



For a fully searchable and synchronized transcript and oral argument video, go to the TX-ORALARG database on Westlaw.com.

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
Railroad Commission of Texas and Pioneer Exploration, Ltd., Petitioners,
v.
Texas Citizens for a Safe Future and Clean Water and James G. Popp,
Respondents.
No. 08-0497.

April 14, 2010.

Appearances:

Daniel L. Geysler, Office of the Texas Attorney General, Austin, TX, for petitioner Railroad Commission of Texas.

David B. Gross, Gross & Nelson, Austin, TX, for petitioner Pioneer Exploration.

Marisa Perales, Lowerre Frederick Perales Allmon & Rockwell, Austin, TX, for respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David Medina, Paul W. Green, Phil Johnson, Don R. Willett and Eva Guzman, Justices.

CONTENTS

ORAL ARGUMENT OF DANIEL L. GEYSER ON BEHALF OF THE PETITIONER

ORAL ARGUMENT OF MARISA PERALES ON BEHALF OF THE RESPONDENT

REBUTTAL ARGUMENT OF DANIEL L. GEYSER ON BEHALF OF PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in the first matter, 08-0497, Railroad Commission of Texas v. Texas Citizens for a Safe Future and Clean Water.

MARSHAL: May it please the Court, Mr. Geysler and Mr. Gross will present argument for the petitioner. The petitioner has reserved three minutes for

rebuttal and Mr. Geysler will present the first 12 minutes and Mr. Geysler will also present rebuttal.

ORAL ARGUMENT OF DANIEL L. GEYSER ON BEHALF OF THE PETITIONER

ATTORNEY DANIEL GEYSER: May it please the Court, the court of appeals failed to satisfy the threshold [inaudible] required for a court to substitute its own views [inaudible] agent. The plain text of the [inaudible] code section 27.051 does not amend the [inaudible] the Commission's construction and statutes of public interest clause. On the contrary, the Commission's construction [inaudible] the most coherent understanding of the statutory scheme it directly advances the legislative purpose and respects the Commission's traditional rule and expertise and it is [inaudible] decades for longstanding [inaudible] practice. [inaudible].

JUSTICE HARRIET O'NEILL: Could a later group of commissioners decide that they want to consider public safety concerns relating to traffic?

ATTORNEY DAVID GROSS: Your Honor, that would be a harder question, but yes, an agency is entitled to construe [inaudible] the statute any way that's reasonable and consistent with the statutory facts.

JUSTICE HARRIET O'NEILL: So if in the next case the commission considered traffic issues and asked for proof on traffic issues, you'd be fine with letting that proceed because that's within their discretion?

ATTORNEY DANIEL GEYSER: If it were in their discretion, again. That's why I think it would be a harder case because [inaudible] that the legislature [inaudible] and the commission [inaudible] those issues.

CHIEF JUSTICE WALLACE B. JEFFERSON: But it's important to know whether that would be in their, within their discretion or not. What's your position on that?

ATTORNEY DANIEL GEYSER: As a generic matter, an agency can always reverse course as long as they acknowledge that they're reversing course and provide a rational basis for changing their position from an earlier one to a later one.

JUSTICE DAVID M. MEDINA: It's not necessarily changing course, but making it broader to take into consideration the totality of the circumstances. We have some experience in [inaudible] and these cement trucks or these gravel trucks. They seem to be pretty dangerous and perhaps maybe there is a public interest as it were to consider those issues.

ATTORNEY DANIEL GEYSER: There is a public interest, but the question is whether the public interest is the one that the legislature was talking about under the statute and looking at the Texas statute it's clear that it isn't, but the legislature included four enumerated clauses. Three of those are remarkably specific and are tailored to what the commission traditionally does.

JUSTICE HARRIET O'NEILL: Well let me just, I think the troubling aspect of this case is whether, in fact, I would agree that if the commission said we're not going to consider or we don't think that there's sufficient traffic safety concerns to preclude issuance of this permit. It's another thing to say that what if there were real public safety issues and to say we simply do not have jurisdiction over them. Those are two very different questions.

ATTORNEY DANIEL GEYSER: [inaudible] but a permit to have an objection to what was not a roving license to preempt or preclude any other regulation or agency [inaudible] of traffic safety. It's a permit that gives you permission [inaudible] consistent with all the other regulations that are posed by other agencies that you have expertise in questions like traffic safety and questions like road construction. If you look at the administrative order, this is on page 115 and 123 of the record, the agency goes through and you can see the kinds of things that the Railroad Commission does. It looked at the permeability of the injection. They asked him what sort of depth does the injection reach? [inaudible] How much pressure can they put into the injection? These are very technical and [inaudible] questions. The Railroad Commission does not have expertise.

JUSTICE HARRIET O'NEILL: What if this well were surrounded by three elementary schools. The Commission could not consider that in any way, shape or form?

ATTORNEY DANIEL GEYSER: Not under their current construction of the statute and I think for good reason. The legislature did not task the Commission with kind of the extraordinary responsibility to [inaudible].

JUSTICE HARRIET O'NEILL: What would happen then if they could not consider that? If there were proof that school children would be in danger by this heavy truck traffic, what then would happen? Where would Texas citizens go?

