2017 Developments in Texas Environmental, Energy, Natural Resources, and Land Use Law

Blake Hudson*

Table of Contents

 I thank the Houston Law library staff and my research assistant Evan Spencer for their research assistance in gathering materials consulted during the preparation of these materials.

Administrative Regulations, Settlements, and Pending Litigation

Air Pollution

- **Texas company settles to resolve Clean Air Act violation allegations**

United States v. Vopak Terminal Deer Park, S.D. Tex., 4:17-cv-01518, 5/17/17

Vopak Terminal Deer Park and Vopak Logistics Services USA Inc. agreed to pay a $2.5 million penalty to settle allegations of air pollution in Texas. Vopak is a tank storage company with facilities located in an area classified as in non-attainment for ozone. The facility includes about 240 tanks on 189 acres of land. Storage capacity is 7 million barrels, used to provide temporary storage for chemicals, fuels, oil and lubricants.

Federal and state regulators said Vopak failed to properly manage equipment, resulting in harmful excess emissions of acetone, benzene, styrene, and VOCs at the on-site wastewater treatment system, and furthermore failed to operate flares and chemical storage tanks in accordance with good air pollution practices. Vopak denies the allegations.

The consent decree formalizing the settlement was lodged with the U.S. District Court in the Southern District of Texas. Vopak agreed to install air pollution controls at the wastewater treatment system and to use infrared cameras to detect air pollution from the facility's storage tanks. The company will also use a third-party auditor to improve how it manages waste and who will evaluate Vopak's compliance with the agreement, the EPA said.

The consent decree is available at http://src.bna.com/oZm.

- **EPA's revised plan to reduce visibility-impairing air pollution in Texas challenged**

Nat'l Parks Conservation Ass'n v. EPA, 5th Cir. App', filed 12/15/17

Environmental groups have asked a federal appeals court to review the EPA's final plan to reduce visibility-impairing air pollution in Texas. The National Parks Conservation Association, the Sierra Club, and the Environmental Defense Fund argue the Environmental Protection Agency's plan, which allows power plants in

Texas to join an intrastate sulfur dioxide emissions trading program instead of installing pollution controls, is not sufficient to protect the environment.

The Obama administration had previously developed a plan requiring individual plants to install pollution controls. Eight Texas coal plants owned by Vistra Energy, Dynegy Inc., and Xcel Energy Inc. were mandated to install pollution controls, known as Best Available Retrofit Technology, to reduce sulfur dioxide emissions. The Trump administration EPA has decided instead to allow the coal plants to participate in the intrastate trading program. The groups argue that the emission limits allowed by the new rule are higher than emissions that were released last year.

The three groups filed a petition asking the agency to reconsider the rule, arguing that it was adopted without notice or ability to comment, that the EPA provided no rationale for abandoning its January 2017 pollution-control rule, and the trading program will not improve visibility.

See the petition for review filed with Fifth Circuit at http://src.bna.com/u36; *see* the petition for review filed with EPA at http://src.bna.com/u37.

Water Pollution

- **Group seeks damages from plastic manufacturer for alleged dumping in Lavaca Bay and other waterways**

San Antonio Bay Estuarine Waterkeeper v. Formosa Plastics, S.D. Tex., No. 6:17-cv-00047, 7/31/17

An environmental group is seeking a $57.45 million penalty against Formosa Plastics Corp. for the company's alleged illegal dumping of plastic pellets near the Southeast Texas coast. The complaint was filed in U.S. District Court for the Southern District of Texas citing alleged "significant, chronic, and ongoing" Clean Water Act violations at Lavaca Bay and other area waterways.

The plaintiffs also seek to force Formosa to clean up the pollutants and stop all future dumping. The plastic manufacturer maintains a 2,500-acre facility in Point Comfort, located near Matagorda Bay, southeast of San Antonio.

Local volunteers collected more than 1,600 pellet samples from about 20 miles of shoreline near the plant starting Jan. 31, 2016. The nearly $58 million penalty being

sought reflects a daily fine of $104,828 for the 548 days, amounts authorized as penalties under the Clean Water Act.

The EPA has dealt with Formosa's problems with discharging plastic pellets in the past, both in 2004 and 2010. In 2010, the Texas Commission on Environmental Quality was notified of the company's alleged dumping of pellets. TCEQ conducted investigations and determined that Formosa had violated its water permit by illegally discharging pellets, but the state agency did not fine Formosa or require any corrective action.

The complaint is available at http://src.bna.com/rfB.

Hazardous Waste

- **Toxic Texas site likely not cleaned up for two more years**

The San Jacinto River Waste Pits—designated a superfund site under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—may not be cleaned up for another two years. The federal Environmental Protection Agency expects that negotiations with responsible parties will take anywhere from six to twelve months to complete, followed by another six to twelve months to prepare and plan design activities.

A protective cap used to cover the pit since 2011 was repaired after the site experienced flooding during Hurricane Harvey. Potentially responsible companies, including International Paper and McGinnes Industrial Maintenance Corporation, oppose EPA's plan to remove contaminants from the site. EPA expects to excavate more than 212,000 cubic yards of contaminated waste. The pit, in Harris County, contains waste materials used in bleaching pulp to make paper, including highly toxic dioxins that are carcinogenic and affect hormone levels and human growth and development. The cost of the cleanup is expected to be around $115 million.

See EPA's final plan is at http://src.bna.com/uI4.

