

2018 Developments in Texas Environmental, Energy, Natural Resources, and Land Use Law

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Administrative Actions, Private Initiatives, Settlements, and Pending Litigation

Air Pollution

- **EPA decision allows states more freedom to write off foreign emissions; may impact localized pollution**

States that marginally exceed federal ozone standards (the lowest category of violation under the Clean Air Act) will now be allowed to write off international sources of pollution to show compliance, without first demonstrating that they have taken all possible steps to control local pollution sources. The EPA's decision means that local areas in violation, such as Yuma, Arizona and San Antonio, Texas will not need to take additional steps to control ozone pollution—if they can collect data necessary to demonstrate that foreign sources of pollution are primarily responsible for violations. Dallas-Forth Worth and Houston-Galveston may also have less work to do to curb ozone, as they have also been found in marginal violation of federal standards.

Read more about the decision here:

https://www.epa.gov/sites/production/files/2018-11/documents/2015_ozone_srr_final_preamble_20181101.pdf

- **BASF chemical leak overlooked, subject to fines and monitoring improvement requirements**

From Sept. 25, 2015, to July 11, 2016, BASF's plant in Nederland, Texas leaked acrolein, acrylic acid, formaldehyde, propane, and propylene. Exposure to some of these chemicals can irritate the skin, eyes, nose, and throat, and sufficient levels of exposure may cause some types of cancers. The leaks were caused by damage to the heat exchanger at the plant, which incinerates byproducts from the oxidation of propylene to produce acrylic acid. BASF first reported the incident on July 14, 2016, but regulators found that the company could have identified the leak when the company shut down the plant for cleaning in April 2016.

BASF faces \$142,063 in fines by the Texas Commission on Environmental Quality, and, commission members will consider an enforcement order requiring BASF to submit an action plan to address the emission of 66,878 pounds of chemicals during

an eight-month stretch at the company's Freeport, Texas, plant near Houston. BASF has also installed monitoring technology to ensure a similar incident will not occur in the future. Commissioners will consider the enforcement order at their Aug. 22 meeting, where they will vote to approve or reject the fine and proposed remedies, remand the order without voting on it, or to continue the item to a future agenda, an agency spokesperson told Bloomberg Environment.

▪ **Houston wants a greater share of VW emissions settlement funds**

The Texas Commission on Environmental Quality regulators allotted Texas cities \$209 million from the Volkswagen diesel emissions cheating scandal settlement. Houston-Galveston-Brazoria is slated to receive only \$27.4 million (or 13%) of those funds, despite the fact that nearly 25% of Volkswagen's vehicles with illegal defeat devices were registered in the area. El Paso will receive nearly the same amount as the Houston area, even though the Houston area has 12 times the number of vehicles registered with emissions defeat devices as El Paso. The funds will be used by counties and cities for pollution reduction efforts on a first-come, first-served grant process. Houston mayor Sylvester Turner has argued that the plan's requirement that cities provide a 40% local match is difficult for smaller local governments to fulfill since budgets have been maxed out in attempts to recover from hurricane Harvey. Turner believes a greater share to Houston would better benefit more people suffering worse air pollution than other regions. Under an alternative plan proposed by the Regional Transportation Council of the North Central Texas Council of Governments, Houston would receive \$58.9 million, North Texas cities (including Dallas/Fort Worth), \$63 million, Austin \$32.8 million, San Antonio \$27.4 million, and El Paso and surrounding cities \$5.8 million (San Antonio is currently set to receive \$73.6 million).

For more information from the draft plan, see: <https://www.tceq.texas.gov/assets/public/implementation/air/terp/VW/RG-537-Draft-for-Public-Review-180801.pdf>

For the Regional Transportation Council of the North Central Texas Council of Governments plan, see:

https://www.tceq.texas.gov/assets/public/implementation/air/terp/VW/VW%20Comments/VW-02-004_NCTCOG_RTC_Redacted.pdf

Electricity Generation

▪ **Exxon purchases wind and solar power in Texas**

In what is the largest ever renewable power contract signed by an oil company, Exxon has signed 12-year contracts to buy 500 megawatts of wind and solar power for the Permian Basin. Exxon had recently been sued by investors who alleged the company downplayed the risk of climate change. Costs for wind and solar have become competitive enough to compete with fossil fuels. Half of the power Exxon will buy will come from the Sage Draw wind farm, which will be completed by 2020.

Hazardous Waste

▪ **EPA designates new Texas sites for hazardous waste cleanup**

U.S. EPA has listed three new Texas sites on its National Priorities List (NPL)—the agency’s program for cleaning up hazardous waste under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The sites are Lane Plating Works, Inc. (Dallas), River City Metal Finishing (San Antonio), and Delfasco Forge (Grand Prairie). The Delfasco Forge site is among the first to be listed as contaminated solely based upon vapors rising into indoor air from chemicals in groundwater and soil (a process known as “vapor intrusion”). Delfasco was home to a munitions manufacturing plant and forge until 1998. Soil and groundwater at the site are contaminated with chlorinated solvents. EPA has identified more than 1,000 sites that have potential or confirmed vapor intrusion contamination, but not all would be suitable candidates for listing on the NPL. Vapor intrusion was only recently added to the list of ways a site can be added to the NPL.

For further information, see: <https://semspub.epa.gov/work/HQ/197226.pdf> and <https://semspub.epa.gov/work/HQ/197359.pdf>

▪ **Dupont fined for illegal hazardous waste releases**

In February 2011 Dupont spilled 18,570 pounds of benzene and nitrobenzene into a ditch near its facility in Nederland, Texas. Benzene gases can cause drowsiness, dizziness, headaches, as well as eye, skin, and respiratory tract irritation. The company also spilled 20,500 pounds of “corrosive waste” and more than 48 pounds of benzene and nitrobenzene into the Neches River, which flows into the Gulf of Mexico. The Texas Commission on Environmental Quality fined DuPont \$171,882

for failing to prevent the releases. The spills were categorized as “multimedia violations” because the releases affected the soil, water, and air. In total, the company was cited for 19 violations between February 2011 and February 2014.

To see the citation, see:

https://www.tceq.texas.gov/assets/public/comm_exec/agendas/comm/backup/Agendas/2018/08-22-2018/0506MLM.pdf

Coal Ash Regulation

- **Texas pushes to take over coal ash regulation from federal government**

In 2016, the Water Infrastructure Improvements for the Nation Act was passed, allowing states to assume coal ash regulation as long as state standards are at least as protective as federal requirements. Coal ash, a byproduct of burning coal, contains toxic pollutants like mercury, cadmium, and arsenic. Texas burns more coal for electricity than any other U.S. state. Coal ash is used in Texas as a component of Portland cement, a construction material. The Texas DOT also requires that fly ash (a component of coal ash) be used in highway pavement.

