

The Fifteenth Court of Appeals: What Texas's New Appeals Court Means for Environmental Litigation



June 19, 2024

AUTHORS

Mike Vitris, Amber Ahmed

On June 11, 2024, Texas Governor Greg Abbott [announced](#) his inaugural appointments to the new Fifteenth Court of Appeals. The new intermediate court of appeals will take effect on September 1, 2024, and have statewide exclusive jurisdiction over civil matters brought by or against the state. The new court will impact every industry regulated by the Texas Commission on

Environmental Quality (TCEQ) and the Texas Railroad Commission, especially those subject to enforcement actions or seeking permits subject to judicial review.

What do we know about the new justices?

Once fully staffed, the Austin-based 15th Court of Appeals will have five justices, each initially appointed by the Governor and then subject to statewide elections.

Governor Abbot's first three appointments all identify as Republicans, a significant contrast with the all-Democratic Third Court of Appeals that currently hears essentially every TCEQ and Railroad Commission case.

- ◆ **Scott A. Brister** is a former Supreme Court of Texas, former Justice and Chief Justice of the First and Fourteenth Courts of Appeals in Houston, and former Judge of the 234th Judicial District Court in Harris County. During his judicial tenure, Justice Brister authored opinions on the enforceability of emission reduction credit contracts,¹ nuisance conditions created by industrial plans,² and evidentiary standards in mass toxic tort claims.³
- ◆ **Scott K. Field** is a former Third Court of Appeals Justice and current Judge of the 480th Judicial District Court in Williamson County. Having served on the Third Court, Justice Field has seen many environmental appeals and authored opinions concerning TCEQ's authority to withhold authorization pending appeal of enforcement orders,⁴ TCEQ's compliance history rules,⁵ coastal protection laws,⁶ municipal solid waste permits,⁷ a petition for greenhouse-gas emission rules,⁸ and pollution-control tax exemptions.⁹
- ◆ **April L. Farris**, a Justice on the First Court of Appeals in Houston and former Assistant Solicitor General for the Texas Solicitor General's Office. Justice Farris authored opinions on real estate damages,¹⁰ and real estate sales agreements.¹¹

What are we watching?

Some of the first cases we will see out of the new court will be those currently pending in other courts of appeal filed on or after September 1, 2023, which will transfer over.

- ◆ ***TCEQ and Max Midstream, LLC v. San Antonio Bay Estuarine Water Keeper, Texas Campaign for the Environment, and S. Diane Wilson, Case No. 03-24-00111-CV, Third Court of Appeals.*** This is an appeal of a Travis County District Court judgment reversing a TCEQ order finding that protesting individuals and associations were not “affected persons” entitled to a contested case hearing and granting a new source review air permit to Max Midstream, LLC. The new court may address the so-called “one mile rule,” a rule of thumb for when a protestant may qualify for “affected person” status.
- ◆ ***TCEQ and Guadalupe-Blanco River Authority v. National Wildlife Federation, Case No. 03-24-00299-CV, Third Court of Appeals.*** This is an appeal of a Travis County District Court judgment reversing a TCEQ order granting a water right permit to the Guadalupe-Blanco River Authority. The new court will consider whether TCEQ must consider construction-related impacts when granting a water right permit.
- ◆ ***TCEQ v. Harrison County, Texas, Case No. 03-24-00029-CV, Third Court of Appeals.*** This is an appeal of a Travis County District Court judgment reversing a TCEQ enforcement order assessing penalties against Harrison County. The new court will consider the validity of TCEQ’s order and whether local governments may offset their penalties with supplemental environmental projects after an enforcement order is issued.

Is the Fifteenth Court a done deal?

The transfers to the Fifteenth Court of Appeals are not set in stone—Dallas County has filed a [petition for writ of injunction](#) in the Texas Supreme Court seeking to declare the new scheme unconstitutional and avoid transfer of its suit against the Texas Health and Human Services Commission related to inmate transfers. If successful, Dallas County will stop the new court in its tracks, and the Third Court of Appeals, based in Austin, will continue to see most environmental appeals in Texas.

B&D’s [Austin](#) office works with clients on environmental regulatory compliance, high-stakes enforcement, permitting, commercial and toxic tort litigation, and project development matters. We provide oil, gas, chemical, manufacturing, and other industry clients with complex and mission-critical support that enables their businesses to grow and protects against litigation risk. When [litigation](#) is necessary, B&D’s office routinely achieves multi-million dollar settlements, and counseling clients in high-stakes and precedent-setting matters. Nearly two-thirds of B&D’s lawyers have prior U.S. state or federal government experience, including many who served in enforcement-focused roles at U.S. EPA and DOJ and state agencies, including TCEQ and the Texas OAG.

¹ *Tractebel Energy Mktg., Inc. v. E.I. Du Pont De Nemours & Co.*, 118 S.W.3d 60, 63 (Tex. App.), opinion supplemented on overruling of reh’g, 118 S.W.3d 929 (Tex. App. 2003)

² *Schneider Nat. Carriers, Inc. v. Bates*, 147 S.W.3d 264, 268 (Tex. 2004), holding modified by *Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Texas), L.P.*, 449 S.W.3d 474 (Tex. 2014)

³ *In re Allied Chem. Corp.*, 227 S.W.3d 652, 654 (Tex. 2007)

⁴ *Crystal Int’l, Inc. v. Texas Comm’n on Env’t Quality*, No. 03-16-00008-CV, 2016 WL 4272117, at *1 (Tex. App. Aug. 10, 2016)

- ⁵ A.I. Divestitures, Inc. v. Texas Comm'n on Env't Quality, No. 03-15-00814-CV, 2016 WL 3136850, at *1 (Tex. App. June 2, 2016)
- ⁶ Polsky v. State, No. 03-14-00068-CV, 2016 WL 2907975, at *1 (Tex. App. May 13, 2016), review granted, judgment vacated, and remanded by agreement, No. 16-0747, 2017 WL 11722526 (Tex. May 12, 2017)
- ⁷ Citizens Against the Landfill in Hempstead v. Texas Comm'n on Env't Quality, No. 03-14-00718-CV, 2016 WL 1566759, at *1 (Tex. App. Apr. 13, 2016)
- ⁸ Texas Comm'n on Env't Quality v. Bonser-Lain, 438 S.W.3d 887, 889 (Tex. App. 2014)
- ⁹ Bastrop Cent. Appraisal Dist. v. Acme Brick Co., 428 S.W.3d 911, 912 (Tex. App. 2014)
- ¹⁰ Rescue Concepts Inc. v. HouReal Corp., No. 01-20-00553-CV, 2022 WL 2976299, at *1 (Tex. App. July 28, 2022), review denied (Sept. 1, 2023)
- ¹¹ Jetall Companies, Inc. v. Jefferson Smith, L.L.C., No. 01-20-00461-CV, 2022 WL 2347922, at *1 (Tex. App. June 30, 2022), review denied (Oct. 28, 2022)

AUTHORS



Mike Vitris

Principal
Austin
mvitris@bdlaw.com
+1.512.391.8018



Amber Ahmed

Of Counsel
Austin
aahmed@bdlaw.com
+1.512.391.8018

ABOUT B&D

Beveridge & Diamond's more than 140 lawyers across the U.S. focus on environmental and natural resources law, litigation, and alternative dispute resolution. We help clients around the world resolve critical environmental and sustainability issues relating to their products, facilities, and operations.

Learn more at bdlaw.com

The content of this alert is not intended as, nor is it a substitute for, legal advice. You should consult with legal counsel for advice specific to your circumstances. This communication may be considered advertising under applicable laws regarding electronic communications.