Natural Gas Storage

- **State of Texas, natural gas industry contest federal storage safety rule**

State of Texas v. U.S. Dep't of Transp., 5th Cir., 17-60189, 3/17/17
Interstate Natural Gas Assoc. v. U.S. Dep't of Transp., D.C. Cir., 17-01096, 3/20/17

Texas has asked the U.S. Court of Appeals for the Fifth Circuit to review a recent Pipeline and Hazardous Materials Safety Administration (PHMSA) rule, arguing that the regulation interferes with states' abilities to regulate their storage caverns. Natural gas industry groups are also challenging the rule in the U.S. Court of Appeals for the D.C. Circuit.

The rule was created in response to a massive leak of natural gas at Southern California Gas Co.'s storage facility at Aliso Canyon in California in 2015. Texas' attorney general argues that the rule "unilaterally and impermissibly" adopts the American Petroleum Institute's underground storage design and safety guidance as regulations, stripping Texas of its authority over underground natural gas facility regulation.

PHMSA responded to the petitions and said the rule established minimum federal standards and serves as a baseline for state regulations, and states are free to enact more stringent regulations.

Texas argues that it has plenty of experience within this regulatory space, as the railroad commission has regulated this type of storage for decades. The Louisiana Mid-Continent Oil and Gas Association has also argued through public comment that PHMSA should permit states to regulate by allowing them to request delegation of authority, as the EPA allows for other federal environmental regulatory regimes.

In January 2017, the associations asked PHMSA to reconsider its rule, but did not receive a response from the agency.

Environmental and Natural Resources Cases

Oil Spill Liability

- **Barge company liable for oil spill cleanup after barges collide; able to obtain contribution from third party found to be partially liable**

In re Settoon Towing, LLC, 859 F.3d 340 (5th Cir. 2017)

Settoon Towing's barge, carrying crude oil, was passing Marquette's barge by mutual agreement of the pilots. For an unclear reason, Marquette's barge initiated

a U-turn in the river and collided with Settoon's barge, which had not yet finished its pass. Settoon's barge spilled 750 barrels of oil into the Mississippi River.

Under the Oil Pollution Act (OPA), the U.S. Coast Guard targeted Settoon as the strictly liable "responsible party," and was charged with remediation and cleanup costs. After fulfilling its obligations under OPA, Settoon filed Limitation of Liability proceedings and brought a counterclaim against Marquette seeking contribution under OPA, general maritime law, or both. After a bench trial, the district court found Marquette 65% at fault and Settoon 35%. The court also determined that a responsible party is entitled to contribution for purely economic damages from a third party found to be partially liable (like Marquette). Marquette appealed both the assignment of fault and the allowance of contribution per OPA.

Marquette argued that OPA did not allow a responsible party to obtain contribution from a partially liable third party for purely economic damages. The court found that prior to OPA, maritime law clearly did not allow contribution for purely economic damages. Under OPA, however, contribution for economic losses is allowed without physical damage as long as the recovery is "due to the injury, destruction, or loss of real property, personal property, or natural resources." The court Applied the "plain meaning" rule of statutory interpretation and determined that OPA created a cause of action outside of admiralty law for contribution.

Marquette also argued that even if contribution is allowed under OPA, the district court's allocation of relative fault was in error. But the court here found no clear error in the allocation of fault and thus deferred to the district court.

Endangered Species

- **Man convicted of illegally transporting and selling endangered species**

*United States v. Seibert, 695 Fed.Appx. 746 (5th Cir. 2017) *Not selected for publication*

Seibert purchased an African leopard by auction. He then advertised it for sale on a website operated out of his ranch in Oklahoma. He then negotiated the sale of the leopard to a buyer in Texas, and physically loaded the leopard onto a truck in Oklahoma for delivery to Texas. He then asked to use another party's address (Shane Clement) in Bonham, Texas to make the sale appear legal, and created a receipt which falsely listed Clement as the seller. Seibert's employee then drove the truck

carrying the leopard from Oklahoma to Denton, Texas without stopping in Bonham. He then instructed both Clement and his employee to lie and say, if asked, that the leopard came from Clement's address in Bonham.

At trial Seibert was convicted of (1) labeling and (2) unlawfully transporting and selling an endangered species.

On appeal, Seibert's primary argument is that the jury should have found his testimony more credible than the Government's witness. The court elected not to revisit the credibility determination in light of the facts and affirmed the trial court's judgment.

- **5th Circuit denies rehearing en banc on gopher frog critical habitat designation on private forestland; U.S. Supreme Court grants *cert***

Markle Interests, LLC v. United States Fish and Wildlife Service, 848 F.3d 635 (5th Cir. 2017) Denial for a rehearing en banc in the 5th circuit; Cert granted by U.S. Supreme Court

Endangered Species Act case regarding the dusky gopher frog. A 5th circuit panel majority upheld the designation of a tract of 1,544 acres in Louisiana as "unoccupied critical habitat," thus requiring federal government approval for certain land use activities affecting the habitat.

The dusky gopher frog was listed as endangered in 2001. Critical habitat designation included land spanning several thousand acres in Mississippi and the contested 1,544-acre tract at issue here. According to the Final Designation by the Fish and Wildlife Service, the Louisiana tract (Unit 1): is uninhabitable by the dusky gopher frog; contains one of three "physical and biological features" necessary for the gopher frog habitat—five ephemeral ponds that could support reproduction; and is approximately ninety percent closed canopy loblolly pines [the other two features necessary for the habitat would require open canopied longleaf pine]. Having only one of three features necessary for gopher frog habitat, without prescribed burning and other management adjustments to create a forested habitat of longleaf pine, Unit 1 is unsuitable for the dusky gopher frog. The Service also acknowledged that the designation could result in economic impacts of up to $34 million from lost development opportunities.

