138 *Id.*
- 139 *Id.*
- 140 *Id.*
- 141 *Id.* at 246.
- 142 *Id.*
- 143 *Id.*
- 144 *Id.*
- 145 *Id.*
- 146 *Id.*
- 147 *Id.* at 247.
- 148 *Id.* at 247-50.
- 149 *See R.R. Street*, 166 S.W.3d at 241 (“[The court] looks to federal case law for guidance in interpreting the term ‘otherwise arranged’ to dispose of solid waste.”).
- 150 *R.R. Street & Co., Inc. v. Pilgrim Enterprises, Inc.*, 81 S.W.3d 276, 292 (Tex.App.—Houston [1st Dist.] 2001), *rev'd and remanded by* 166 S.W.3d 232 (Tex. 2005) (citing *U.S. v. Cello-Foil Prod., Inc.*, 100 F.3d 1227, 1231-32 (6th Cir. 1996)) (The Houston First Court of Appeals explained that requiring an intent element, which was a factor in its “totality of the circumstances” analysis, does not undermine the strict liability basis of CERCLA because the intent element only determines whether a party is potentially liable from the outset. “Once a party is determined to have the requisite intent to be an arranger, then strict liability takes effect.”).
- 151 *R.R. Street*, 166 S.W.3d at 242.
- 152 *Id.* (quoting *Montalvo*, 84 F.3d at 407).
- 153 912, F.Supp. 1476, 1486-87 (N.D. Ala. 1995)).
- 154 *R.R. Street*, 166 S.W.3d at 241 (citing *E.S. Robbins*, 912, F.Supp. at 1486-87).
- 155 *Id.*
- 156 *Id.* at 245.
- 157 *Id.* at 242. (“[W]hether [the] defendant [(1)] owned or possessed the solid waste in question; [(2)] had the authority to make disposal decisions; [(3)] had the obligation to make disposal decisions; [(4)] exercised control over decisions regarding the waste’s disposal; or [(5)] actually disposed of the solid waste.”)
- 158 *Id.* at 244.
- 159 This conclusion does not attempt to delineate the ways in which a party may “contract away” liability from the SWDA or CERCLA, *i.e.*, by indemnification; rather, it merely illustrates ways in which a party may structure a business deal or tolling agreement in order to have a good faith argument against the imposition of arranger liability if it becomes subject to an enforcement or cost-recovery action.
- 160 *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1381 (8th Cir. 1989).
- 161 *See discussion supra* Part VI.A.
- 162 *PERCIVAL, supra* note 2, at 247.

RECENT DEVELOPMENTS

AIR QUALITY

PROPOSED CHANGES TO THE PERMIT BY RULE PROGRAM

The Texas Commission on Environmental Quality (TCEQ) has recently proposed rule changes to the Permit by Rule (PBR) Program, titled "Air Permit by Rule Study - Phase II" with project number 2005-016-106-PR. Tex. Comm'n Env'tl. Quality Proposals, *available at* http://www5.tceq.state.tx.us/rules/index.cfm?fuseaction=external_reports.projectDetail&projectID=1034. The proposed rule "will more effectively focus resources, streamline the PBR process, update both administrative and technical requirements, and will address registration and fee applicability." *Id.* The Air Permit by Rule Study is currently a proposal that the Commission approved to be published in the *Texas Register* for public comment. The public comments were due on February 3, 2006 and the proposed agenda for adoption is May 31, 2006. Tex. Comm'n Env'tl. Quality Rule Projects, *available at* <http://www.tceq.state.tx.us/rules/prop.html>.

This proposed rule results from the substantial inquiries TCEQ received about maintenance, startup, and shutdown (MSS) and authorized releases by the New Source Review (NSR) permit due to the revisions to 30 TAC Chapter 101, General Air Quality Rules, federal NSR rules, and ongoing implementation of the Federal Operating Permits Program. Tex. Comm'n Env'tl. Quality, Rule Project Number 2005-016-PR, Chapter 106 - Permits by Rule 1, *available at* http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/05016106_proCLEAN.pdf; Chapter 116 - Control of Air Pollution by Permits for New Construction or Modification 1, *available at* http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/05016116_proCLEAN.pdf. Thus, the TCEQ proposes criteria "to determine, if and when, emissions that are generated outside the production of operations should be covered under a permit." Chapter 116 - Control of Air Pollution by Permits for New Construction or Modification 1, *available at* http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/05016116_proCLEAN.pdf. The Air Permit by Rule Study proposes to: (1) authorize all types of routine operations (production, MSS, and certain anticipated and

quantifiable emissions); (2) create a non-standard permit as an additional mechanism to authorize MSS emissions; and (3) revise the requirements for authorization by PBR program. *Id.* at 2. The Air Permit by Rule Study proposes concurrent amendments to Chapters 106 and 116; §§106.2, 106.4, 106.6, 106.8, and 106.50; the repeal of §§106.261 - 106.263; and new §§106.261, 106.263, 106.268, and 106.269; §§116.10, 116.111, 116.116, 116.311, 116.614, 116.615, and 116.710. *Id.* at 2; *see also* Tex. Comm'n Env'tl. Quality, Rule Project Number 2005-016-PR, Chapter 106 - Permits by Rule 1, *available at* http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/05016106_proCLEAN.pdf.

MSS EMISSION AUTHORIZATION

The TCEQ proposed MSS non-rule standard permits (Air Quality Standard Permit for Maintenance Startup and Shutdown Emissions) would "assist in reducing excess emissions and improve overall air quality" by authorizing certain MSS emissions from otherwise authorized facilities. Tex. Comm'n Env'tl. Quality, Rule Project Number 2005-016-PR, Chapter 106 - Permits by Rule 1, *available at* http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/05016106_proCLEAN.pdf, at 2. The proposed changes to Chapter 106 would authorize predictable, preventive MSS operations like periodic plant turnarounds and allow companies to group MSS emissions into one authorization. Tex. Comm'n Env'tl. Quality, Rule Project Number 2005-016-PR, Chapter 106- Permits by Rule 2, *available at* http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/05016106_proCLEAN.pdf. These proposed changes would amend Section 106.263, Temporary Maintenance Facilities; Section 106.268, MSS Emission Releases; and Section 106.269, Quantifiable, Anticipated (QUAN) Emission Releases. *Id.*

The proposed Section 106.263 changes would only contain administrative changes for temporary maintenance facilities and would not contain any MSS provisions. Tex. Comm'n Env'tl. Quality, Rule Project Number 2005-016-PR, Chapter 106-Permits by Rule 2, *available at* http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/05016106_proCLEAN.pdf, at 22. The proposed Section 106.268 would authorize "emissions result-

ing from planned MSS as part of the facility's normal operations." *Id.* at 23. The proposed MSS standard permit and the new Section 106.268, MSS Emission Releases, may also be used in conjunction with the proposed changes authorizing MSS emissions under NSR permitting. Tex. Comm'n Envtl. Quality, Rule Project Number 2005-016-PR, Chapter 116 - Control of Air Pollution by Permits for New Construction or Modification 2, available at http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/05016116_proCLEAN.pdf. However, each facility or MSS activity at the site may use only one of these authorization mechanisms but may utilize a combination of PBRs, standard permits, and NSR permits to authorize MSS. *Id.* at 2. Facilities authorized by PBR, another standard permit, or any type of Chapter 116 permit independently authorizing MSS could utilize the proposed MSS standard permit. *Id.* at 2.