Oklahoma was the first state to take over coal ash regulations in the summer of 2018. The Texas Commission on Environmental Quality (TCEQ) is currently planning to publish and receive comments on the state’s own coal ash regulations, which U.S. EPA must approve. EPA may take up consideration in fall 2019.

Endangered Species

- **Texas weakens protections for species threatened by fracking**

Texas has discontinued its current protection plan for the dunes sagebrush lizard and has submitted a Candidate Conservation Agreement with Assurances (CCAA) plan for the lizard to the U.S. National Fish and Wildlife service for approval. The new plan was developed with the input of oil and gas industry, the service, and landowners participating in the current conservation plan for the lizard. The goal of the previous and current plan is to prevent the lizard from becoming federally listed as threatened or endangered. The state cited protection of economic and industrial interests as a motivation for developing the new plan. Environmental groups have petitioned US FWS to list the lizard under the Endangered Species Act, but FWS

has not yet acted. If the lizard were listed under the ESA, more stringent limitations would be placed on fracking activities.

For more on the plan, see: <https://comptroller.texas.gov/programs/species-economy/cca.php>

Environmental and Natural Resources Cases

Air Pollution

- **Texas environmental groups settle lawsuit with Pasadena refining**

Sierra Club v. Pasadena Refining Sys. Inc., S.D. Tex., No. 4:17-cv-660, 07/26/18

Environment Texas and the Sierra Club's Lone Star Chapter filed a lawsuit in March 2017 in the U.S. District Court for the Southern District of Texas, alleging that Pasadena Refining violated emissions limits thousands of times during a five-year period at its aging refinery in Pasadena, Texas. In 2016, the company released 70,129 pounds of illegal particulate matter from a unit that refines petroleum into gasoline, making it the worst in the state for this form of pollution. Exposure to particulate matter decreases life expectancy and aggravates asthma.

The environmental groups proposed a settlement and consent decree, which requires Pasadena Refining to pay \$3.175 million to the Houston-Galveston Area Council to create a fund providing grants to school districts and local governments in southeast Harris County. These grants will be used to convert school buses and municipal vehicles to electric or hybrid models or build infrastructure to support electric vehicles. Pasadena Refining will pay the remaining \$350,000 to the EPA. Pasadena Refining agreed to install new pollution control equipment, engage in preventative maintenance, and more thoroughly investigate emissions events. The company also will make operational changes to reduce emissions, upgrade and enhance existing plans to minimize flaring events, control emissions brought on by hurricanes and electrical grid failure, and develop and implement a plan to document, respond to, and investigate complaints from local residents about odors or other emissions.

This is the fourth successful case filed by Environment Texas and the Sierra Club directed at Houston's ship channel for violations of emission regulations.

To review the proposed consent decree, see:

https://www.bloomberglaw.com/public/desktop/document/Sierra_Club_Lone_Star_Chapter_et_al_v_Pasadena_Refining_System_In/1?1556295466

- **A Clean Air Act claim timely filed in court should not be dismissed because plaintiff failed to serve the TCEQ within statutory period for filing petition**

AC Interests v. TCEQ, 543 S.W.3d 703 (Tex. 2018)

AC Interests asked TCEQ to certify its Emission Reduction Credits (ERCs) under the Clean Air Act (CAA). TCEQ reviewed and denied the application. As was their right, AC Interest filed a petition in Travis County District Court within the 30-day filing window after an adverse decision. AC Interest hand delivered a copy of their petition to TCEQ a few days after filing. But AC Interests did not formally serve TCEQ within the 30-day service window from the time the petition was filed. Notably, the citation was served 58 days after the adverse decision, within the 60 days total permitted under the statute (30 days to file and another 30 days to serve). TCEQ moved to dismiss on the basis that it hadn't been served within 30 days of the petition being filed.

AC Interests argued alternatively that (i) the Texas Clean Air Act 30-day service requirement did not apply to them and (ii) that even if it did, the 30 days were not mandatory nor a legitimate basis for dismissal.

AC Interests argued that the service deadline is directory rather than mandatory and that the statute's essential purpose was complied with through the hand-delivery of the petition two days after it was filed. Texas precedence states that "statutory provisions that are included for the purpose of promoting the proper, orderly and prompt conduct of business are not generally construed as mandatory, particularly when the failure to comply will not prejudice the rights of the interested parties. Moreover, a timing provision that requires performing an act within a certain time but does not specify the consequences for noncompliance is generally construed as directory." The court noted, however, that "the lack of a stated consequence cannot be interpreted to defeat a statute's essential purpose."

AC Interests therefore argued that it was in substantial compliance with the act. TCEQ responded that the language and purpose of the statute clearly indicate that the service time requirement is mandatory. "The statute states that 'service of citation must be accomplished within 30 days.'" The court, however, interpreted

the language of the statute to mean “shall” occur within 30 days from the date the petition is filed. The court noted that the ‘fundamental rule’ for determining whether a statutory provision is mandatory or directory “is to ascertain and give effect to the legislative intent.”

After acknowledging that “shall” and “must” are typically treated as mandatory, the Court noted that failure to inquire as to the context of the statutes in which those terms are found can lead to inappropriate outcomes. “The issue is not whether shall is mandatory, but what consequences follow a failure to comply.” The Court thus looks for a non-compliance penalty: “If a provision requires that an act be performed within a certain time without any words restraining the act’s performance after that time, the timing provision is usually directory.”

The Court considered the petition requirement and the service requirement together. The petition requirement states that one “may appeal by filing a petition.” This necessitates that one may not appeal without filing a petition. There is no similar consequence tied to the failure to timely serve. Although the word “must” is used, “[t]he statutory provision at issue here does not state a consequence and, importantly, no consequence is logically necessary.”

The Court noted that had service never been made—the failure to satisfy a condition precedent—there would be grounds for dismissal. But since service was eventually made, the condition was satisfied, albeit late, and thus the prohibition on continuing the appeal should be lifted: “...AC Interests did serve citation on the TCEQ. What AC Interests did not do was serve citation within the statute’s 30-day deadline. AC Interests did not fail to meet a constitutional or jurisdictional requirement; it failed to meet a statutory one. Thus, we cannot conclude that failing to meet this statutory requirement implicates due-process concerns or deprives a court of subject-matter jurisdiction.”