Landowners brought suit alleging that because Unit 1 is uninhabitable, it is not "essential for the conservation" of the frog, and failure to consider costs and benefits

tainted the conclusion that no disproportionate impacts would result. The circuit court upheld the district court's summary judgment in favor of the Service based on: (1) current habitability being an "extra-textual limit" not imposed by the ESA; (2) a single element of the critical habitat being sufficient to merit a critical designation; and (3) the economic impact decision is unreviewable.

The dissent's response to the above determinations:

(1) Habitability is required by the ESA because a "critical habitat" must necessarily be a subset of the "habitat of such species." Habitat is defined as "the place where a plant or animal species naturally lives and grows." (Webster's Third). This definition makes it impossible for Unit 1 to be considered critical habitat, because it is not habitat at all.

(2) As an alternative to the notion that critical habitat must be a subset of actually habitable land, since Unit 1 is uninhabited all of the features need to be present in order to determine that the "area" is critical habitat. The lacking elements, therefore, are sufficient to render the area outside the scope of critical habitat designation on the logic that a designation that is not already conducive habitat must be more stringently tested than a designation within a habitat that is conducive and contains all features essential for the species to survive.

- **Plaintiffs allowed to proceed in ESA case against San Antonio Zoo for treatment of elephant**

Graham v. San Antonio Zoological Society, 261 F.Supp.3d 711 (W.D. Tex. San Antonio, 2017)

Plaintiffs alleged that the San Antonio Zoo violated Section 9 of the ESA by unlawfully "taking" an endangered species, the Asian Elephant "Lucky" (here, by "harming" or "harassing," included in the definition of "take" under the ESA). Plaintiffs alleged four bases for the alleged violation: (1) keeping her alone without any Asian elephant companions; (2) keeping her in a small enclosure which failed to meet the minimum size standard set by the Association of Zoos and Aquariums (AZA); (3) depriving her of adequate shelter from the sun; and (4) forcing her to live on a hard, unnatural, species-inappropriate substrate. Plaintiffs sought a declaration that the Zoo violated Section 9 and requested an injunction either forcing transfer or remedy of treatment.

Defendant Zoo sought to exclude the opinions of the Plaintiff's experts, Ensley (a veterinarian) and Blais (an expert on captive elephant behaviors). The Zoo also moved for summary judgment based on arguments that (1) the Animal Welfare Act (AWA) governs treatment rather than the ESA and that the AWA contains no citizen-suit provision; (2) the Zoo's conduct does not, as a matter of law, constitute harm or harassment under the ESA because it is not "gravely threatening;" (3) the Zoo's simple possession of Lucky does not violate the ESA; (4) plaintiff's requested injunctive relief is inappropriate because the ESA does not provide a forfeiture remedy; and (5) Plaintiff's claims lack factual support.

Regarding expert testimony, the court found that Ensley was qualified and therefore denied the motion to exclude his testimony from the record. The court further found that Blais' testimony was admissible to the extent that he merely observed the existence of certain conditions in Lucky based on his experience. But Blais' testimony was excluded as unreliable to the extent that he attributed causal significance to those conditions.

Regarding the substantive claims the court held, first, that the claim that the AWA governs because Lucky is in captivity fails as a matter of law. While the ESA has an exclusion for harassment claims for captive animals whose care is in line with AWA practices, no such exclusions apply to the harm element, and therefore the court must make its own compliance determination on harm. The court further rejected the Zoo's argument that avoiding harassment necessarily means avoiding harm, since certain injuries could fall outside of the scope of harassment but within the scope of harm.

The court further rejected the Zoo's claim that its conduct, as a matter of law, did not constitute harassment or harm because it was not "gravely threatening." The court noted that the "gravely threatening" language was injected into ESA analysis, without citation, by the Southern District of Florida in a case called PETA v. Miami Seaquarium (189 F.Supp.3d 1327 (S.D. Fla. 2016)) and had no basis in the AWA or the ESA.

Finally, the Zoo claimed that plaintiffs lack factual support and sufficient evidence to receive a partial summary judgment. The court found that factual questions remain regarding whether Lucky had symptoms of heat stress due to inadequate shelter from the sun and whether the quality of the soil substrate was harming Lucky. Therefore, plaintiffs can proceed with their case.

- **Plaintiff fails to obtain preliminary injunction against barge fleeting facility for endangered species impacts**

Friends of Lydia Ann Channel v. U.S. Army Corps of Engineers, 701 Fed.Appx. 352 (5th Cir. 2017)

A district court granted a preliminary injunction against a barge fleeting facility (whose construction was approved by the U.S. Army Corps of Engineers) because of the facility's alleged imminent endangerment of two turtle species. An initial suit was brought against the Army Corps for alleged violations of the ESA (and NEPA, not discussed here). The Army Corps, after being sued by Friends of Lydia Ann Channel, determined that the pilings constructed were of different specifications than those approved and were located in the wrong places. The Army Corps then suspended and revoked the facility's letter of permission and ordered the company to submit a plan to remove all structures and restore the area. The facility (LACM) intervened and Friends amended their initial complaint seeking an injunction against LACM.