The proposed Section 106.268 would also protect public health and welfare by including "air contaminant emission limits for specific substances based on restrictions of the proposed §106.261." Tex. Comm'n Envtl. Quality, Rule Project Number 2005-016-PR, Chapter 106- Permits by Rule 23, available at http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/05016106_proCLEAN.pdf. Other proposed Section 106.268 changes include the new subsection (b), which "identifies certain facilities, emissions, or activities not covered by this section." *Id.* A new subsection (c) would "authorize MSS emissions that meet both the short-term and annual limitations of proposed new §106.261 to ensure public health and welfare." *Id.* at 24. The proposed subsection (d) would "limit site-wide emissions for any 12-month rolling period to less than any applicable emission limit under §106.4(a)(1)-(3) for the aggregate of emissions authorized by this section, §106.263, and §106.269" to ensure public safety. *Id.* The proposed subsection (e) would "require facility owners to retain records with sufficient information to demonstrate compliance." *Id.*

The new Section 106.269 would authorize QUAN emissions as specified in Section 116.10(16)(c); emissions that "any well maintained, operated, and managed facility cannot eliminate entirely." Tex. Comm'n Envtl. Quality, Rule Project Number 2005-016-PR, Chapter 106- Permits by Rule 23, available at http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/05016106_proCLEAN.pdf, at 24-25. The proposed Section 106.269(b) identifies activities not authorized by the PBR, and Sec-

tion 106.269(c) would "authorize QUAN emissions that meet both the short-term and annual emission limitations of §106.261" for public health and safety. *Id.* at 25. The new Section 106.269(d)-(e) would "limit the amount of QUAN emissions that can be authorized and prevent stacking of QUAN and MSS emissions." *Id.* Finally, the proposed subsection (f) of Section 106.269 would "require facility owners to retain records with sufficient information to demonstrate compliance." *Id.*

PBR PROGRAM CHANGES

One of several other changes to the PBR program would prohibit use of PBRs as authorization of major sources. Tex. Comm'n Envtl. Quality, Rule Project Number 2005-016-PR, Chapter 106- Permits by Rule 23, available at http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/05016106_proCLEAN.pdf, at 2. The proposal would limit carbon monoxide and nitrogen oxide emissions to 100 tons per year (tpy) per PBR claim and hazardous air pollutants (HAP) emissions to 10 tpy for individual HAP and 25 tpy for combined HAPs. *Id.*

Further amendments to Sections 106.2, 106.4, 106.6, 106.8, and 106.50 are "intended to more effectively focus commission resources, update administrative and technical requirements for certain PBRs, streamline the air quality PBR process where appropriate, and address unnecessary registration and fee requirements." *Id.* at 3. For example, the TCEQ proposes to repeal Section 106.261, Facilities (Emission Limitations), and Section 106.262, Facilities (Emission and Distance Limitation), and replace them with "a new §106.261 that contains updated technical requirements and emission limitations." *Id.* at 2-3. Because those PBRs were found to be used frequently at some facilities, the new Section 106.261 would further increase protectiveness of the PBR program. *Id.* at 3.

The new Section 106.261, New Facilities and Changes to Authorized Facilities, creates a single PBR for general use and will "eliminate overlapping or conflicting requirements in the current PBR, provide greater clarity, and improve protectiveness." Tex. Comm'n Envtl. Quality, Rule Project Number 2005-016-PR, Chapter 106- Permits by Rule 23, available at http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/05016106_proCLEAN.pdf, at 16. This new PBR provides new equations for the "determination of short-term (hourly) emis-

sion based on distance to the receptor, stack height, and the effects of screening level (ESL) of the air containment.” *Id.* Whereas the current Sections 106.261 and 106.262 utilizes outdated guidelines and fails to consider stack height. *Id.* Further, the current Section 106.262 short term emission rate is based on guidelines of acceptable exposure levels for an employee on an eight hour shift in an industrial or commercial setting and is not an appropriate short term exposure of the general public for one hour. *Id.* at 17. The current Section 106.262 short term emission rate is derived from formula, $E=L/K$, ($L=TLV$), K is constant based on distance to receptor), while the new Section 106.261 will use limits derived by $E=ESL/X$ (E =allowable emission rate in lbs/hr, ESL =effects of screening level of the contaminant, and X =constant based on distance to the receptor and stack height). *Id.*

The TCEQ also plans other changes for the new single PBR for general use. Tex. Comm’n Env’tl. Quality, Rule Project Number 2005-016-PR, Chapter 106- Permits by Rule 23, *available at* http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/05016106_proCLEAN.pdf. A new Section 106.261(a)(1)(J) would allow short-term emission limits for agricultural facilities that emit cellulose fiber to be no more than the rate specified in Section 111.171, Emission Limits Based on Process Weight Method so that total allowable emissions of cellulose fiber cannot exceed 10 lb/hr. *Id.* at 18. New Section 106.261(a)(2) would limit benzene and ethylene dichloride to 1 tpy and hydrogen chloride to 1/2 tpy. *Id.* at 19. Section 106.261(a)(3) adds the requirement that, when other PBRs are included in a claim, all emissions need to meet the emission limits, including emissions from “all proposed facilities and all related emissions increases upstream and downstream of the facility.” *Id.* Like the current Section 106.262(a)(4), the proposed new rule would also restrict the authorization of certain quantities of compounds based on toxicity but would be based on the Air Permits Division’s NSRDB Review document, a more comprehensive list of compounds. *Id.* The proposed Section 106.261(a)(5) would require that “visible emissions, from any point or fugitive source, not leave the property for a period exceeding 30 seconds in any six-minute period as determined by the EPA Test Method 22.” Tex. Comm’n Env’tl. Quality, Rule Project Number 2005-016-PR, Chapter 106- Permits by Rule 23, *available at* http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/05016106_proCLEAN.pdf. This would replace the current §106.261(a)(5) and (6), which prohibits visible emissions from any point or fugitive source in excess of 5% opacity. *Id.*

The proposed Section 106.261 would also allow permit changes the old Sections 106.261 and 106.262 did not authorize. Tex. Comm’n Env’tl. Quality, Rule Project Number 2005-016-PR, Chapter 106- Permits by Rule 23, *available at* http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/05016106_proCLEAN.pdf. Because the old Sections 106.261 and 106.262 did not allow changes or additions of air pollution abatement equipment for physical changes or modification to existing facilities, the new PBR would allow these additions or changes provided they meet the requirements of a qualified facility (using BACT no more than ten years old). *Id.* at 20.

The proposed Section 106.261 would also utilize a system of “notification, certification, or registration depending on the type of facility authorized.” Tex. Comm’n Env’tl. Quality, Rule Project Number 2005-016-PR, Chapter 106- Permits by Rule 23, *available at* http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/05016106_proCLEAN.pdf. For example, the proposed §106.261(b)(1) “requires the owner or operator to submit notification, with the appropriate form, to the Air Permits Division and the appropriate regional office within ten days of the start of construction or start of the operational change for increases of less than 5 tpy.” *Id.* Further, the proposed Section 106.261(b)(2) “requires facilities or emission increases of 5 tpy or greater to be registered.” *Id.*

The proposed Subsection 106.261(c) lists the facilities or activities that are specifically not authorized by this PBR in order to “prevent facility changes that may circumvent the original protectiveness evaluation of a PBR or SP resulting from the backsliding of distance limits, contaminant restrictions, or control requirements.” Tex. Comm’n Env’tl. Quality, Rule Project Number 2005-016-PR, Chapter 106- Permits by Rule 23, *available at* http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/05016106_proCLEAN.pdf. These activities “consist of construction of a facility for which there is another PBR or SP in effect, any change to a facility for which there is a PBR or SP in effect, and emissions resulting from MSS or QUAN.” *Id.* In ad-

dition, the proposed Section 106.261(c) authorizes “the subsequent use of additional air contaminants, which are neither authorized nor prohibited at a facility authorized by a PBR or SP as long as the facility continues to meet the conditions of the original authorization.” *Id.* at 21.

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FEDERAL CASENOTES

A COMMON SENSE READING OF THE TERM “FACILITY” IN RCRA’S CITIZEN SUIT PROVISION

Consolidated Companies, Inc. v. Union Pacific Railroad Co., No. Civ.A. 98-1804 L-O, 2006 WL 408234, at *1 (W.D. La. Feb. 17, 2006)(slip copy).

The citizen suit provision of the Resource Conservation Recovery Act (RCRA) states, in pertinent part, “any person may commence a civil action on his own behalf – against any person... including any... past or present owner or operator of a treatment, storage, or disposal *facility*, who has contributed or who is contributing to [hazardous waste contamination] which may present an imminent and substantial endangerment to health or the environment.” 42 U.S.C. § 6972(a)(1)(B) (emphasis added). Defining the term “facility” in Section 6972 was the main issue before the United States District Court, Western District of Louisiana, in *Consolidated Companies, Inc. v. Union Pacific Railroad Co., No. Civ.A. 98-1804 L-O, 2006 WL 408234, at *1 (W.D. La. Feb. 17, 2006)*.