The Court went on to note that “presuming that the provision here is mandatory requires us to create a statutory consequence for noncompliance, which is the Legislature’s job, not ours. Interpreting such a provision as directory avoids this problem.” Further, the statute permits a case to remain open, after the filing and service, for up to one year with no action from plaintiff. The Court reads that to mean that expeditious litigation is not so important that the 30-day window for service should be read to require dismissal for non-compliance.

The dissent argued that the word “must” clearly means what it says, establishing a condition precedent to continuing the action. The dissent also looks to the context of the statute and the statute’s purpose—which is to expedite claims related to adverse rulings. The strict time limits imposed are enacted to carry out the purpose and should not be treated as directory when the language clearly indicates otherwise.

Water Conservation

- **U.S. Supreme Court rules that federal government may join Texas’ lawsuit against New Mexico over Rio Grande River water**

Texas v. New Mexico, U.S., No. 220141, 03/05/2018

In a unanimous decision authored by Justice Neil Gorsuch, the U.S. Supreme Court has ruled that the U.S. government can join Texas’ lawsuit against New Mexico over water rights from the Rio Grande River, since the dispute is likely to include Mexico. Texas claims that New Mexico is violating a longstanding agreement by allowing its farmers to extract groundwater from the Rio Grande basin before it reaches the Texas border. New Mexico’s action might also make it more difficult to comply with a treaty that allocates Rio Grande water to Mexico.

To review the case, see:

https://www.supremecourt.gov/opinions/17pdf/141orig_f204.pdf

Water Quality

- **Corporate officer remains personally liable for violation of Texas Water Code after U.S. Supreme Court cert denied**

Morello v. Texas, U.S., 547 S.W.3d 881 (Tex. 2018) (cert denied)

Bernard Morello, who formed White Lion Holdings LLC to own and hold title to contaminated property, failed to comply with a state permit and compliance plan to address hazardous waste on site. Morello failed to provide financial assurance, and actually removed groundwater recovery and wastewater treatment systems. The state sued and sought \$50 per day in civil penalties, ultimately holding Morello liable for \$367,000 in penalties. Under the Texas Water Code, violators face up to \$25,000 per day in civil penalties. The Texas Supreme Court found that the Texas Water Code applies to individuals as well as businesses, and when an environmental regulation applies to a “person,” corporate officers face the same liability as if he or

she personally participated in wrongful conduct. They rejected the argument that a sole corporate officer may only be held liable if he or she committed tortious or fraudulent acts.

To review the case, visit: <http://src.bna.com/DIS>

Petition for Writ of Certiorari: <http://src.bna.com/DIV>

- **City of Austin forced to pay civil fine, but no injunction granted, for sediment depositions into the Colorado River**

Kleinman v. City of Austin, 310 F.Supp.3d 770 (W.D. Texas 2018)

Plaintiffs sued the City of Austin for allegedly discharging pollutants (sediment) into the Colorado River via the bed and banks of a channel running through a city park in violation of the Clean Water Act. Country Club Creek West runs through Roy G. Guerrero Colorado River Park and empties into the Colorado River. The creek was formed when prior developers had built streams/channels which eventually stopped about 1,000 feet from the river. But the force of the water in the streams combined with the sandy soil constituting where the man-made channels stopped eventually caused them to extend to the river and become Country Club Creek West. The grade of the creek is much steeper than the sandy soils can handle and thus enough sediment has deposited into the river to create a visible sandbar across the river from plaintiff Kleinman's backyard.

The City made a few efforts at remedying the problem but to no avail. There is now a \$12.5 million-dollar plan in place to create discreet concrete steps-down in the stream with slacking areas along the way to prevent any more sediment runoff.

Kleinman brought suit and was found to have standing because: 1) he had suffered a concrete, particularized, actual injury in fact. Importantly, the court noted that aesthetic and recreational injuries are injuries in fact under the CWA; 2) the injury was fairly traceable to defendant's challenged conduct, since the City was found to have "(i) discharged some pollutant in concentrations greater than allowed by its permit (ii) into a waterway in which the plaintiff has an interest that is or may be adversely affected by the pollutant and (iii) the pollutant has caused or contributed to the kind of injuries alleged by the plaintiff"; and 3) the injury was likely to be redressed by a decision in the plaintiff's favor.

The City argued that it acted in compliance with its permit for the discharge. The City has a permit that authorizes discharge of storm water and pollutants from the Municipal Separate Storm Sewer System (MS4) (issued by the TCEQ; the MS4 Permit). The permit requires that the city “adopt minimum control measures to reduce erosion to the maximum extent practicable.” The City interpreted the MS4 Permit to excuse discharges caused by “acts of God” such as flooding.

But the court noted this is not the only standard required by the MS4 permit. The permit requires that the City develop and implement a Storm Water Management Plan (SWMP) which is to “include controls necessary to reduce the discharge of pollutants from the MS4 to the maximum extent practicable.” Part of the implementation of the SWMP is the City’s Environmental Criteria Manual (ECM), which has a policy to “minimize the erosion and transport of soil . . . [etc].” The ECM “requires the City to retrieve sediment carried offsite from construction sites after rain events and prohibits the release of excessive amounts of sediment in storm water runoff.” The court found that “the substantial ongoing erosion of sediment resulting from the City’s construction of the Channel does not comply with these requirements and thus takes the City outside of the compliance with its MS4 permit.”

As for the force majeure defense, the City’s conduct outside of periodic flood events has also resulted in pollutant discharge and thus did not permit an application of the defense. Because Kleinman had proven an ongoing discharge of a pollutant from a point source into navigable waters of the United States, and no defenses were available, the City violated the CWA.

Regarding relief, however, the court found that an injunction was improper and a nominal civil penalty was appropriate. The court denied injunctive relief, noting that the sandbar was present prior to the City’s conduct. The City had not developed the original channel that terminated 1,000 feet from the river and the City has taken appropriate actions to substantially reduce erosion in the Channel. Further, the court found that the injunction is not in the public interest. The CWA’s purpose is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” No evidence supported the plaintiff’s claim that ongoing sedimentary discharge was detrimental to human health. Nor had any evidence supported a contention that the river’s ecosystem had been negatively affected. “The harm” is thus “personal to Kleinman” and the “public interest is not served by imposing costly oversight on the court and on the City solely to vindicate Kleinman’s

aesthetic concerns. That is especially true when the City is currently undertaking substantial and costly measures to address the ongoing discharge.”