To sustain a grant of a preliminary injunction, the court noted that a movant must establish (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the injury, if the injunction is denied, outweighs harm that would result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest.

Friends' ESA claims were based on improper "takes" of the two turtle species through (1) "cold stunning" that would occur when the water got below 50 degrees Fahrenheit and the turtles were too cold to properly respond to an incoming barge and (2) the inability to escape an incoming barge due to turtle dependence on feeding on moss growing on the moorings and the water being too shallow to avoid barges when feeding.

The court here determined that since the water temperature dropped below 50 degrees only four times over a nine-year period (2007-2015), and that since in each year the temperature only lowered for a few days, that "[g]iven the sporadic and unusual occurrence of this necessary condition in the Channel, it is doubtful that cold stunning by itself is either "imminent" or "reasonably certain." The court went on to say that for it to find that LACM caused a take based on cold stunning it would need to hypothesize "that (1) a turtle would have to be present in the path of a barge in the 1500-foot wide Channel; (2) the barge would have to be among the 15% of

barge traffic through the Channel that utilized LACM's facility; (3) the barge could not avoid harming the turtle; and (4) whatever protective measures were taken by LACM—from 'monitors' to shutting down barge movements—were ineffective." Thus the court found that, "[t]aken together, this series of contingencies reduces to a minimal level the chance that the facility will 'take' cold-stunned turtles."

As for the moss-feeding claim, the court determined that the testimony presented below was only sufficient to conclude that a take was merely "possible": (1) if turtles feed on moss when mooring operations are taking place; (2) if they attempt to flee by diving; and (3) if they run out of water and hit the bottom. The court described these contingencies as "quintessential speculation." The court found that, as a result, there was no reasonably certain threat of imminent harm to the endangered turtles. Because there is no substantial likelihood of success, the preliminary injunction was vacated.

Water Conservation

- **Court defers to TCEQ's inner-basin transfer and approval of water conservation plan**

Upper Trinity Regional Water Dist. v. Nat'l Wildlife Federation, 514 S.W.3d 855 (Court of Appeals of Texas, Houston, 1st district)

After approval of an inter-basin water transfer to Upper Trinity Regional Water District, the National Wildlife Federation (NWF) sued the Texas Commission on Environmental Quality (TCEQ) challenging three findings of fact from TCEQ's order granting Upper Trinity's water conservation plan. NWF challenged the findings that the plan met the requirements of the state's water and administrative codes, and that the plan's goals were reasonable and its proposed measures were adequate.

After Upper Trinity intervened, the district court found that TCEQ erred in concluding that Upper Trinity's conservation plan met the requirements of Water Code § 11.085(I)(2), which provides that the commission may grant an application for an interbasin transfer only if the applicant "has developed and implemented a water conservation plan that will result in the highest practicable levels of water conservation and efficiency achievable within the jurisdiction of the applicant." Neither "practicable" nor "achievable" are defined in the code.

TCEQ and Upper Trinity appealed. On appeal, the court considered whether substantial evidence supported TCEQ's decision to approve the water conservation plan. NWF argued that Upper Trinity needed to include in its conservation plan two alternative conservation measures; a coin operated clothes-washer rebate program and landscape irrigation restrictions. In the absence of these measures, NWF argued that Upper Trinity needed to include explanations for their omission. Upper Trinity, however, argued that there is no requirement that a particular conservation measure be adopted, but rather each conservation plan should be assessed on a case-by-case basis to determine if the plan as a whole satisfied the statute.

The court found that the common, ordinary meanings should be applied to "practicable" and "achievable." Therefore the statute does not require than an applicant's plan be measured against fixed criteria, but rather TCEQ must determine which conservation measures an applicant is capable of putting into practice and carrying out successfully. TCEQ produced testimony of an expert in water planning and permitting, who concluded that TCEQs multiple conservation efforts met the requirements of the Water Code. TCEQ also presented evidence that their conservation plan was created to adopt best practices set out by the Texas Water Development Board. Lastly, TCEQ argued that the specific measures complained of by NWF were largely out of Upper Trinity's capabilities because Upper Trinity had no power for enforcement on individual retail customers.

The court found that these elements together provided substantial evidence supporting TCEQ's decision, that its approval of the conservation plan deserved deference, and that its order was to be reinstated.

Water Quality

- **Army Corps grant of 404 permit for closing of man-made channel connecting East Bay and the Gulf of Mexico not arbitrary or capricious**

Gulf Coast Rod, Reel and Gun Club v. U.S. Army Corps of Engineers, 676 Fed.Appx. 245 (5th Cir. 2017)

The U.S. Army Corps of Engineers issued a Clean Water Act § 404 permit allowing the Texas General Land Office (GLO) to close Rollover Pass, a man-made channel cut through private property on Bolivar Peninsula connecting East Bay and the Gulf of Mexico. The channel was initially cut to allow fish and salt water to more easily

enter the bay, but increased erosion prompted the decision to close the channel. The district court granted summary judgment in favor of the Corps.

Gulf Coast Rod, Reel and Gun Club alleges that the requirements of the National Environmental Policy Act (NEPA) were not fulfilled by the Corps because the required Environmental Assessment (EA) failed to fully assess the cumulative impact that closing the pass would have on the salinity of East Bay, and the EA did not adequately consider alternatives to closing the pass.