BACKGROUND

Southern Pacific owned and operated a railyard from 1928-1964, which it later divided into five separate parcels – four of which were contiguous and one was not. *Consolidated*, 2006 WL 408234, at *1-2. In 1964, Southern Pacific sold Consolidated Companies (“Conco”) one of the parcels and ceased all railroad operations on the parcel. *Id.* at *1. Union Pacific merged with Southern Pacific and assumed all legal obligations of Southern Pacific with respect to the railyard. *Id.* at *2.

The Louisiana Department of Environmental Quality (LDEQ) has treated each separate parcel as a separate facility. *Consolidated*, 2006 WL 408234, at *8. The LDEQ issued “no further action at this time” letters concerning contamination at two of the

parcels. *Id.* at *2. However, the parties stipulated that contamination is present in the soil and the groundwater at all of the sites that is “attributable to the historical operations of the railroad.” *Id.*

After hearing from numerous expert witnesses about the current environmental condition of the tracts of land, the court determined “the former Southern Pacific railroad site included a 35,000 gallon aboveground fuel oil tank, a 30,000 gallon aboveground fuel oil tank, a machine shop, a round house, multiple paint houses, multiple oil houses and multiple repair shops.” *Consolidated*, 2006 WL 408234, at *7. Further, contamination resulted from these assorted operations at various times throughout the Southern Pacific former operations at the site. *Id.* at *7-8. The court also noted that, because contamination existed at the different tracts at different times, the LDEQ treated each parcel “in a vacuum.” *Id.* at *8. Finally, the court declined to find whether migration had taken place or was taking place. *Id.*

The only dispute in the Rule 42 bench trial, other than standing, concerned the definition of “facility” under RCRA and the Louisiana Environmental Quality Act (LEQA). *Consolidated*, 2006 WL 408234, at *8. The question before the court was whether a “facility,” as defined by RCRA and the LEQA, comprised the entirety of the former Southern Pacific property, or was restricted to the parcel of property that Conco owned. *Id.* Conco took the position that, for the purposes of their RCRA suit, Conco should be able to present evidence of and maintain suit against Union Pacific for contamination throughout the entire former Southern Pacific Site. *Id.* at *1. Union Pacific contended that Conco was limited to presenting evidence only on the contamination within the Conco parcel’s boundaries. *Id.* at *1.

STANDING

Union Pacific challenged Conco’s constitutional standing to expand the definition of “facility” beyond

Conco's own property lines under Article III, Section 2 of the United States Constitution. *Consolidated*, 2006 WL 408234, at *9. Union Pacific contended that the record did not contain any evidence to show that the constituents were migrating from the other tracts onto the Conco tract; therefore, Conco could not assert "injury in fact" for contamination beyond Conco's property. *Id.* Union Pacific cited *Gordon v. Guide Corporation*, No. IP00-1433-C-H/G, 2001 WL 1168144 (S.D. Ind. 2001), in support of its contention that the plaintiff did not have Article III standing because the record did not contain any evidence of injury in fact to the plaintiff's property. *Id.*

The court ruled that Conco met the requirements of Article III, Section 2, and had standing to expand the definition of facility. *Consolidated*, 2006 WL 408234, at *11. The court distinguished Conco's claim from the claim in *Gordon*, stating that, in *Gordon*, the plaintiff did not present any plausible evidence that injury was occurring or would occur in the future. *Id.* However, the court found that Conco's experts presented "evidence of contamination on the Conco tract as well as the other tracts constituting the former Southern Pacific site." *Id.* Further, Conco also asserted that the "piecemeal" assessment of the "facility" by the LDEQ was in and of itself causing harm to Conco. *Id.* at 10. Finally, the court pointed out that Conco "need only show threatened harm, not actual injury, in order to survive a standing challenge." *Id.* (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 690 (1973)). In addition, the court briefly discussed and found Conco met the requirements for the "fairly traceable" and "redressability" requirements of Article III standing. *Consolidated*, 2006 WL 408234, at *10-11.

DEFINING "FACILITY"

Conco developed a three-part argument to support the contention that the court should read the term "facility" to include the entire former Southern Pacific Site. *Consolidated*, 2006 WL 408234, at *12. First, while "facility" is not generally defined in RCRA, a subsection of RCRA on underground storage tanks defines "facility" as: "all underground storage tanks used for the storage of petroleum which are owned or operated by such owner or operator and located on a single parcel of property (or on any contiguous or adjacent property)." 42 U.S.C. § 6991b(h)(6)(D) (2005) (emphasis added) (incorrectly cited in *Consolidated* as 42

U.S.C. § 6991(b)(6)(D)). Conco argued that the court should use this definition of "facility" in the citizen suit provision, and that under the Section 6991b(h)(6)(D) definition, the entire former Southern Pacific Site would be considered the "facility." *Consolidated*, 2006 WL 408234, at *12. Second, the Comprehensive Environmental Response, Compensation, Liability Act (CERCLA) defines "facility" as: "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel." *Id.* (quoting 42 U.S.C. § 9601(9)(B) (2005)). Conco further argued that constituents from the railyard operation have "come to be located" throughout the entire former Southern Pacific Site; therefore, under the CERCLA definition, the entire site would be considered the "facility." *Consolidated*, 2006 WL 408234, at *12. Third and finally, Conco pointed out that RCRA has an integration provision. *Id.* (citing 42 U.S.C. § 6905). Conco argued that the integration provision requires that RCRA be read *in pari materia* with the CERCLA definition and the 42 U.S.C. § 6991b(h)(6)(D) definition of "facility." *Consolidated*, 2006 WL 408234, at *13. Therefore, the integration provision "provides the basis for construing 'facility' under RCRA to include contiguous or adjacent property." *Id.*

The court ruled that the entire Southern Pacific Site constituted the "facility" for purposes of Conco's RCRA claim, reasoning that "[o]ne of the purposes of the citizen suit provision is to provide a mechanism for federal relief when a state regulatory scheme fails to provide the proper relief." *Id.* The court held that LDEQ's regulatory scheme of dividing the Southern Pacific Site into smaller parcels and treating them as separate facilities "does not properly address the situation." *Id.* The court also held that it "is consistent with both RCRA and CERCLA to include the entire site in the definition of 'facility.'" *Id.*

In addition, Conco contended that "facility" be read to include the entire area the original Southern Pacific railyard encompassed under the LEQA. *Consolidated*, 2006 WL 408234, at *14. The court conducted a straightforward statutory analysis, finding the citizen suit provision under the LEQA provided that "facility" was defined as a "pollution source," and "pollution source" was defined as "the immediate site or location of a discharge or potential discharge, including such surrounding

property necessary to secure or quarantine the area from access by the general public.” *Id.* Therefore, the court found that “facility” is defined as the location of discharge, without regard to property lines. *Id.* The court also pointed out that the definition of “hazardous waste site” in the LEQA includes “the entire contaminated area and may extend beyond a facility’s boundary.” *Id.* The court concluded that the entire Southern Pacific Site was a “facility” for Conco’s LEQA claims. *Id.*

CONCLUSION

The decision in *Consolidated* sets good policy. The court recognized the inherent dangers in limiting RCRA plaintiffs to the boundaries of their property. The court expressed notable disdain to approaching RCRA claims in this way. *See Consolidated*, 2006 WL 408234, at *8 (“The piecemeal testing of this area makes little sense in the larger scheme.”). One foreseeable consequence of addressing RCRA sites in a “piecemeal” fashion is that it unnecessarily requires more complicated, drawn-out litigation. Plaintiffs and defendants alike should appreciate the inherent judicial efficiency of bringing multiple claims in one forum. Under the piecemeal approach, the court might grant one plaintiff greater

relief than her neighbors based upon her ability to present better evidence or better expert witnesses; the court might place less emphasis on the amount of harm suffered in relation to similarly-situated individuals. However, under the court’s definition of “facility,” some plaintiffs arguably may be in a position to manage their risk by allowing their neighbors to bear the burden and expense of trial, and still have the benefit of a clean facility, if the suit is successful. This situation may be beneficial; the party who is either the most aggrieved or the most able to pay for litigation will most likely absorb the risk and expense of trial. At the same time, the parties who benefit without risk are most likely parties that lack the means or expertise to gain access to the citizen suit provision. Either way, the result is a cleaner environment and less litigation.