The CWA does not provide a specific means to arrive at an appropriate civil penalty. The court discussed the “top-down” approach and the “bottom-up” approach used in other courts. Top-down starts with calculating the maximum penalty and reducing it according to CWA mitigating factors (33 U.S.C. § 1319(d)). The bottom-up approach calculates the economic benefit resulting from the violation and uses the remaining mitigating factors to adjust the figure up or down. The court rejects the top-down approach in the instant case because of the difficulty required in determining a maximum penalty (because discharge is only periodic rather than continuous with no records or evidence produced as to the actual amount of discharge).

After opting for the bottom-up approach, the court sought to determine the reasonably approximated amount required to mitigate the erosion. The court used the \$12.5 million City plan for reference. The court then considered the 1319(d) factors, finding: (1) the violation was not very “serious” because no detrimental effects had resulted; (2) there was not a substantial history of the City causing or exacerbating sedimentary erosion into navigable waters; (3) the City had made good faith efforts to comply with the CWA; (4) the \$12.5 million mitigation cost would not be “ruinous or otherwise disabling” to the city; and (5) justice required consideration of additional factors such as (i) the city did not bear sole responsibility, (ii) a civil penalty did not serve the same purpose when levied against a state actor as it does when against a private actor, and (iii) a civil penalty against the City would not serve to disincentivize illegal but profitable pollution because the City had no motive to exacerbate the erosion.

After considering the foregoing factors in relation to the \$12.5 million mitigation cost, the court assessed a penalty of \$25,000 on the City of Austin.

▪ **Tug pushing barge that spilled oil in Mississippi River found to be an “operator” under Oil Pollution Act**

U.S. v. Nature’s Way Marine, 904 F.3d 416 (5th Cir. 2018)

Nature’s Way owned a tug that was pushing two oil barges (“dumb” barges—no self-propulsion) down the Mississippi River. One of the barges struck a bridge and 7,000 gallons of oil spilled into the Mississippi River. Nature’s Way spent \$2.99 million on clean up (while government agencies spent nearly \$800,000) and sought

reimbursement from the National Pollution Funds Center (NPFC) on the grounds that its liability should be limited per the tonnage of the tugboat, not of the vessel plus the barges and that it was not an “operator” under the meaning of the Oil Pollution Act (OPA). The government sought reimbursement for agency expenditures.

A “responsible party” under OPA is “any person owning, operating, or demise chartering the vessel.” There is no further definition for “operating” but an “owner or operator [is] in the case of a vessel, any person owning, operating, or chartering by demise, the vessel.” Because the statute does not give the term “operator” a clear meaning, the court must “give the term its ordinary or natural meaning.”

The court then looked to the Supreme Court’s decision in *U.S. v. Bestfoods*, 524 U.S. 51, 66 (1998), where the Court unanimously defined “operator” under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) as “simply someone who directs the working of, manages, or conducts the affairs of a facility.” Because the OPA tracks the same language as CERCLA, the court applied the definition here, stating “[i]t follows from that analysis that the ordinary and natural meaning of an ‘operator’ of a vessel under the OPA would include someone who directs, manages, or conducts the affairs of the vessel.” Operating would thus “include the act of piloting or moving the vessel.”

As a result, because Nature’s Way had exclusive control over the navigation of the barge at the time of the collision, it was the party responsible for the collision and was “operating” the barge within the natural and ordinary meaning of the term.

Nature’s Way’s final argument was that their towage services were more akin to a “mechanical activation of pumps” than the discretionary powers of an operator. The court rejected that notion, commenting on the high degree of discretion a towboat operator exercises when navigating the busy Mississippi River with large barges under its control.

The district court’s grant of partial summary judgment for the government on the issue of NPFC classifying Nature’s Way as operator for purposes of liability was affirmed.

- **Property owner who claims receipt of deed by fraud still liable for waste cleanup on property under Texas underground storage tank law**

Pryor v. State, Tex. App., 3d Dist., 03-17-00316-CV, 06/12/2018

In 1993, Parker Tire signed a warranty deed transferring a piece of property to Pryor. In 2007, the state of Texas discovered contamination on the property and filed an enforcement action under the state's underground storage tank law, seeking civil penalties and an order that he properly remove three underground storage tanks. Pryor claimed he did not own the property, and that the deed was fraudulently filed. Parker Tire testified that Pryor's sister-in-law bought the property and asked him to put the deed in Pryor's name. But the court said the action against Pryor could not be dismissed, and his liability for cleanup remained, because even if the deed was obtained by fraud, it remained in effect until set aside. The state met its burden to establish Pryor's ownership through the "presumptively valid deed." Pryor's only remedy is to seek to void the deed.

To review the case, see:

https://www.bloomberglaw.com/public/desktop/document/Pryor_v_State_No_031700316CV_2018_BL_206521_Tex_AppAustin_June_12?1556147069

- **Exxon Mobil may recover hazardous waste cleanup costs from federal government**

Exxon Mobil Corp. v. United States, 335 F.Supp.3d 889 (S.D. Tex. 2018)

Exxon-owned properties (oil refinery and chemical plants) in Baytown, Texas and Baton Rouge, Louisiana were used for production of aviation fuel during WWII and the Korean War. Exxon Mobil has incurred \$77 million in cleanup costs at the sites. A court ruling in June 2015 found that the government shares liability for the cleanups with Exxon Mobil.

In this case, Judge Lee H. Rosenthal of the U.S. District Court for the Southern District of Texas found that Exxon Mobil can go forward with claims against the U.S. government for cleanup costs because Exxon is still engaged in "interim" (not permanent) and "removal" cleanup at the sites (rather than "remedial" cleanup). The statute of limitations period for bringing a removal action is three years after

completion, while the time limit for remedial actions is six years after “initiation of physical on-site construction.” Thus, the court found, the statute of limitations for filing suit has not yet started running and Exxon could bring suit.

To review the case, see:

https://www.bloomberglaw.com/public/desktop/document/Exxon_Mobil_Co_rp_v_United_States_No_H102386_2018_BL_295986_SD_Tex?1556297809

Plastic pollution

▪ **Texas Supreme Court forbids local government bans on plastic bags**

Laredo v. Laredo Merchs. Ass’n, Tex., 550 S.W.3d 586, (Tex. 2018)

The city of Laredo banned commercial establishments from selling or providing single-use plastic bags, citing their contribution to flooding (damage to stormwater, sewage, and water utilities systems), mosquitos, costly local government cleanups, and harm to ecosystems and wildlife. The ban provide that businesses could be fined up to \$2,000 if they provided plastic bags to consumers. Laredo Merchants Association argued the ban violated Texas solid waste disposal laws, specifically the Texas Solid Waste Disposal Act (TSWDA). A trial court sided with Laredo. In 2014, then-Attorney General Greg Abbott had issued a nonbinding advisory opinion, saying local plastic bag bans are allowed as long as they do not target solid waste management. Laredo relied upon this to argue that the ordinance did not target solid waste management because it dealt with single use bags *before* they became trash. A divided appeals court reversed. The appeals court found that state law preempted the ordinance because 1) plastic or paper bags are “containers” or “packages” under the Act, 2) the ordinance has a solid waste management purpose, and 3) the City is not empowered by state law to prohibit the sale or use of plastic and paper bags.