Specifically, Gulf Coast Rod challenged the models used by the Corps and claimed that inadequate consideration was given to freshwater inflows. The Corps used seasonal, rather than daily, salinity measures to avoid local anomalies and because such measures are cheaper to attain. The Corps also allegedly did not quantify the salinity effects of an under-construction freshwater diversion planned to channel freshwater from Beaumont into East Bay. The Corps determined that the diversion, when in operation, would not have any appreciable impact on salinity. The court held that the "Corps' extensive consideration of the cumulative impact closing the pass could have on East Bay's salinity convinces us that the agency's action was not arbitrary or capricious."

Regarding practicable alternatives required under NEPA, The Corps considered six alternatives, including no-action, and rejected each because at least one of the stated objectives would not be met (including preventing erosion at Rollover Pass, eliminating sediment transport into East Bay and Rollover Bay, returning the area to its more natural salinity regime, and minimizing water quality impacts in the region).

Gulf Coast Rod argued that the Corps should have considered alternatives including the construction of jetties or the construction of a gate at the mouth of the Pass. The Corps did not consider jetties as an alternative because they would adversely impact sand distribution on the surrounding beaches. The Corps did not consider the gate option at all, and Gulf Coast Rod did not present the idea to them nor was that alternative so obvious that the Corps should have considered it. Since the Corps considered a number of alternatives, their issuance of the 404 permit was not arbitrary and capricious.

Hazardous Waste

- **City of Pasadena, Texas liable for hazardous waste cleanup**

USOR Site PRP Grp. v. A&M Contractors, Inc., 2017 BL 269165, No. 14-CV-2441 (S.D. Tex., 2017)

The Southern District of Texas ruled that Pasadena, Texas, is liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for contamination at a site where it formerly operated a wastewater treatment plant. A group of parties that settled their liability for contamination at the U.S. Oil Recovery Superfund site filed the suit against the city seeking contribution toward cleanup costs. The site is property on which the city operated the treatment plant until selling it to U.S. Oil Recovery in 2004, and an adjacent site where USOR operated a hazardous and solid waste disposal business.

The city argued that it did not dispose of hazardous substances at the site. Samples of municipal wastewater treated at the plant showed elevated levels of hazardous substances. The city conceded that wastewater spilled from its plant from 1944 to 2004 would have contained "trace" amounts of the heavy metals copper, lead and zinc, among other CERCLA hazardous substances. But the city claimed that wastewater treatment prior to the sale of its treatment plant did not involve hazardous substances and, therefore, does not create a basis for liability under CERCLA. The city further argued that the *permitted* discharges of treated wastewater occurred off-site and so were not discharges at the Superfund site, and that any spills of domestic wastewater are not "disposal" under CERCLA. The court rejected all of these claims in granting the plaintiffs' motion for summary judgment and ruled that the City's use during ownership gave rise to liability under CERCLA.

See entire ruling at http://src.bna.com/rmX.

Fisheries Management

- **Group fails in challenge to rule dividing recreational red snapper fishery into charter and private recreational groups**

Coastal Conservation Ass'n v. United States Department of Commerce, 846 F.3d 99 (5th Cir. 2017)

When a Regional Fisheries Management Council creates a fishery management plan under the Magnuson-Stevens Act (MSA) they must, among other requirements, make use of the best scientific information available and consider the "importance of the fishery resource to fishing communities by utilizing economic and social data . .

. to (a) provide for sustained participation of such communities, and (b) to the extent practicable, minimize adverse economic impacts on such communities."

The Gulf Council proposed Amendment 40 to the Reef Fish Fishery Management Plan, and the 2015 Final Rule established two categories within the recreational sector for Gulf of Mexico red snapper: a federal charter category and a private angling category. Both seasons would open on the same day and the season length would be determined for each based on its quota. The amendment was aimed at reducing overfishing by recreational fishers that occurred because of the private anglers' ability to take advantage of less restrictive state fishing seasons (as opposed to stricter standards during the federal season). Charter fishers cannot fish based upon state season timelines because they are granted a federal charter license and thus can only fish during the designated federal season.

The Coastal Conservation Association (CCA) failed in challenging the regulation at the district court level, and on appeal argued (in part) that: (1) the MSA prohibits the Gulf Council from regulating charter fishing separately from other recreational fishermen; (2) the Gulf Council and the National Marine Fisheries Service (NMFS) failed to adequately assess, specify, and analyze the likely economic and social effects of Amendment 40; and (3) the selection of data ranges used to calculate quota allocations was arbitrary and capricious and did not constitute the "best scientific information available."

Regarding the separate charter and recreational fishing quota claim the court found that it was not correct to say that individual recreational fishers had a separate quota, but rather under the rule they had a subquota, appropriate because the MSA provision "within the recreational sector" allowed for management flexibility within the larger category.

Regarding assessment of economic and social effects of Amendment 40, the court found that the MSA's requirement to put economic and social impacts within a Fishery Impact Statement (FIS) was a procedural requirement, not substantive and "that it is satisfied where NMFS produces the required assessments, without respect to their conclusions." The court found no affirmative duty to collect and generate quantitative, rather than qualitative, predictions of economic and social effects in National Standard 8 as alleged by CCA.

Further, regarding the "best scientific information available," CCA argued that the Secretary should have used additional quantitative economic analysis in determining

private-vessel fishery impacts. However, the word "available" does not contemplate analysis of unpredictable and unavailable data, as the agency argued was the case for private, non-charter vessels. The court deferred to the Agency.