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NATURAL RESOURCES

ENTRY INTO FORCE OF THE 1996 PROTOCOL TO THE 1972 CONVENTION ON THE PREVENTION OF MARINE POLLUTION BY DUMPING OF WASTES AND OTHER MATTER

The 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (“1996 Convention”) entered into force on March 24, 2006, marking an important step towards the protection of the marine environment. International Maritime Org., http://www.imo.org/Newsroom/mainframe.asp?topic_id=1337 (last visited Apr. 25, 2006). The 1996 Protocol became effective after the 26th country, Mexico, ratified it on February 22, 2006. *Id.*

The 1996 Protocol represents a significant change in the approach to regulation of the sea as a depository for waste materials. The 1996 Protocol prohibits marine dumping, except for materials that are on an approved list. *Id.* This new approach is

stricter than the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (“1972 Convention”), which allowed dumping of wastes at sea, except for those materials on a banned list. *Id.* Furthermore, the 1996 Protocol requires all contracting parties to implement the measures of the protocol by applying them to all vessels and aircraft registered in its territory or flying its flag. International Marine Org., 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 and Resolutions Adopted by the Special Meeting, <http://www.londonconvention.org/documents/lc72/PROTOCOL.pdf> (last visited Apr. 25, 2006) [hereafter *Protocol*].

Several key features of the 1996 Protocol serve to make it more modern and comprehensive than the original 1972 Convention. In Article 3, the 1996 Protocol introduces what is known as the “precautionary approach” as a general obligation for participating countries. *Id.* The precautionary approach re-

quires that “appropriate preventative measures are taken when there is reason to believe that wastes or other matter introduced into the marine environment are likely to cause harm even when there is no conclusive evidence to prove a causal relation between inputs and their effects.” *Id.* Article 3 also requires that “the polluter should, in principle, bear the cost of pollution.” *Id.*

The 1996 Protocol is more restrictive than the 1972 Convention in that the latter permitted dumping if the “contracting parties” met certain conditions. International Marine Org., http://www.imo.org/Newsroom/mainframe.asp?topic_id=1337 (last visited Apr. 25, 2006). The 1996 Protocol prohibits contracting parties from dumping any wastes or other matter aside from those expressly included in the approved list. *Protocol*, <http://www.londonconvention.org/documents/lc72/PROTOCOL.pdf> (last visited Apr. 25, 2006). The approved listed materials include: dredged sewage; sewage sludge; fish waste, or material resulting from industrial fish processing operations; vessels and platforms or other fabricated structures at sea; inert, inorganic geological material; organic material of natural origin; and several bulky materials that could cause significant impact to the marine environment. *Id.*

Article 1 of the 1996 Protocol provides wider geographical coverage than its predecessor, as it also governs the storage of waste in seabeds, as well as the abandonment of offshore installations. *Id.* The 1996 Protocol continues to exclude internal waters of a state from the coverage of the dumping restrictions. However, Article 2 gives parties to the 1996 Protocol the option to apply the Protocol’s requirements to their internal waters if they wish. *Id.*

The 1996 Protocol takes a more practical approach than the 1972 Convention. The Protocol is oriented towards commonly generated wastes rather than contaminants. International Marine Org., http://www.imo.org/Newsroom/mainframe.asp?topic_id=1337 (last visited Apr. 25, 2006). This change results in a proscriptive approach that provides greater clarity by designating what is and what is not permitted to be dumped at sea. This approach is expected to make the 1996 Protocol easier to apply. *Id.*

In addition, compared with the 1972 Convention, the 1996 Protocol places a greater emphasis on compliance. Article 11 requires a meeting of contracting parties “no less than two years after the Protocol’s entry into force, to establish procedures and mechanisms necessary to assess and promote compliance with the Protocol.” *Protocol*, <http://www.londonconvention.org/documents/lc72/PROTOCOL.pdf> (last visited Apr. 25, 2006).

At this time, the 1996 Protocol only supersedes the 1972 Convention for the contracting parties that have ratified it. International Marine Org., http://www.imo.org/Newsroom/mainframe.asp?topic_id=1337 (last visited Apr. 25, 2006). This means that both instruments will be in force for several years to come, but will change as more parties ratify the 1996 Protocol. *Id.* The United States is currently a Party to the 1972 Convention, but it has not ratified the 1996 Protocol. *Id.* However, vessels operating in U.S. waters that are flagged in countries that have ratified the 1996 Protocol will be subject to the Protocol’s requirements.

The first meeting for contracting parties to the 1996 Protocol is scheduled to take place from October 30 to November 3 of this year. The discussion is likely to focus on the challenge of tackling climate change and ocean acidification through the sequestration of carbon dioxide in sub-seabed geological structures. *Id.* In preparation, the International Marine Organization is hosting a series of intersessional working groups to discuss the technical and legal issues related to such a measure. London Convention 1972, News, <http://www.londonconvention.org/News.html> (last visited Apr. 25, 2006).

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PUBLICATIONS

THE DISADVANTAGES OF THE “BEST SCIENCE AVAILABLE” STANDARD IN ENVIRONMENTAL REGULATIONS

Mariyetta Meyers, Note: *Maximizing Scientific Integrity in Environmental Regulations: The Need for Congress to Provide Guidance When Scientific Methods Are Inadequate or When Data Is Inconclusive*, 12 ANIMAL L. 99 (2005).

Mariyetta Meyers' comment examines the often vague standard of “best science available” (“the BSA standard”) that is used in many environmental law statutes and emphasizes the need for Congress to provide guidance when scientific methods are inadequate or inconclusive. Mariyetta Meyers, *Maximizing Scientific Integrity in Environmental Regulations: The Need for Congress to Provide Guidance When Scientific Methods are Inadequate or When Data is Inconclusive*, 12 ANIMAL L. 99, 100 (2005). As an illustration, Meyers analyzes the Magnuson-Stevens Fishery Conservation and Management Act (MSA), that Congress enacted in 1976 to regulate domestic fishery resources. *Id.* at 102. MSA's National Standard Two directs the Secretary of Commerce to use the BSA standard in creating Fishery Management Plans (FMPs) and in promulgating regulations. *Id.* Meyers pinpoints ambiguity as the major set-back of the BSA standard, and identifies two underlying causes. *Id.* at 101-02. First, ambiguity occurs when scientific principles fail to yield a definitive answer. *Id.* at 101. Second, ambiguity occurs because the term “best science available” is not defined in the statutes in which it is used. *Id.* After discussing the seriousness of the ambiguity problem, Meyers concludes with a comparison to the International Dolphin Conservation Program Act (IDCPA) of 1997, which she promotes as a more appropriate framework for agencies that must interpret scientific data to promulgate regulations. *Id.* at 103-05.

WHEN SCIENCE FAILS TO PROVIDE A DEFINITIVE ANSWER

Meyers argues that the BSA standard is ambiguous because scientific data is not always conclusive. *Id.* at 101. For example, the MSA uses the BSA stan-

dard, and allows an agency to make a finding based on scientific data if the data is conclusive and science is the only consideration. However, problems arise when scientific principles are not conclusive. *Id.* at 101-02. When this inconclusiveness occurs, rulemaking agencies must often consider non-scientific factors, turning the agency's decision into one of policy. *Id.* at 102. The MSA in particular presents a dilemma to the agency because it has a dual objective, “to promote domestic commercial and recreational fishing while ensuring sound conservation and recreational fishing.” *Id.* at 109. Thus, the MSA does not give the agency clear guidance as to which objective to favor. *Id.* at 102.

WHEN STATUTES DO NOT DEFINE “BEST SCIENCE AVAILABLE”

Meyers argues that the term “best science available” is ambiguous because most statutes do not define it, leaving it vulnerable to inconsistent interpretation. *Id.* at 101. The MSA is one such statute that lacks a definition for “best science available.” *See id.* at 106. This lack of definition leads to attacks on the MSA, which scrutinize everything from the science relied upon by the agency to the weight given to non-scientific factors. *Id.* at 106-07.

Meyers discusses how, under the Administrative Procedure Act (APA), agencies often retain broad discretionary power, even for decisions based on science. *Id.* at 107-09. The APA mandates that courts must review agency decisions under the “arbitrary and capricious” standard; an agency rule is arbitrary and capricious if “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.* at 107-08. Courts narrowly interpret this standard and rarely use it to overturn agency decisions. *See id.* at 108. According to Meyers, this “creates a very heavy burden for the plaintiffs to overcome in challenging agency action,” particularly when statutory language is broad or ambiguous. *See id.* at 109.