The Texas Supreme Court acknowledged that Laredo is a “home-rule” city, meaning that it possesses the “full power of local self-government.” However, even a home-rule city ordinance must not contain provisions inconsistent with the Constitution of the State, or the general laws enacted by the Legislature of the State. While home-rule cities do not need to look to the state for permission to enact laws, the state legislature may limit or withdraw powers by enacting general laws. The question here is whether the general law so restricts the ordinance.

The TSWDA provides that “a local government may not adopt an ordinance to prohibit or restrict for solid waste management purposes, the sale or use of a

container or package in a manner not authorized by state law.” It seeks to “eliminate the generation of municipal solid waste to the extent that is technologically and economically feasible.” The Act includes enumerated methods of achieving that end, including “source reduction and waste minimization.”

Statutory limits on local power may be express or implied but must appear with “unmistakable clarity.” If a co-existence is possible, local and state law will both be given effect. The TSWDA expressly precludes a local government from prohibiting or restricting “the sale or use of a container or package” if the restraint is for “solid waste management purposes” and the “manner” of the regulation is “not authorized by state law.”

The City argued that the Act does not clearly and unmistakably preempt a municipality from banning single-use bags, arguing that “container” and “package” refer to a closed vessel or wrapping, not a bag; the ordinance regulates bags before they become trash, thus there is no “waste management purpose”; the ordinance is authorized because municipalities are entitled to act to protect streams and watersheds; and the ordinance is a valid exercise of police power. The merchants, however, contended that a “bag” is a “container” within the plain meaning of the statute; nothing in the Act supports the City’s definition of “solid waste management purposes”; the ordinance seeks to control a specific generation of waste and is therefore a waste management purpose; and the police power is irrelevant to preemption issues.

The Texas Supreme Court found that the “intent in the Act to preempt local law is clear,” by looking at the statutory text and plain meaning of the words therein. The Court describes the state’s interest in controlling management of solid waste as “plenary” while the preemption of local laws remains narrowly confined to ordinances that prohibit or restrict (i) for solid waste management purposes, (ii) the sale or use of a container or package (iii) in a manner not authorized by state law.

Regarding “for solid waste management purposes,” the City argued that the ordinance could not be a solid waste management purpose because the bags are not waste at the point at which they are subject to regulation. The Court held that “management” must include “the systematic control of the generation of solid waste, as well as its handling after it is created.” The ordinance sought to reduce litter and eliminate trash. This can only be read, the court found, as a method for managing solid waste.

The City also argued that there are other, independent purposes for the ordinance. The Court, however, held that the “ordinance’s solid waste management cannot avoid preemption merely because it has other purposes.”

Regarding “container or package,” the City argued that single-use bags are not “containers” or “packages” as used in the TSWDA. They argue that the Act only reaches (i) containers and packages that have already been discarded, or (ii) containers and packages that store or transport garbage, like dumpsters. The court, finding that neither container nor package are defined in the statute, held that the ordinary meaning of container and package clearly refer to a bag: “Construing the term container to exclude bags is incompatible with the common use and understanding of that word.”

Having ascertained the common understanding of the word, the Court then sought to determine if the legislature sought to narrow or provide a specialized meaning of the word through the context of the statute. The court found that the Act excluded consumer products in certain situations, but not here. Because the legislature could have, but did not, exclude consumer goods from the section at issue, “the only reasonable construction of the Act that accords with the statute as a whole is one that affords the terms container and package their ordinary meanings.”

Regarding the phrase “Manner Authorized by State Law” the City argued that its ordinance is consistent with its authority to protect water sources, water systems, drainage systems, sewage management, and water pollution control and abatement. The Court noted, however, that the Act preempts regulation in a “manner” not authorized by law. The Court stated that if the restriction said “authorized by law” there would be no dispute because home-rule cities are authorized by law to perform functions not disallowed by the state. However, “*manner* authorized by law” refers to the way in which something can be carried out. Here, while the City had the authority to undertake all of the water and sanitary management functions, it did not have the authority to do those things in a manner which ran afoul of TSWDA prohibitions.

Two justices (Guzman and Lehrmann) concurred but wrote separately to note that the law currently has negative environmental impacts: “I write separately to highlight the urgency of this matter . . . The optimal solution to the problem of single-use plastics may be unsettled, but the adverse impact of leaving the matter wholly unaddressed is undeniable. . . . I urge the Legislature to take direct ameliorative action or, as [the statute] contemplates, create a specific exception to

preemption of local control. Standing idle in the face of an ongoing assault on our delicate ecosystems will not forestall a day of environmental reckoning—it will invite one.”

The decision could lead to the invalidation of similar laws in dozens of cities across Texas, including Austin, which has had a similar ban in place since 2012.

To review the case, see: <http://www.txcourts.gov/media/1441865/160748.pdf>

Fisheries Management

- **Court rules NMFS does not have authority under the Magnuson-Stevens Act to adopt a regulatory scheme for offshore aquaculture in the Gulf**

Gulf Fishermens Ass’n v. NMFS [Appeal filed], 341 F.Supp.3d 632 (E.D. Louisiana 2018)

Plaintiffs, a group of food safety and gulf fishermen associations, brought suit against the National Marine Fisheries Service (NMFS) and the National Oceanic and Atmospheric Administration (NOAA) seeking a declaratory judgment that Defendants violated the Magnuson-Stevens Act (MSA), Endangered Species Act (ESA), National Environmental Policy Act (NEPA), and Administrative Procedures Act (APA) for enacting regulations regarding offshore aquaculture. They asked the court to vacate those regulations as arbitrary and capricious agency actions.

The eight regional fishery management councils were created and tasked with preparing Fishery Management Plans (FMPs) to address conservation and management of their fisheries. FMPs are to be “necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery.” FMPs go through notice and comment rulemaking and are promulgated through NMFS and the Commerce Secretary.