The court also found that the Agency need not "acquire or produce" the CCA's preferred quantitative data. The Agency was under no obligation to produce further data when the Secretary possesses some, albeit incomplete, scientific information.

Finally CCA objected to the Agency's decision to base recreational allocations on data dating back to 1986. The court found that it was ok for the agency to do so, given its rational justification of wanting to establish a historical baseline.

The court affirmed the lower court.

Energy Cases

Oil and Gas Drilling

- **Energy company that should have known lease was void liable for trespass**

XTO Energy Inc. v. Goodwin, 2017 WL 4675136 (Tex. App. Tyler, 2017)

XTO took over a lease, the agreement for which contained an error regarding Goodwin's ownership interest in minerals. XTO was aware of the mistake, but took the position that it did not void the lease. XTO developed wells pursuant to the lease terms, paid Goodwin royalties for doing so, but also drilled beneath Goodwin's property without permission. XTO was found liable and a jury awarded damages to Goodwin for over $2 million for (1) trespass, (2) bad faith trespass, (3) bad faith pooling, and (4) conversion.

XTO appealed on a number of issues. Most significantly, XTO argued that Goodwin did not have a legally protected ownership interest in the subsurface two miles below the surface of his property sufficient to support a trespass cause of action. The court found that there is no limitation on the surface owner's interest in the subsurface, that the surface owner's rights to the underlying earth do not end at some specific depth below the surface (citing Lightning Oil Co. v. Anadarko, 520 S.W.3d 39 (Tex. 2017)).

XTO also argued that Goodwin was not entitled to bad faith pooling damages because if the lease was invalid, then any entitlements Goodwin had to production proceeds from wells not drilled on his property were nullified. In other words, because Goodwin's tracts could not legally have been pooled in the first place, XTO argued it could not have pooled them in bad faith. The court found that to be liable for bad faith pooling, an operator must have the contractual authority to pool before it can breach the implied duty of fairness and good faith as to non-producing tracts in the exercise of its pooling powers.

XTO further claimed that Goodwin was unjustly enriched since he received royalty payments for a time. The court found that the voluntary payment rule precluded XTO's claim of unjust enrichment (based on payment of royalties to Goodwin) since XTO had all relevant information to determine that the lease was void.

- **Mineral estate lessee not liable for trespass or tortuous interference to adjacent mineral estate holder for drilling through adjacent mineral estate**

Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39 (Tex. 2017)

The State of Texas is a land and mineral owner in the Chaparral Wildlife Management Area. A mineral lease specified that "drilling locations will be established off the Chaparral . . . when prudent and feasible." Anadarko, the mineral lessee for the area underlying the Chaparral, entered into an agreement with adjacent landowners to place a well on their property (Briscoe Ranch) rather than on the Wildlife Management Area. Specifically, Anadarko and Briscoe Ranch had a Surface Use and Subsurface Easement Agreement authorizing Anadarko to locate wells on the surface, drill through the subsurface, and use the wells to produce minerals from beneath the Chaparral. Lightning Oil Co. leased the severed mineral interests underlying Briscoe Ranch and brought an action against Anadarko for trespass on their mineral estate and tortious interference with contract for interfering with the mineral lease. Lightning also sought a temporary restraining order and an injunction prohibiting Anadarko from drilling on the Ranch.

The district court granted Anadarko's summary judgment motion as to the claims for trespass on the mineral estate and claims for injunctive relief. The court of appeals affirmed.

In this case, the Texas Supreme Court held that the preliminary question in determining whether or not there is a trespass or a tortious interference is "whether a lessee's rights in the mineral estate include the right to preclude a surface owner or an adjacent lessee's activities that are not intended to capture the lessee's minerals, but rather are intended only to traverse . . . the formations in which the lessee's minerals are located." The court held that the loss of minerals that Lightning would suffer by a well being drilled from the surface through its mineral estate by Anadarko for purposes of reaching minerals under an adjacent property was not a sufficient injury to support a claim for trespass. The court held that "ownership of property does not necessarily include the right to exclude every invasion . . . based on . . . rights attached to the ownership." The court acknowledges that boring a hole through the mineral estate necessarily constitutes removing the amount of mineral bearing material that is displaced by the diameter of the pipe itself, but that whether such removal constitutes trespass is determined by balancing the interests of society and the interests of the oil and gas industry as a whole against the interest of the individual operator. The court then determines that the societal interests promoted by having fewer well-sites outweighs the mineral estate holder's interests in maintaining a trespass claim for the removal of the miniscule amount of available mineral converted.

Regarding tortious interference—which is when a party interferes with a contract willfully and intentionally and the interference proximately causes actual damages or loss—the court found that the defendant was only exercising its own contractual rights (so, no tortious interference).

Mineral Interest Determinations

- **"All of [the] right, title, and interest in" Property Under Will Includes Both Surface and Mineral Rights**

ConocoPhillips Co. v. Ramirez, 534 S.W.3d 490 (Tex. App. San Antonio, 2017)

Grandchildren took property under a will which stated that they took "all of [the] right, title, and interest in and to Ranch 'Las Piedras'." The question is whether that included only testator's ½ interest in the surface estate of Las Piedras Ranch or also include testator's ¼ mineral interest in Las Piedras Ranch.