MODEL FOR A SOLUTION: THE INTERNATIONAL DOLPHIN CONSERVATION PROGRAM ACT

To maintain the scientific integrity of environmental regulations such as the MSA, Meyers contends that Congress should follow the model it set out in the IDCPA. *Id.* at 127. Congress enacted the IDCPA in 1997 to protect dolphins. *Id.* at 117. The IDCPA's scientific directives are "uncommonly specific directives, going beyond the generic best science available requirement and placing an affirmative duty on the agency to conduct specific research studies within designated timeframes." *Id.* at 117. Unlike the MSA's dual, competing objectives, the IDCPA specifies one congressional intent: to protect dolphins. *Id.* at 104. As specified in the IDCPA, Congress required the National Oceanic and Atmospheric Association (NOAA), as the agency responsible for conducting scientific studies, to use new evidence "in conjunction with the best science already available to determine whether intentional encirclement of dolphins has a significant adverse impact on dolphin stocks." *Id.* at 103-04. Along with the single policy objective of the IDCPA, Congress gave specific guidelines and timeframes for the conduct of the agency research, leaving the agency little discretion. *Id.* 118-119. According to Meyers, this level of specificity on the part of Congress resolves the ambiguity problems of the BSA standard, making it feasible for courts to strike down agency decisions that fail to conform to science-gathering requirements. *Id.* at 119-120.

CONCLUSION

Meyers contends that Congress should make specific policy decisions that clarify the BSA standard in the MSA, as well as other environmental regulations, to maintain scientific integrity. *Id.* at 105. To help limit later disputes, Congress should consider following the model it set out in the IDCPA and provide agencies with clear guidelines and move away from more generic BSA language. *Id.* at 127. Specific guidelines could minimize agency discretion in considering non-scientific factors, require agencies to collect additional data instead of merely relying on unclear or incomplete scientific information, and provide agencies with guidance on which policies to favor in cases of scientific uncertainty. *Id.* at 130, 31. Overall, this specificity will improve agency conformity to Congressional intent and increase the judiciary's ability to conduct meaningful review. *Id.* at 132.

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SOLID WASTE

TCEQ TRASHES OLD MUNICIPAL SOLID WASTE RULES

On March 1, 2006, the Texas Commission on Environmental Quality (TCEQ) revised Chapter 330 of the Texas Administrative Code, implementing serious changes in the State's municipal solid waste rules. The municipal solid waste rules had not been comprehensively updated in ten years, and the rule changes accordingly created much interest among the regulated community and environmental groups, leading to the submission to TCEQ of extensive comments concerning the proposed rules. *Texas Commission on Environmental Quality Interoffice Memorandum of February 17th (2006) available at:*

http://www.tceq.state.tx.us/assets/public/permitting/waste/msw/msw_ch330_ED_re_adop.pdf. The new rules make many changes to the solid waste landscape in Texas.

One of the most significant changes the new rules make is that of requiring an expanded buffer distance between landfills and communities. 30 TEX. ADMIN. CODE §330.543 (2003) (Tex Comm'n on Env'tl. Quality, Municipal Solid Waste). Prior to the issuance of the new rules, only a fifty foot distance was required between landfills and communities, but the new rules mandate that 125 feet separate landfills and communities. *Id.* The new rules also set forth that the 125 foot span be measured from the point of waste placement (and not from the property line

of the waste facility). *Id.* The TCEQ stated that the rationale for the increased buffer zone was to serve the following purposes: visual screening of the landfill from surrounding residents; ease of access to the landfill site for emergency response, maintenance, and monitoring personnel; preventing the spread of odors and windblown waste; and, increasing the ability to control drainage and sediment runoff. 30 TEX. ADMIN. CODE §330.543(b)(3)(B)(i) - (iv) (2003) (Tex Comm'n on Env'tl. Quality, Municipal Solid Waste).

The new rules also change the requirements for certain landfill operators, requiring them to install groundwater monitoring devices and to inform local authorities of any problems at the landfill. 30 TEX. ADMIN. CODE §330.331 (Tex Comm'n on Env'tl. Quality, Municipal Solid Waste). Operators of Type I landfills now operate under the presumption that they ought to have monitoring wells spaced out by 600 feet, but the new rules do provide that this 600 foot presumption can be rebutted if operators can provide scientific evidence that militates towards allowing for more widely spaced monitoring wells. *Id.* Such evidence might include facts about aquifer thickness, groundwater flow rate and direction, and the stratigraphy and hydraulic characteristics of saturated and unsaturated geologic units. 30 TEX. ADMIN. CODE 330.231(e)(1) (Tex Comm'n on Env'tl. Quality, Municipal Solid Waste). Operators of Type IV facilities, however, do not face any new groundwater monitoring requirements. (A Type IV landfill is distinguished from a Type I landfill in that a Type IV facility may only accept brush, construction, or demolition waste, and/or rubbish. More specifically, "A Type IV landfill unit may not accept putrescible wastes, conditionally exempt small-quantity generator waste, and household wastes" while a Type I landfill may accept these types of waste. 30 TEX. ADMIN. CODE §330.5(a)(2) (Tex Comm'n on Env'tl. Quality, Municipal Solid Waste).

The new rules also address the issue of vertical landfill expansions. 30 TEX. ADMIN. CODE §330.331 (Tex Comm'n on Env'tl. Quality, Municipal Solid Waste). The new rules state that vertical expansion of landfills is generally allowable only when a landfill is compositely lined, thereby reducing the risk of groundwater pollution. *Id.* However, even if the landfill is lacking a composite liner, the new rules allow a landfill owner or operator to expand a landfill vertically if the owner or operator can demonstrate that

the expansion will not lead to the landfill exceeding maximum allowable contaminant limits. *Id.*

Environmental groups expressed concern over the existence of last-minute changes in the rules, changes that the TCEQ Commissioners made on March 1st as they considered whether to adopt the proposed rules. Cappiello, Dina. *Environmentalists lament landfill revisions*, HOUSTON CHRONICLE, March 2, 2006, available at: http://www.texasenvironment.org/news_story.cfm?IID=206. The Commissioners, in making the last-minute changes, decided not to approve a proposed requirement that would have forced solid waste permittees to submit to permit and registration reviews at five year intervals. See *Texas Commission on Environmental Quality memorandum*, available at: http://www.tceq.state.tx.us/assets/public/permitting/waste/msw/msw_ch330_advdp_adoption_changes.pdf. (The proposed reviews would have looked at such factors as the existence, if any, of rule violations a facility may have committed in the past five years and the rate at which the facility had been accepting waste for disposal.). *Texas Commission on Environmental Quality Interoffice Memorandum of February 17th* (2006) available at: http://www.tceq.state.tx.us/assets/public/permitting/waste/msw/msw_ch330_ED_re_adop.pdf. Additionally, the Commissioners altered the proposed landfill buffer rule to exempt Type IV landfills from the more stringent buffer distance requirements that now apply to other landfills. See *Texas Commission on Environmental Quality memorandum*, available at: http://www.tceq.state.tx.us/assets/public/permitting/waste/msw/msw_ch330_advdp_adoption_changes.pdf. Environmental groups were critical of these changes and characterized them as weakening the environmental protections that the rules would have otherwise provided. Cappiello, Dina. *Environmentalists lament landfill revisions*, HOUSTON CHRONICLE, March 2, 2006, available at: http://www.texasenvironment.org/news_story.cfm?IID=206.

When the Commissioners passed the rules, twenty-one entities had already applied to build or modify landfills. *Id.* These entities will be exempt from many of the new rules. *Id.* As might be expected, when major new environmental regulations are being considered, the number of applications for permits jumped during the TCEQ began to look at overhauling the solid waste rules and the date the Commissioners adopted them. Cappiello, Dina. *Environmentalists lament landfill revisions*, HOUSTON

CHRONICLE, March 2, 2006, available at: http://www.texasenvironment.org/news_story.cfm?IID=206. In fact, in the five month period stretching from when the TCEQ began working on the new rules until the Commissioners approved them, twenty-one entities applied for new permits, a significant increase over the annual average of thirteen applications. *Id.* Texas environmental groups have decried this “grandfathering” of those who are already applied, arguing that it represents a significant hurdle to environmental progress. *Id.*

Texas solid waste disposal facilities face a new regulatory environment with the passage of the new rules,

rules that the TCEQ characterizes as providing effective environmental protections to the citizens of Texas.