On January 13, 2016, NMFS and the Gulf Fishery Management Council finalized regs authorizing a commercial aquaculture permitting scheme in federal waters. This action was analyzed in an FMP and a programmatic EIS, treating all farmed fish as a fishery unit under the MSA. Regulations established a permitting scheme for conducting commercial aquaculture and created an application process for facilities and management of those facilities.

Plaintiffs argue that the regulations were outside NMFS authority and violate federal statutes because they allow a permit holder to farm fish in most areas of the Gulf with little oversight and defer consideration of the impacts on a discretionary and individual applicant basis. Plaintiffs argued that the MSA only grants NMFS authority to regulate fishing, and aquaculture is not fishing.

The court uses *Chevron*'s two step analysis to ask (i) whether Congress has directly spoken to the precise question at issue and, if not, (ii) whether NMFS's interpretation is arbitrary or capricious.

MSA grants NMFS "broad authority to issue any regulation deemed 'necessary' to effectuate the underlying purposes of the statute." One such purpose is "fishing," which is defined as "(a) catching, taking, or harvesting of fish; (b) attempted catching, taking, or harvesting of fish; (c) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or (d) any operations at sea in support of, or in preparation for, any activity described in (a) through (c)."

NMFS contended that "harvesting" gave it the authority to regulate aquaculture. They argue that "harvesting" means "act or process of gathering a crop"—fish in the case of aquaculture. Plaintiffs contend that harvest is more akin to catching and taking, which refer to wild fish. The court agrees with the Plaintiffs' contention and holds that harvest is intended to reference wild fish. The court's inquiry does not end there, however, as it also looked to statutory scheme and legislative history.

The MSA seeks to "conserve and manage the fishery resources found off the coasts of the U.S. and the anadromous species and Continental Shelf fishery resources of the U.S. [and] promote domestic commercial and recreational fishing under sound conservation and management principles." Elsewhere, the MSA refers to fish being "found" and "species that dwell" off coasts as a natural resource. Nowhere in the findings and purpose statements of the MSA is aquaculture mentioned. The term is mentioned three times in unrelated sections, which clearly indicates (in the court's eyes) that Congress knew of aquaculture and chose to exclude it from within the NMFS's authority.

The court also found that the "MSA as a whole is nonsensical when applied to aquaculture." FMPs are required to contain conservation and management measures "applicable to foreign fishing and fishing by vessels" and allows permits for fishing to "any fishing vessel" or "the operator of any such vessel." The MSA then goes on to define vessel in a way that excludes aquaculture facilities ("any vessel, boat, ship, or

other craft” as opposed to cage or pen). FMPs are also required to contain measures necessary to prevent overfishing, a concept inapplicable to fish farming. The same is true for the FMP requirement to assess maximum sustainable yield and optimum yield from a fishery.

Energy Cases

Mineral Interest Determinations

- **Court finds that the Texas natural resource code does not require royalty payments to cotenant mineral interest holder when no privity exists between holder and un-related lessor**

Devon Energy v. Apache, 550 S.W.3d 259 (Tex.App.Eastland 2018)

Norma Hester owned a 1/3 interest in minerals. She leased her interest to Apache, reserving a 1/4 royalty interest thereof. The owners making up the other 2/3 interest in the minerals leased their interest to Devon, also reserving a 1/4 royalty in the same. Apache produced minerals, Devon did not. Apache paid Devon its 2/3 share of the net revenue to which Apache believed Devon was entitled as Apache’s cotenant in the mineral estate. But no one paid the landowners who reserved 1/4 of the 2/3 which was paid to Devon. The 2/3 interest landowners (plaintiffs) sued Devon and Apache for failure to pay royalties. Devon sued Apache, claiming that Apache owed the royalty payments to the plaintiffs. The trial court granted summary judgment against Devon and for Apache on failure to pay claims.

The plaintiffs settled with Devon and the suit was dismissed. The lessors then severed their claims against Apache into a new case and the judge ordered a take-nothing judgment against the lessors, finding that Apache had no obligation under the Texas Natural Resources Code to pay royalties to the 2/3 lessors.

Devon appealed, claiming that the trial court erred in finding that Apache did not owe royalties to the 2/3 lessors under TxNRC § 91.402. Coteneants who produce minerals without consent of other coteneants are accountable on the basis of value of the minerals less necessary and reasonable costs of production. *Cox v. Davison*, 397 S.W.2d 200 (Tex. 1965). This is a carried interest owner. Texas also treats a mineral lease as a fee simple determinable rather than a lease, which means that the cotenant is the lessee, not the lessor. Thus, the duty under the common law is for Apache to pay the cotenant, Devon. In other words, had the plaintiffs not leased their interests in the mineral estate to anyone, they would have been coteneants of

the mineral estate with Apache. Devon thus looked to the statute to try to find a requirement that Apache pay the lessors.

Texas Natural Resource Code § 91.405(a) provides that “proceeds derived from the sale of oil or gas production from an oil or gas well located in this state must be paid to each payee by payor. . . .” Thus it must be determined if there was a payor-payee relationship between Apache and the 2/3 lessors.

The court distinguishes *Prize Energy Res., L.P. v. Cliff Hoskins, Inc.*, 345 S.W.3d 537 (Tex.App.San Antonio, 2011), which deals with a Non-Participating Royalty Interest (NPRI) rather than a royalty reserved in a lease, finding that the nature of the royalty (versus an NPRI) is sufficient to differentiate the direct payment requirement. The Court found that an NPRI is essentially tied to the land and not to a specific lease, thus whomever is working the land is in privity with the NPRI holder, unlike with the royalty interest owner under a particular lease.

The court concluded that there was no privity between Apache and the 2/3 landowners because the lease governing the 2/3 owners’ interest was with Devon, not Apache. The royalty interest was found to be sufficiently tied to the particular lease rather than tied to the land like an NPRI. Thus, since there was no privity between Apache and the 2/3 landowners, there was no payor-payee relationship and the Resources Code did not mandate payment by Apache to the 2/3 landowners.

Natural Gas Exports

- **Court ruling finds pipeline subject primarily to state environmental review; federal review not expanded**

Big Bend Conservation All. v. FERC, 896 F.3d 418 (D.C. Cir. 2018)

Nonprofit Big Bend Conservation Alliance brought a claim arguing that the Federal Energy Regulatory Commission (FERC) had regulatory jurisdiction over natural gas export facilities located on the Texas-Mexico border, as well as over the Trans-Pecos Pipeline. Exports leave the facility and go into Mexico, and the 148 mile pipeline has been subject to lawsuits and opposition from environmental groups. The group argued that regardless of the scope of FERC’s jurisdiction under the Natural Gas Act, the National Environmental Policy Act (NEPA) required an expanded review of the facilities and pipeline.