In this case the appeals court agreed with the trial court and held that the meaning of the phrase could be ascertained according to the plain language of the will within

its four corners. Therefore, use of extrinsic evidence (as suggested by ConocoPhillips) was inappropriate. The failure to expressly include mineral interests in the grant was not sufficient evidence to overcome the presumption that unlimited language contains all rights, both mineral and surface.

The court's ruling resulted in a determination that oil and gas leases with ConocoPhillips that were signed by other owners were not binding on the grandchildren's mineral interest and that they were entitled to a cotenancy accounting and attorney fees.

Mineral Lease Interpretations

- **Shut-in provision regarding "wells capable of producing gas" valid for well purportedly incapable of production; keeps lease alive**

BP American Production Co. v. Red Deer Resources, LLC, 526 S.W.3d 389 (Tex. 2017)

BP owned an oil and gas lease covering approximately 2,113 acres in Lipscomb and Hemphill Counties, Texas (the Vera Murray lease). The lease originated in 1962, and BP has owned and operated the lease since 2000. The lease had a five-year primary term and lasts "as long thereafter as oil, gas or other minerals is produced." In 1986, the lessee drilled three wells, including the Vera Murray # 11. Production from #11 had declined to less than 100 Mcf per day when BP acquired the lease in 2000. By 2009, production had declined to less than 10 Mcf per day. Red Deer Resources, LLC discovered the low production from the Vera Murray lease and obtained top leases in June 2011. The top leases contain an assignment provision giving Red Deer the right to file suit to terminate BP's lease. In July 2011, Red Deer notified BP of its top leases, asserting that BP's wells were "non-commercial."

Starting June 4, #11 went eight days with no production. On June 12, 2012 BP shut in #11, and it became the only well that could have sustained the lease at that point in time. On June 13, BP sent notice to the lessors that it was invoking the shut-in royalty clause, enclosing checks for the shut-in royalty owed. On the shut-in royalty checks, BP designated June 13, 2012, as the beginning of the shut-in period. The #11 remained shut in since that point in time.

The shut-in royalty clause read, in relevant part:

> Where gas from any well or wells *capable of producing gas* … is not sold or used during or after the primary term and this lease is not otherwise

> maintained in effect, lessee may pay or tender as shut-in royalty…, payable annually on or before the end of each twelve month period during which such gas is not sold or used and this lease is not otherwise maintained in force, and if such shut-in royalty is so paid or tendered … it shall be considered that gas is being produced in paying quantities, and this lease shall remain in force during each twelve-month period for which shut-in royalty is so paid or tendered …. (emphasis added)

Red Deer sued BP in August 2012, more than sixty days after BP shut in #11, and asked the trial court to declare that BP's lease had terminated. Red Deer argued that: (1) BP's lease had terminated because the lease had not produced in paying quantities since June 12, 2012; and (2) the shut-in clause did not save it because #11 was incapable of producing in paying quantities on June 13, 2012.

At trial, a jury found that BP's lease had lapsed and terminated it because #11 was incapable of producing in paying quantities June 13, 2012, and that a reasonably prudent operator would not continue to operate the well.

The Texas Supreme Court interpreted the unambiguous shut-in clause to provide BP "the right to maintain the lease upon payment of an annual shut-in royalty within a year after the last day gas is 'sold or used' from a well capable of producing gas." The record supported that gas was last sold or used on June 4, 2012, making June 4 the proper date from which to determine whether BP complied with the shut-in clause. The facts further supported that Red Deer was not able to prove that the well was not capable of producing in paying quantities on June 4th, the last day that gas was "sold or used." Because BP tendered the shut-in royalty payments prior to June 4, 2013—one year after the well was shut in—the lease remained in force.

Land Use Cases

Historic Districts

- **Board of Adjustments approval of renovation of residence considered "rehabilitation," "restoration," or "alteration" of structure, not "demolition"**

Five Aces v. River Road Neighborhood Assc., 534 S.W.3d 598 (Court of Appeals of Texas, San Antonio, 2017)

San Antonio's Historic and Design Review Commission (HDRC) and Board of Adjustment (BOA) approved a proposed project to renovate a historic residence and construct a new six-unit apartment complex within the River Road Historic District. The BOA issued a Certificate of Appropriateness (COA) to Five Aces.

The River Road Neighborhood Association (RRNA) sought judicial review of the approval in district court and were granted summary judgment, the district court finding that BOA abused their discretion, reversing the BOA's decision and withdrawing the COA.

The BOA had approved a renovation of the existing structure, including removal of later-added (non-original) elements to the home, such as additional porches, a patio, a rear addition, and a swimming pool.

The RRNA argued that removal of these items, aimed at restoring the building to its period specific architectural elements, constituted "demolition" as defined in the Unified Development Code (UDC) and thereby required subsequent applications and approvals. The BOA claimed, rather, that the project was correctly approved as a "rehabilitation," "restoration," or "alteration" requiring no additional permitting. The BOA asserted that the UDC definitions of restoration and rehabilitation "contemplate structural changes to historic buildings by removal of later work."

The UDC defined demolition as "any act or process that destroys or razes in whole or in part . . . a building, object, site or structure . . . located within a historic district."

The court noted that deference is warranted so long as the board's reasoning is reasonable and does not contradict the statutory authority's plain language. The court agreed with the BOA that the definitions of "restoration," "rehabilitation," and "alteration" all included removal of certain elements of structures as a means to the end of an overall restoration or rehabilitation process rather than "demolition," which refers to removal as the end itself. The court found that the plaintiff's focus on the word "demolition" "does not comport with statutory construction principles which require interpreting a provision within the larger context" of the statute.