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STATE CASE NOTES

EDWARDS AQUIFER AUTHORITY V. PEAVY RANCH, 2006 WL 397959 (TEX. APP.—SAN ANTONIO 2006, NO PET. HIST.).

In *Edwards Aquifer Authority v. Peavy Ranch*, the Fourth Court of Appeals in San Antonio upheld the Edwards Aquifer Authority’s (the “EAA”) denial of an a withdrawal permit application of the Peavy Ranch, an existing user of the Edwards Aquifer, for failing to timely file its application for a groundwater withdrawal permit. *Edwards Aquifer Authority v. Peavy Ranch*, 2006 WL 397959, at *1 (Tex. App.—San Antonio 2006, no pet. hist.). The 38th District Court of Medina County had reversed the EAA’s initial order denying the permit on the grounds that due process of law required Peavy Ranch receive individualized notice of the application deadline. *Id.* Without dissent, the court of appeals reversed the district court and held that the EAA’s decision to deny Peavy Ranch’s permit was not in error. The court of appeals held that individualized notice was not necessary because the permit application requirements arose from legislation that allowed the “citizenry a reasonable opportunity to familiarize itself with its terms and to comply.” *Id.* at *2 (citing *Texaco v. Short*, 454 U.S. 516, 532 (1982)).

In 1993, the Texas Legislature enacted the Edwards Aquifer Authority Act (the “EAA Act”), prohibiting any person from withdrawing water from the Edwards Aquifer without a permit and requiring existing users to apply for a permit by filing a declaration of historical use by March 1, 1994. *Peavy Ranch*, 2006 WL 397959 at *1. Due to voting rights pre-clearance issues and litigation, including

a challenge to the constitutionality of the Act made in *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618 (Tex. 1996), the EAA Act did not become effective on its original effective date of September 1, 1993. After the *Barshop* decision was issued, the EAA adopted a new filing deadline of December 30, 1996. *Peavy Ranch*, 2006 WL 397959 at *1. Notably, this deadline was recently held invalid in *Edwards Aquifer Authority v. Chemical Lime, Ltd.*, 2006 WL 2631864 (Tex. App.—Austin 2006, no pet. hist.) (*prior opinions in –S.W.3d –, 2006 WL 305180 and 2006 WL 1502285 withdrawn*) as discussed further below.

Peavy Ranch did not file its application until December 31, 1997. *Peavy Ranch*, 2006 WL 397959 at *1. After a contested case hearing, the EAA board denied the application on the basis that it was untimely filed. *Id.* Peavy Ranch appealed that decision, contending it was constitutionally entitled to individualized notice of the deadline. *Id.* The district court granted summary judgment in favor of Peavy Ranch, reversing the EAA’s order. *Id.*

On appeal, the EAA argued that Peavy Ranch lacked a protected property interest or, if it had such an interest, it received all constitutionally required notice. *Peavy Ranch*, 2006 WL 397959 at *2. Peavy Ranch maintained that it had a “constitutional right to be advised by the EAA of the permit filing requirement applicable to its land.” *Peavy Ranch*, 2006 WL 397959 at *3. The EAA contended that the requirement to apply for a permit by the deadline in the Act was legislation affecting a general class of persons and those persons received all the notice to which they were entitled through the legislative process. *Id.* at *2. The court of appeals, which as-

sumed without deciding that Peavy Ranch had a protected property interest, agreed with the EAA. *Id.* In reaching its decision, the court relied on two similar U.S. Supreme Court cases holding that a legislature provides constitutionally adequate process by enacting legislation and providing a reasonable period of time in which people may become familiar and comply with any requirements. *Id.* at *2-3 (citing *Texaco*, 454 U.S. at 532; *U.S. v. Locke*, 471 U.S. 84, 105 (1985)).

The court held that the U.S. Supreme Court cases controlled the outcome in this case because, as a matter of law, the Act provided Peavy with all notice to which it was entitled of the requirement to file a permit application by the deadline. *Peavy Ranch*, 2006 WL 397959 at *3 The court added that whether an individualized notice system might be more “sound, rational, or desirable” was a legislative, rather than judicial, question. *Id.* at *5.

EDWARDS AQUIFER AUTHORITY V. CHEMICAL LIME, LTD., 2006 WL 2631864 (TEX. APP.—AUSTIN 2006, NO PET. HIST.) (PRIOR OPINIONS IN —S.W.3D —, 2006 WL 305180 AND 2006 WL 1502285 WITHDRAWN).

The Third Court of Appeals in Austin recently held that the Edwards Aquifer Authority (EAA) exceeded its powers by setting an impermissibly early deadline for filing historic use declarations. *Edwards Aquifer Auth. v. Chemical Lime, Ltd.*, 2006 WL 2631864 at *1 (Tex. App.—Austin 2006, no pet. hist.).

In this case, the EAA denied Chemical Lime’s permit request based on the fact the applications were filed after the deadline established in the Authority’s rules. The district court reversed the EAA’s order denying the permit application, holding that the EAA rule setting the deadline was invalid because the Edwards Aquifer Authority Act (the Act) and the EAA did not become effective until the Supreme Court denied the motion for rehearing in *Barshop v. Medina County Underground Water Dist.*, 925 S.W.2d 618 (Tex. 1996). 2006 WL 2631864 at *6 (*Barshop* involved an unsuccessful constitutional challenge of the Act). Alternatively, the district court held that the permit should be granted on the basis of Chemical Lime’s substantial compliance with the deadline. *Id.* In addition, the district court

awarded attorney’s fees and costs to Chemical Lime. *Id.* at *6.

The court of appeals affirmed, finding the EAA’s deadline was invalid because the Act only became enforceable after the Supreme Court issued its mandate in the *Barshop* opinion. *Chemical Lime*, 2006 WL 2631864 at *8 (citing *Barshop*, 925 S.W.2d at 618). Accordingly, the court deemed it unnecessary to address the alternative substantial compliance ground of support. *Id.* The court of appeals also affirmed the grant of attorney’s fees and costs to Chemical Lime. *Id.*

The EAA Act, enacted by the Texas Legislature in 1993, imposed limits on withdrawals from the Edwards Aquifer and required existing users to file declarations of historical use to be entitled to a permit recognizing that use. *Chemical Lime*, 2006 WL 2631864 at *2. The statutory deadline for filing the declaration was March 1, 1994, six months after the Act’s effective date. *Id.* A voting rights challenge and intervening litigation prevented implementation of the EAA Act until 1996, when the Supreme Court vacated an injunction against its enforcement in *Barshop*. *Id.* at *3.

In response to *Barshop*, the EAA adopted a rule setting the deadline for December 30, 1996—six months after the Supreme Court’s ruling in *Barshop*. *Chemical Lime*, 2006 WL 2631864, at *4. Chemical Lime did not file any part of its historical declaration until January 17, 1997. *Id.* at *5. The EAA subsequently denied Chemical Lime’s permit application, finding that it was not timely filed. *Id.* at *6.

Chemical Lime filed suit under the Uniform Declaratory Judgment Act (UDJA) seeking declarations that the rule establishing the deadline was invalid; that its initial regular permit application was timely filed on January 17, 1997; or, in the alternative, that it had substantially complied with the deadline if the rule was valid. *Id.* Chemical Lime also attacked the constitutionality of the EAA Act on multiple grounds. *Id.*

The district court rendered judgment on the jury verdict, holding that the deadline in question was invalid and that Chemical Lime’s application was timely filed and awarding attorney’s fees and costs. *Chemical Lime*, 2006 WL 2631864, at *6 After severing the constitutional takings claim, the district court denied all of Chemical Lime’s remaining constitutional claims including due course of law, separation of powers, and open courts. *Id.* The court also held, in the alternative, that Chemical Lime had

substantially complied with the application requirements. *Id.*

On appeal, the EAA contended that the effective date of the Act was the date *Barshop* was decided because on that date the injunction that prevented the Act and the EAA from becoming effective was immediately dissolved as a matter of law; therefore, its rule setting the deadline six months later was valid. *Chemical Lime*, 2006 WL 2631864 at *7. *Chemical Lime*, in contrast, claimed the effective date was either the date the Supreme Court denied rehearing or the date the Supreme Court issued its mandate; therefore, the deadline should have been set no earlier than February 17, 1997. *Id.* at *8. The EAA also challenged the fee award on the ground that the Water Code controls the award, and under the Water Code, *Chemical Lime* cannot receive fees. *Id.* at *10. The court of appeals affirmed the judgment of the district court, ruling in *Chemical Lime's* favor on all claims. *Id.* at *12.