The D.C. Circuit, however, found that FERC properly limited its jurisdiction when it determined that the pipeline would be used to transport natural gas *produced* in Texas and received from other Texas-based intrastate pipelines and processing plants. As a result, the pipeline is subject to regulations from the state of Texas rather than the federal government. The court also found that there was an abundant amount of natural gas sourced within Texas to supply the pipeline without relying on interstate pipelines.

The ruling will make it easier for natural gas producers in West Texas to export gas from the Permian Basin to Mexico.

To review the case, see:

[https://www.cadc.uscourts.gov/internet/opinions.nsf/557549FC09F316FC852582CD0052AD5F/\\$file/17-1002-1740895.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/557549FC09F316FC852582CD0052AD5F/$file/17-1002-1740895.pdf)

Land Use Cases

Takings

- **Plaintiff who claimed property rendered unmarketable by government failure to timely cure deed fails in takings claim**

Younger v. El Paso County, 564 S.W.3d 97 (Tex.App.El Paso 2018)

Younger purchased a lot in El Paso under an agreement with a non-profit association and the Montana Vista Volunteer Fire Department. The agreement was as follows: The Association donated two lots to the Fire Department in exchange for the department building a fire station on the lots (there had apparently been a rash of fires in the area in recent years). The Association also offered to sell two adjacent lots to any two members of the volunteer fire department who would be willing to build homes there and operate the fire station. Younger was one such member and bought her lot with her husband for \$4,700.

The County agreed to pave and maintain roads sufficient to support the fire trucks. To facilitate construction, 20 ft. frontages from each of the four lots were deeded back to the county. The County Attorney's office drew up the deeds for each of the four lots for a nominal fee. The owners then signed and hand-carried the deeds back to the County Attorney's office for recording.

Everything went smoothly for 17 years, until Younger attempted to sell her property, at which time she discovered that none of the deeds transferring the 20 foot right of way to the County had ever been recorded. Without the deeds, Younger could not get a title policy and therefore held unmarketable title. The District overseeing the fire station could not find records of the deed and the County Attorney's office could not find the deeds. The County Attorney's office offered to redraft the deeds for free. Three of the four deeds were re-executed, but the deed belonging to the fire District had to go through formal approval processes to get signed. If the District did not execute the deed, Younger's title insurance would not get approved.

While District approval was forthcoming, but not finalized, Younger leased her property to the prospective buyer and moved out of state. The deed was eventually signed, but Younger had already taken legal action regarding the "taking" she claims occurred by the District's failure to sign the deed which resulted in unmarketable title.

Younger's claim included a constitutional takings claim and a cause of action under the Private Real Property Rights Preservation Act (PRPRPA). The district court also granted the District's pleas to the jurisdiction on the PRPRPA takings claim and this appeal followed.

Younger argued that the court erred in granting the District's plea to the jurisdiction because she pleaded facts sufficient to establish a takings claim. She argued that her claim that title was made unmarketable because of the District's refusal to sign the deed was sufficient to show a taking.

The court stated that the Texas Constitution and the PRPRPA (which defines taking as "a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the 5th and 14th amendments to the US Constitution or §§ 17 or 19 Art. 1 of the Texas Constitution") allow a property owner to bring a takings claim if the plaintiff can establish (1) the government intentionally performed certain acts; (2) that resulted in the plaintiff's property being taken, damaged, or destroyed; (3) for public use.

Here, the pleadings were deficient to state a constitutional takings claim because inaction from the government is not sufficiently intentional. Awareness that a result may occur, such as unmarketability, is not evidence of intent to deprive the

landowner of their land. Further, the PRPRPA claim failed because it contains a 180-day limitation period and the suit was brought against the District on October 2015 based on claims that the meeting where the signatures were withheld occurred in June 2014. The court stated that “[b]ecause the PRPRPA only waives immunity to the extent provided for in the statute, the requirement that the claim be brought within 180 days is jurisdictional.” Younger’s failure to bring suit within that time thus deprives the court of subject matter jurisdiction and dismissal with prejudice is proper. Trial court decision is affirmed.

[NOTE: The court undertook the same analysis for Younger’s suit against El Paso County, coming to the same conclusions].

Nuisance

- **Landowner fails in nuisance claim against neighbor who builds boathouse in neighborhood with no boathouse regulations**

Gulledge v. Wester, 562 S.W.3d 809 (Tex.App.Houston 2018)

Blue Point Road homeowners in Clear Lake, TX are bound by community restrictions related to where homes can be built, but no such restrictions govern their boathouses. The homes are located on one of only two stretches of deep-water access home sites in the Galveston Bay. These sites can accommodate large yachts—up to 70 feet long—in their back yards. No restrictions govern the boathouses, but most are roughly 20 feet tall. Most homeowners have two-story homes which can see over the boathouses without problem.

The Gulledges sought to build a one-story boat house. Because the boathouses are built over water, the General Land Office (GLO) must approve plans for construction and grant a coastal easement that leases the submerged land to the homeowner. As a part of the GLO application, the proposed plans are released publicly for comment. After Gulledge proposed his plan, Sullivan—a neighbor on one side—objected, asserting that it was too close to his property line and interfered with his ability to access his boat dock. Gulledge agreed to shift construction further away from Sullivan and Sullivan withdrew his objection. Then Gulledge decided that a rooftop deck would be a nice addition to the dock and amended his plan to add railing and a metal roof an additional ten feet above the top of the 25-foot-tall boathouse. The new second story would not be closed in, but would have siderails and a roof. Sullivan and Wester (a neighbor on the other side) objected. The GLO informed them that it did not regulate boathouse height and approved the design.

After Gullledge began construction, Wester and Sullivan initiated this suit seeking injunctive relief for negligent and intentional nuisance.

The trial court found for plaintiffs, calling the boathouse a negligent nuisance, issuing a permanent injunction limiting total height to 25 feet above mean water line, and prohibiting use of the deck for social gatherings. Gullledge appealed.

To rise to the level of a nuisance, the court noted Texas law requires that the interference of another's use be (1) "substantial" in light of the circumstances and (2) cause discomfort or annoyance that is objectively "unreasonable." Substantiality is measured by the nature and extent of the interference, how long it lasts, and its frequency of occurrence. A court may also review whether the use impairs the other property owner's market value. Unreasonable harm is that which is severe and greater than a property owner should be required to bear without compensation.

