

# GUIDA SLAVICH & FLORES, P.C.

*The Environmental Law Firm*<sup>SM</sup>

## Environmental News

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### 2015 Environmental Law Year End Review

This article originally appeared in the Texas Bar Journal. 2015 has been an exciting year for significant environmental law holdings from Texas state and federal courts. Although space allows only a brief mention of the cases below, for the environmental practitioner, all are worth reading in full.

#### *U.S. Supreme Court*

In *Michigan v. EPA*, 135 S.Ct. 2699, 192 L.Ed.2d 674 (2015) the U.S. Supreme Court reversed and remanded EPA's rule limiting mercury emissions from power plants, holding that the Agency interpreted the Clean Air Act ("CAA") unreasonably when it deemed cost irrelevant to the decision to regulate power plants. On remand, the EPA must consider costs before issuing regulations.

#### *Federal Courts*

In *United States v. Citgo Petroleum Corp.*, 801 F.3d 477 (5<sup>th</sup> Cir 2015), the Fifth Circuit reversed an oil company's convictions for violating the CAA and Migratory Bird Treaty Act ("MBTA") in connection with its wastewater treatment system at a Texas refinery. The company's CAA convictions were reversed because the jury instruction was erroneous in describing the scope of the regulations. The court overturned the MBTA

convictions because the statute does not criminalize omissions that un-intentionally kill birds.

In *In re Environmental Protection Agency*, 803 F.3d 804 (6<sup>th</sup> Cir. 2015), the Sixth Circuit issued a nationwide stay enjoining the "waters of the United States" rule pending the court's determination as to whether it has subject matter jurisdiction. The court concluded that a nationwide stay would restore uniformity of regulation pending judicial review.

In *Vine Street, LLC v. Borg Warner Corp.*, 776 F.3d 312 (5<sup>th</sup> Cir. 2015), following the U.S. Supreme Court's reasoning in *Burlington Northern & Santa Fe Railway Co. v. United States*, 556 U.S. 599 (2009), and reversing a lower court opinion, the Fifth Circuit held that a company selling dry cleaning equipment and a PERC supply did not take "intentional steps to dispose of a hazardous substance" and therefore did not qualify as an "arranger" under §107(a)(3) of CERCLA.

In *MEMC Pasadena, Inc. v. Goodgames Industrial Solutions, LLC*, 2015 WL 6473385 (S.D. Tex. Oct. 27, 2015), the court held that a waste broker was liable for cleanup costs under CERCLA and the Texas Solid Waste Disposal Act as an "arranger" on the basis

that it suggested and coordinated with a waste disposal site, arranged for transport of generator's waste to the site, received invoices directly from the disposal site, and delivered them to the generator with markups for the broker's service.

### ***Texas State Courts***

In *Environmental Processing Systems v. FPL Farming, Ltd.*, 457 S.W.3d 414 (Tex. 2015), the Supreme Court sidestepped the question of whether a subsurface trespass claim exists in Texas and instead reversed on the basis that the plaintiff failed to prove the entry was unauthorized or without its consent. As a matter of first impression, the court recognized that lack of consent was an element of a trespass causes of action and not an affirmative defense.

In *Sciscoe v. Enbridge Gathering*, 2015 WL 3463490 (Tex. App.—Amarillo July 17, 2015, no pet. h.), the Amarillo court held that the mere migration of airborne particulates across one's property can constitute an actionable trespass.

In *Cerny v. Marathon Oil Corp.*, 2015 WL 5852596 (Tex. App.—San Antonio Oct. 7, 2015, no pet. h.), the San Antonio court held that the plaintiff's nuisance and negligence claims concerning air emissions from nearby oil and gas operations were in the nature of toxic tort claims which required the stringent proof requirements imposed by the Texas Supreme Court in *Havner* and its progeny.

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

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*This is one in a series of occasional pieces discussing environmental issues of current interest to clients and friends of the firm. This material is not intended as legal advice. Readers should not act upon information discussed in this material without consulting an attorney.*

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