The court first interpreted *Barshop* to hold that the deadline should be six months after the Act's effective date, *i.e.*, six months after the court issued its mandate in *Barshop*. *Chemical Lime*, 2006 WL 2631864 at * 8. The court reasoned that an appellate decision is not enforceable in the lower courts before the appellate court issues its mandate. *Id.* at *9. Under the Texas Rules of Appellate Procedure, a mandate will ordinarily issue after the appellate court's judgment is final. *Id.*; see TEX. R. APP. P. 18.1. However, the parties may agree to an expedited mandate, or in the case of an accelerated appeal, the appellate court may issue its mandate with the

judgment. *Chemical Lime*, 2006 WL 2631864, at *9. The court reasoned that because the State did not seek to expedite the *Barshop* mandate, the EAA Act did not issue until the Supreme Court's judgment was final. *Id.* at *9.

Finally, the court determined that both the UDJA and the Water Code apply to the issue of fees, and that the legislature intended the remedies in the Water Code to be cumulative and not to bar parties from seeking declaratory relief. *Chemical Lime*, 2006 WL 2631864 at *12. Because section 36.254 of the Water Code did not foreclose the availability of "other legal or equitable remedies that may be available," the court of appeals affirmed the award of attorney's fees and costs to *Chemical Lime*. *Id.* at *12.

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WATER QUALITY

COURT OF APPEALS FAVORS BROAD INTERPRETATION OF MUNICIPAL TORT IMMUNITY, LIMITS SCOPE OF TCEQ AUTHORITY REGARDING WATER UTILITY DISPUTES

***City of San Antonio v. BSR Water Co.*, No. 04-05-00495-CV, 2005 WL 3533121, *1 (Tex. App. Dec. 28, 2005).**

City of San Antonio v. BSR Water Co. involves a challenge by a private water company to a proposed city water utility expansion based upon tort and contract claims. No. 04-05-00495-CV, 2005 WL 3533121, *1 (Tex. App. Dec. 28, 2005). BSR Water Company

(BSR) operates a 440-plus acre ranch in northwest San Antonio. *Id.* at *1. The company held a Certificate of Convenience and Necessity (CCN) from the TCEQ that authorizes the holder to operate a potable water system. *Id.* Issues over water use arose when the San Antonio Water System (SAWS) filed an application with the TCEQ for expansion of its CCN into several thousand acres (Expansion Area), including land already included with BSR's CCN and an additional proposed 800 acres that BSR sought to include in its CCN area. *Id.* BSR filed a protest with the TCEQ, as did the Bexar Met County Metropolitan Water District (Bexar Mett). *Id.*

BSR and SAWS engaged in negotiations to address BSR's concerns about SAWS's expansion proposal. *City of San Antonio v. BSR Water Co.* at *1. These negotiations resulted in a Water Supply Contract and Service Area Settlement Agreement. *Id.* The terms of the Contract essentially stated that BSR would drop its protest over SAWS's expansion in exchange for BSR retaining its existing CCN and SAWS's agreement to drill wells on BSR's land for BSR. *Id.* Additionally, SAWS agreed to support BSR's smaller scale expansion attempt. *Id.*

Shortly after coming to this agreement with BSR, SAWS addressed Bexar Met's concerns. *Id.* at *2. SAWS and Bexar Met negotiated an Interlocal Operational Agreement whereby SAWS dropped its claim to the 800 acre Expansion Area (as already promised to BSR). Bexar Met dropped its protest of SAWS's large CCN request in exchange for SAWS clearing the way for Bexar Met to file a CCN for the Expansion Area. *City of San Antonio v. BSR Water Co.* at *2. According to BSR, SAWS never informed it of the agreement reached with Bexar Met. *Id.*

After the negotiation, SAWS postponed drilling wells on BSR's land. *Id.* SAWS eventually completed construction of the wells, but not before Bexar Met forced BSR to withdraw its application for the Expansion Area in the face of Bexar Met's protest and superior size and capabilities. *Id.* Bexar Met received the CCN for the Expansion Area, and BSR filed suit against SAWS. *Id.* BSR alleged breach of contract, fraud, fraudulent inducement, and conversion related to SAWS's promise to support BSR's 800-acre CCN claim that ultimately came under Bexar Met's control. *City of San Antonio v. BSR Water Co.* at *1-2. SAWS responded with a plea to the jurisdiction, claiming the trial court lacked subject-matter jurisdiction on two distinct grounds: governmental immunity from the tort claims, and exclusive jurisdiction on the part of the TCEQ concerning the contract claims. *Id.* at *2-6. The trial court denied the SAWS's plea to the jurisdiction, finding that SAWS was not immune from tort claims and the TCEQ did not have exclusive jurisdiction. *Id.* at *2,*4.

The appellate court reversed the trial court, finding that the trial court lacked subject-matter jurisdiction on the tort claims. *Id.* at *4. In doing so, the court recognized the distinction between governmental functions giving rise to immunity and the proprietary functions of a water utility that do not give rise to immunity. *Id.* at *3-4. However, the court gave a broad reading to the statute setting out gov-

ernmental immunity. *Id.* at 4. Section 101.0215(a) of the Texas Civil Practice & Remedies Code (Vernon 2005) lists "water and sewer service" as a governmental function for which a municipality enjoys immunity. The court noted that it cannot separate one aspect of a utility's actions from its general mission to provide water service, and granted immunity despite the possibility of any profit-oriented or discretionary motivations in the agreement. *City of San Antonio v. BSR Water Co.* at *3-4. Because the overriding purpose of SAWS was to provide water service as a governmental activity, the profit-oriented activities in which SAWS engaged could not be carved out and reclassified as proprietary. *Id.* at *4.

After recognizing SAWS's immunity from tort claims and the trial court's consequential lack of subject matter jurisdiction, the court considered whether the TCEQ had authority over CCN-related contract claims. If the TCEQ had exclusive jurisdiction, the court would lack subject-matter jurisdiction, and the TCEQ would have sole authority to make an initial determination in a dispute. *Id.* at *5. BSR would have to exhaust all administrative remedies before filing in court if this had been the case. *Id.*

Contrary to the broad interpretation of tort immunity, the court took a more measured approach with regard to TCEQ powers. *City of San Antonio v. BSR Water Co.* at *7. Section 13.042(e) of the Texas Water Code (Vernon 2005) grants the TCEQ "exclusive original jurisdiction over water and sewer utility rates, operations, and services." The Code also explicitly grants the TCEQ authority to issue CCNs such as the ones in this case. TEX. WATER CODE ANN. §13.242. Hearings for parties effected by CCN decisions are also mandated. *Id.* § 13.246(a). The Code does not have a provision granting the TCEQ the authority to resolve contract claims. *City of San Antonio v. BSR Water Co.* at *6. The court found that a lack of procedure for resolving contract disputes coupled with the TCEQ's lack of power to levy damages showed that the Legislative did not grant exclusive authority over contract claims to the TCEQ. *Id.* at *7.

The court also considered a lesser form of TCEQ authority and dismissed it. *Id.* Primary jurisdiction is a judicially-created doctrine, not statutory; it states that a court should issue a stay for an action pending the result of an ongoing agency determination. *Id.* Given that a contract claim was at issue between BSR and SAWS rather than a determination of the merits of issuing a CCN, the court found that TCEQ did not hold primary jurisdiction. *Id.* As such,

the trial court did not face any bar to subject matter jurisdiction from the agency. *City of San Antonio v. BSR Water Co.* at *7-8. The TCEQ does not have any particular expertise in contract claims, and the court did not wish to impose duties better suited for a judicial resolution on the state environmental agency. *Id.* The appellate court thus upheld the trial court's finding of subject matter jurisdiction over the issue of agency authority and reversed the trial court's finding of subject matter jurisdiction based on SAWS's lack of immunity from tort claims.