The court on appeal found no substantial interference. The deck would cause no invasion into another's property. No expert testimony was presented quantifying any economic harm. The jury below rejected a psychological harm claim. In looking to the nature of the use in context of the neighborhood, other landowners in the area engage in similar conduct. A large dock/boathouse is not unexpected in the neighborhood—many owners have large boats. The limited deep-water access along homesites make the lots unique and even more likely to be used with large boat owners. All other boat houses, at least to some extent, block another owner's view.

The court also found that Gullledge has acted quite reasonably. He had taken note of objections and had done everything possible—short of not building the boathouse—to satisfy his neighbors. As for extent of interference, the boathouse's second story is only covered with a roof. There are no enclosed walls on the top deck (or the bottom deck) which limits the amount of "interference" one can claim the structure causes.

The court holds that even though the plaintiffs offered some evidence that there was substantial interference, the record showed as a matter of law that the interference was not substantial and thus could not constitute a nuisance.

▪ **Texas Supreme Court upholds trial court’s ruling on just compensation value**

Morale v. State, 557 S.W.3d 569 (Tex. 2018)

Petitioners owned a 33,000 sq. ft. piece of property with an 8,831 sq. ft. collision repair shop as the only improvement on the land. The state (TxDOT) sought to take a 3,200 sq. ft. strip of land to expand FM 720 in Denton County, which would include a metal canopy used by the business that would have to be demolished as a part of the taking.

The state’s appraiser initially determined that after the taking the land could be used as a general repair shop but not as a collision repair shop. Because that determination meant the use of the property would change as a result of the taking, in May 2012, the petitioners were classified as “displaced” pursuant to Tex. Admin. Code § 21.116 (“When a person is required to relocate as a result of the acquisition of right-of-way for a highway project, the [TxDOT] will pay the reasonable expenses of relocating the displaced and his or her business and personal property . . .”). A classification of “displaced” denotes that the partial taking will render the condemnee “unable to conduct business in the same or similar manner as prior to the acquisition.”

The state’s lead planner then developed a second cure plan for reconfiguring the property that would enable the petitioners to continue operating their existing business on the site. The plan relocated the metal canopy to another location on the property, among other changes. In February 2013, the appraiser revised her initial appraisal to incorporate the cure plan, thereby determining that the property could be used as a collision repair shop. In May 2013, the special commissioners awarded the petitioners \$49,804 in damages for the taking. Petitioners objected and demanded a jury trial. The state formally revoked the displaced status in November 2013.

Meanwhile, in May 2013, petitioners had hired their own appraiser (Bolton) and land planner (Carson). Bolton’s initial appraisal was based on the assumption that the entire site would be demolished pursuant to the assumption of displacement. Carson developed two cure plans to continue to use the property as a collision repair shop. Bolton then used one of those plans to make an alternative appraisal based on non-displacement. In formulating those cure plans, Carson considered alterations to the property over and above what was considered by the State planner to allow the

site to continue to be used as a collision repair shop because much of the existing site design was out of conformity with zoning laws and would lose its grandfathered-in status if changes were made. The State planner had not considered the zoning issues.

At trial, the State presented evidence that the compensation owed was \$122,953 for the partial displacement (the State moved to exclude evidence of the now-revoked displaced status but was unsuccessful). Petitioner's appraiser testified as to two values; displaced valuation of \$1,262,947, and non-displaced valuation of \$1,064,335. Landowners were requesting \$1,262,000 because that represented the highest use of the land. The parties disagreed over whether the zoning issues were admissible in determining value, the State putting on experts that claimed the zoning board usually permitted these kind of non-conforming uses but the landowners presenting experts who stated that even with a likelihood of success, the property would still be difficult to sell because a potential buyer would not know of the uses of the land until it was purchased and modified. The state's appraised value also assumed that the zoning variance would be approved. The trial judge admitted the testimony from petitioner and petitioner's appraiser but excluded the experts from the State as irrelevant. The jury was asked to award the value of the remaining property after the taking and awarded \$1,064,335.

On appeal, the court held that the admitted evidence of displacement was both irrelevant to the issue of compensation for the part taken and for damages for to the remainder of the property. The court also held that petitioner's appraisal was "based on a land use that was speculative and unsubstantiated" and that "the displacement market value testimony was irrelevant and therefore inadmissible." Finally, the appeals court held that the trial court erred in excluding the State's expert testimony as to the impact of the zoning laws.

The issues is what evidence was proper to consider given that the only question presented to the jury was: what was the amount of just compensation due to the landowners for the partial taking, calculated as the difference between the market value of the entire property before the taking and the market value of the remaining property after the taking, considering the effects of the condemnation?

The court found that the "factfinder may consider the highest and best use of the condemned land which is presumed to be the existing use of the land." The collision repair shop was the existing use, and thus considered the highest and best use. While the appeals court held that "the fact that the Morales were considered displaced . . . does not make it more probable that the State at one time believed that the taking

itself caused a change in the property's use because the classification was based on a combination of the effect of the taking and the initial proposed cure plan," the supreme court here disagreed. The court found that the State's "cure plan merely reflected [the] conclusion that, at best, the property's highest and best use after the taking would still change." The supreme court acknowledged that the state changed its theory but rejects the assumption that the initial classification was wholly irrelevant to the property's highest and best use, and its corresponding market value, after the taking.

The appeals court had also disapproved of the petitioners questioning of the State's witnesses on displacement, stating that such questions "did not add any new information about the property's market value before or after the taking." The supreme court responded by stating that "[i]nquiries into the nature of the displacement revocation are probative in an adversarial trial in which the plaintiffs seek damages based on their alleged displacement."

The supreme court next rejected the appeals' court's holding that the Bolton displacement value was inadmissible as irrelevant because it was premised on the relocation of the entire business and the purchase price of the property that a buyer would pay intending to have to redevelop the entire site. The SC holds that such presumptions are proper because the uncertainty of the zoning variances made it possible that such a scenario was as likely to occur as continuance of the existing use. The court also notes that Bolton did state that such a total displacement may not be necessary contingent upon zoning variances, a statement that differentiates this case from *State v. Little Elm Plaza* where the court held that the expert testimony was inadmissible because the expert there made improper assumptions.

The supreme court finally disagrees with the appeals' court's holding that the expert testimony was improperly excluded. The court held that since the expert testimony referred to zoning variance practices in general in the area, and not specifically to the Morales' property, such testimony was properly inadmissible.

Ultimately, the court concluded that the trial court did not abuse its discretion in (1) admitting evidence about the Morales' alleged displacement, (2) admitting Bolton's displacement valuation testimony, and (3) excluding the state's expert testimony. Court of appeals reversed, and trial court's judgment reinstated.