Eminent Domain

- **CO2 pipeline allowed to engage in eminent domain as long as demonstrating a reasonable probability of serving the public**

Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners LTD, 510 S.W.3d 909 (Tex. 2017)

Landowners (Rice) refused to allow Denbury Green Pipeline access to Rice's property to survey for and construct a CO2 pipeline. Denbury Green then obtained a common-carrier permit, invoked eminent domain, and entered upon the land and eventually built the pipeline.

In an earlier case involving the parties before the Texas Supreme Court, the court held that to qualify as a common carrier with the power of eminent domain, the pipeline must serve the public and could not be built only for the builder's exclusive use. The court found that there must be more than a possibility, but rather a reasonable probability, that the pipeline would serve the public.

Under the evidence as presented here, Denbury had conclusively established that there was a reasonable probability that at some point after construction, the pipeline would serve the public.

The appeals court incorrectly focused on Denbury's intent at the time of application to determine that the pipeline would not serve a public purpose (evidence at the time of application indicated that Denbury planned to use pipeline only for its tertiary recovery operations). The court here found that the law does not require intent that the pipeline be put to public use, but only that evidence be presented demonstrating that the pipeline has a reasonable probability of public use. Here, Denbury had post-construction contracts which could be used to show a reasonable probability that at some point after construction a pipeline would serve the public. These contracts demonstrated that there were specific, identified potential customers who owned CO2 near the pipeline's route.

The appeals court also erroneously required that the reasonably probable future use serve a "substantial public interest." The court here says this is the wrong standard and that serving even one customer unaffiliated with the pipeline owner is substantial enough to satisfy public use.

- **Jury award of damages for condemnation proceeding upheld**

State v. Speedway Grapevine, 536 S.W.3d 858 (Court of Appeals of Texas, Fort Worth, 2017)

Speedway operated an automated carwash and the state filed a petition to condemn a portion of Speedway's property, a strip of land at the southern end of Speedway's

carwash business adjacent to FM 2499. After failing to come to an agreement, Texas filed a petition to condemn and a trial court appointed special commissioners who awarded damages of $954,285. The state filed an objection, deposited the money, and took possession of the property and started construction. Speedway brought suit.

After expert testimony from both sides, the jury found that the part condemned had a market value of $92,190 and that Speedway's remainder property sustained damages of $4,401,028. After adjusting for the $954,285 already paid by the state, the judgment was entered against the state for $3,538,933. The state appealed, challenging admission of Speedway's expert testimony and the jury's damages calculation.

Specifically, the state argued that Speedway's expert relied on unproven values of other allegedly comparable car wash sales in his valuation. The court found, however, that his testimony as a whole provided a reasonable factual basis for his opinion, and so the district court did not clearly err in allowing his testimony.

The state also challenged the fact that Speedway's expert appraisal of damages was based off of the difference between the highest and best use of the property and the likely new value after the condemnation, even though the new purpose for which the value was calculated had not come to pass. Texas challenged McRoberts' claim that a carwash would no longer be workable by pointing to the fact that the site still functioned as a carwash—but the court noted that the fact that the demolition did not commence did not make the calculations erroneous when presented to the jury. The court noted that the decision regarding which evidence to accept and reject is the task of the jury.

Finally, the court found that the jury's damages assessment was within the proper range when considering the expert testimony presented by both Speedway and the State. Judgment affirmed.

- **Pipeline company condemnation of ranchland upheld**

Boerschig v. Trans-Pecos Pipeline, 872 F.3d 701 (5th Cir., 2017)

Trans-Pecos exercised their authority as a natural gas utility to condemn land for public use, initiating a condemnation proceeding to obtain a 50-foot wide permanent right-of-way and easement on Boerschig's ranch. Boerschig contends that by ceding

condemnation power to a private company, Texas eminent domain law offends his due process rights under the private non-delegation doctrine of the 14th amendment.

The federal district court refused to enjoin the condemnation proceeding, which it stated would violate the federal Anti-Injunction Act's prohibition on federal courts enjoining ongoing state proceedings. Boerschig appealed. The pipeline was completed before the appeal was heard, prompting Trans-Pecos to request dismissal of the injunction request for mootness.

The court held that since the defendant was on notice that the request for injunctive relief was ongoing that the plaintiff was not deprived of appellate review simply because the action was complete. The court held that it could order the land returned to its pre-condemnation state and therefore the claim was not moot.

In considering whether the injunction should have been issued, the court noted that the ultimate question was whether a plaintiff would succeed on the merits. The court took up the constitutional question. Eminent domain law is long-settled that due process does not require that Texas afford Boerschig a court hearing before his land is taken. The U.S. Supreme Court has repeatedly upheld such "quick takings" without a prior hearing as consistent with due process.

Boerschig's other claim, that the Texas laws constitute unconstitutional delegation of power to private entities, is a seldom-used legal point, but "its continuing force is generally accepted." The court here summarizes the key principle of non-delegation: "when private parties have the unrestrained ability to decide whether another citizen's property rights can be restricted, any resulting deprivation happens without process of law."

The court looks to the facts that (1) a standard is set requiring "public use" or "necessity" and (2) a utility's assessment of whether the public necessity standard has been satisfied is subject to judicial review as dispositive evidence that the Texas eminent domain doctrine does not violate the non-delegation doctrine of the 14th amendment. The district court decision was affirmed.