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WATER RIGHTS

TRAVIS COUNTY DISTRICT JUDGE RULES IN FAVOR OF ENVIRONMENTAL GROUPS' ATTEMPT TO APPLY FOR INSTREAM USE PERMITS

On February 7, 2006, a Travis County District Court judge ruled that the Texas Commission on Environmental Quality (TCEQ) has jurisdiction to hear permit applications for the instream use of water, remanding four TCEQ orders back to the TCEQ for further proceedings. See *Caddo Lake Inst., Inc. v. Texas Comm'n on Env'tl. Quality*, No. GN4-00132 (200th Dist. Ct., Travis County, Tex., Feb. 7, 2006) (order granting Plaintiff Caddo Lake Institute, Inc.'s Motion for Partial Summary Judgment); *San Marcos River Found. v. Texas Comm'n on Env'tl. Quality*, No. GN3-01251 (261st Dist. Ct., Travis County, Tex., Feb. 7, 2006) (order granting Plaintiff San Marcos River Foundation's Amended Motion for Summary Judgment); *Galveston Bay Conservation and Pres. Ass'n, Galveston Bay Found., and Matagorda Bay Found. v. Texas Comm'n on Env'tl. Quality*, No. GN4-00160 (345th Dist. Ct., Travis County, Tex., Feb. 7, 2006) (order granting Plaintiff's Motion for Summary Judgment). "Instream use" is the use of streamflows for purposes "including, but not limited to, navigation, recreation, hydropower, fisheries, game preserves, stock raising, park purposes, aesthetics, water quality protection, aquatic and riparian wildlife habitat, and freshwater inflows for bays and estuaries ...[.]" 30 TEX. ADMIN. CODE § 297.1(25) (West 2006) (Tex. Comm'n Env'tl. Quality, Water Rights Definitions).

The Texas district court orders deciding that the TCEQ has jurisdiction over instream permit applications reversed the TCEQ's decision that it lacked the authority to issue new water rights permits for

only instream use. See e.g., *Caddo Lake Inst., Inc. v. Texas Comm'n on Env'tl. Quality*, No. GN4-00132 (200th Dist. Ct., Travis County, Tex., Feb. 7, 2006). The district court orders specifically involved the denial of the permit applications of the Caddo Lake Institute, Inc., the San Marcos River Foundation, the Galveston Bay Conservation and Preservation Association, Galveston Bay Foundation, and the Matagorda Bay Foundation, collectively. See *Galveston Bay Conservation and Pres. Ass'n, Galveston Bay Found., and Matagorda Bay Found. v. Texas Comm'n on Env'tl. Quality*, No. GN4-00160 (345th Dist. Ct., Travis County, Tex., Feb. 7, 2006).

The first order issued by the TCEQ involved the San Marcos River Foundation's application for instream use. *San Marcos River Found. v. Texas Comm'n on Env'tl. Quality*, No. GN3-01251 (261st Dist. Ct., Travis County, Tex., Feb. 7, 2006). The San Marcos River Foundation submitted a permit application for a new water right "to appropriate 1.3 million acre-feet of water per annum from the Guadalupe River to maintain streamflows for beneficial nonconsumptive instream use and to maintain beneficial inflows of freshwater to the Guadalupe Estuary." Tex. Comm'n on Env'tl. Quality, *Order*, Docket No. 2003-0027-WR (March 20, 2003) (order denying the application of San Marcos River Foundation for water rights). The applicant sought to secure water rights in the Guadalupe River for environmental protection purposes. *Id.* In the order denying the San Marcos River Foundation's permit application for instream use, the TCEQ noted that, although the TCEQ had approved applications to add instream use designations to other uses in water rights permits in the past, it did not have "express statutory authority, nor should authority be implied from Texas Wa-

ter Code section 11.023, to issue the [new] permit” for instream use only. *Id.* The TCEQ’s order refers to section 11.023, which lists several purposes for which water may be appropriated:

(1) domestic and municipal uses, including water for sustaining human life and the life of domestic animals;

(2) agricultural uses and industrial uses, meaning processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, including the development of power by means other than hydroelectric;

(3) mining and recovery of minerals;

(4) hydroelectric power;

(5) navigation;

(6) recreation and pleasure;

(7) public parks; and

(8) game preserves.

TEX. WATER CODE ANN. § 11.023(a) (Vernon 2005). Section 11.023(b) of the Water Code also provides for state water to be appropriated, stored, or diverted for “any other beneficial use.” *Id.* at § 11.023(b) (Vernon 2005). The TCEQ determined that it did not have authority to issue instream use permits solely for instream use because instream use is not expressly listed in section 11.023, and because the Water Code contemplates other methods of protecting the environment in water rights permitting. *Tex. Comm’n on Env’tl. Quality, Order, Docket No. 2003-0027-WR* (March 20, 2003) (order denying the application of San Marcos River Foundation for water rights).

The district court ruling is significant because protection of instream flows has become an issue for the legislature in the last two sessions, and the issue of TCEQ’s authority to issue instream use permits was specifically addressed in legislation in the 78th Legislative Session. *See Tex. S.B. 1639, 78th Leg., R.S. (2003)*. The policy provisions in section 11.0235, as added by S.B. 1639, provide that the right to use state water may be appropriated only as expressly authorized by law, and that the legislature has not expressly authorized the granting of water rights exclusively for instream flows dedicated to environmental needs or inflows to the state’s bay and estuary systems or other similar beneficial uses. TEX. WATER CODE ANN. § 11.0235(b), (d) (Vernon 2005).

In a letter accompanying her Orders, Judge Livingston stated that contrary to the TCEQ’s interpre-

tation of section 11.023, Texas law “contemplate[s] appropriation of water rights for instream uses and to protect inflows into bays and estuaries.” Letter from the Honorable Suzanne Covington, 201st District Court Judge, Travis County, Texas, to Richard W. Lowerre, Marisa Perales, et. al. (February 7, 2006) (on file with author).

In the letter explaining her decision, Judge Suzanne Covington stated that she was only able to harmonize section 11.0235, the policy section of the Code, with the statutory scheme set out in the Water Code “by construing the section as applying only during the moratorium period which expired September 1, 2005.” *Id.* Judge Covington determined that any other interpretation of the policy section would make it “a permanent bar on the granting of water rights exclusively for instream flows for environmental uses” to everyone, including the state itself. *Id.* Thus, the judge concluded that the Legislature could not have provided for such a permanent bar on instream uses because of allowances made for the state to obtain water for instream uses in other parts of the Texas Water Code. *Id.* Furthermore, the judge stated that the TCEQ has jurisdiction to hear the applications for new permits for instream uses because the Texas Legislature *could have* enacted legislation barring private entities from seeking permits for instream uses, but has not enacted such legislation. *Id.*

Moreover, the district judge’s order does not grant instream permits to those the entities seeking them. *Id.* Rather, the order establishes that the TCEQ has jurisdiction to hear applications for instream use permits; establishes that the TCEQ has authority to issue instream use permits; and remands the cases to the TCEQ for further proceedings. *Id.*

On May 11, 2006, Judge Livingston issued a final order in the SMRF case, dismissing the claims that were pending. *San Marcos River Found. v. Texas Comm’n on Env’tl. Quality*, No. GN3-01251 (261th Dist. Ct., Travis County, Tex., May 11, 2006). The Judge also found that the priority date on the SMRF application will be determined by the TCEQ. *Id.* The other two cases are still pending in her court.

The TCEQ has appealed the decision to the Austin Court of Appeals. The case was transferred to the Corpus Christi Court of Appeals. *San Marcos River Found. v. Texas Comm’n on Env’tl. Quality*, Cause No. 13-06-00326-CV (Tr. Ct. No. GN301251)

(Letter from Court of Appeals for the Thirteenth District of Texas, June 23, 2006). The TCEQ filed its Appellant's brief on July 21, 2006. No date has been set for oral argument as of the date of this article.

Ehimwenma Joyce Iyamu is a third-year law student at the University of Texas School of Law and a staff member of the Texas Environmental Law Journal.

Robin Smith is an attorney for the Texas Commission on Environmental Quality.

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Christina T. Wisdom has joined the Texas Chemical Council as General Counsel and Director of Government Affairs.

John So has joined the Houston office of Vinson & Elkins, LLP as an associate in their Administrative and Environmental Law section. Mr. So is a 2005 graduate of The University of Texas School of Law, and was the 2004-05 Editor-in-Chief of the *Texas Environmental Law Journal*.

McGinnis, Lochridge & Kilgore, L.L.P. has moved to 600 Congress Avenue, Suite 2100, Austin, Texas 78701

Mike Nasi has joined the Austin office of Jackson Walker as a partner. **Ali Abazari** and **Christopher Pepper** have also joined the firm as associates.



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