ATTORNEY DANIEL GEYSER: They need to go to the body that properly regulates questions of [inaudible] and questions of public safety [inaudible] in that agency's expertise. A permit to drill [inaudible] is not a permit to [inaudible].

JUSTICE HARRIET O'NEILL: I understand, but tell me what that would look like. I would like to know what the Respondents in this case would do. Where would they go and what would they ask for if they thought increased truck traffic would endanger school kids?

ATTORNEY DAVID GROSS: They would go either to the body that has control of the regulate this or they could go to another organization that controls the traffic rules on the streets.

JUSTICE HARRIET O'NEILL: And say what?

ATTORNEY DANIEL GEYSER: And they would say that moving the truck traffic in this area is unsafe and so that body, which actually has the expertise

to decide whether truck traffic is indeed unsafe on this road and whether the road-bearing capacity of a gravel road can actually withstand the movement of the truck. They would make those determinations and they would change the rules if they had to. If there is--

CHIEF JUSTICE WALLACE B. JEFFERSON: Mr. Geysler, what if we were not talking about truck traffic, but let's assume and I don't know if even this is scientifically plausible, but the amount of pressures buckles the road and actually makes traveling on the road unsafe, cracks them or ptholes or something, would there be an ability to regulate on the ground of safety in that instance?

ATTORNEY DANIEL GEYSER: Someone would have the ability to regulate safety, but not the Railroad Commission.

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes, but so if the Railroad Commission couldn't, who's going to stop the injection wells from having that impact. I mean the Commission has jurisdiction over the wells, correct?

ATTORNEY DANIEL GEYSER: The Commission has jurisdiction over the wells. The Commission does not have jurisdiction over the traffic.

CHIEF JUSTICE WALLACE B. JEFFERSON: Right, so who's going to stop the company from injecting that sort of high pressure that causes buckling of the highways and roads?

ATTORNEY DANIEL GEYSER: I'm sorry. I misunderstood the question, which is my fault, but if the injection itself is buckling, this is presumably the injection is doing something that is unsafe, as for the area presumably would also be unsafe for the fresh water supply. Those are the things that the Railroad Commission is [inaudible]. If the trucks themselves going back and forth on the road prove to be unsafe on the road for reasons specific to traffic safety road construction, [inaudible].

JUSTICE EVA GUZMAN: Is it a traffic safety issue though if you have a site and the only way in and out of the site is this one road that happens to about other businesses or schools? Is that really a traffic safety issue or does relate directly to whether it's in the public interest to have those trucks going through there?

ATTORNEY DANIEL GEYSER: The question of whether it's in the public interest to have the trucks going back and forth, again something that the legislature did not [inaudible] whether it be a better use of this area to put up a hospital or a school or a church. Those are questions that the legislature [inaudible] agencies some expertise in making those kinds of decisions.

JUSTICE DALE WAINWRIGHT: Assume that the agency that has the expertise in this tertiary matters as I guess you see them, anything unrelated to technical aspects of approving the permit for the injection well on common tertiary and assume these other agencies looking at public safety, safety highway, the issue of the hypothetical where the well was in the middle of three schools, assume they reach a contrary result from the Railroad Com-

mission, assume they conclude, the other agencies, that traffic can't be safe on this road going to the injection well. The schools will be in danger and the Railroad Commission, however, says the injection well goes in. Then what happens?

ATTORNEY DANIEL GEYSER: What happens actually is that the bodies that have jurisdiction who regulate the zoning [inaudible] and then that's [inaudible] exactly how the [inaudible] is suppose to work. The [inaudible] to put in injection wells. The only permission [inaudible] it's the acknowledgment by the agency that actually has expertise in the area that if you put the injection well in the ground in this area, you won't endanger the fresh water supply and it's consistent with the state's codes in preserving its natural resources. That is--

JUSTICE DON R. WILLETT: Could they condition approval of the permit on the whether the zoning authorities or whoever might have authority over the highway system or public safety and could the Commission condition their permit approval on the prior approval from a traffic standpoint or whatever from some other body?

ATTORNEY DANIEL GEYSER: The Commission has not done that understanding the circumstances I'm aware and I think that is a current reading the statute [inaudible] they rely on the [inaudible] jurisdiction over the other agencies to take care of problems that then those agencies [inaudible].

JUSTICE DON R. WILLETT: How does the Commission itself define public interest?

ATTORNEY DANIEL GEYSER: It looks, the way [inaudible] in this case and I think this reflects the way they interpret it for about 40 years. Is it consistent with the environmental concerns of preserving the fresh water supply? Will it avoid waste? Will it injure or endanger any other natural resource [inaudible] material and it will be or further that the economic [inaudible]. Those are the things that the Commission has historically done [inaudible].

JUSTICE DALE WAINWRIGHT: So if the other agencies, let's assume it's a county commission decides that we've got enough injection wells in our county. It's the Barnett shell, production's exploding over a 10-county area of gas and the commission says an injection well in Wise County, another one is fine. The county commissioners say no we don't think it's fine and in fact we're going to preclude construction of any further roadways to that area, which are going to keep you from being able to truck any water in or out. Can the county commission change in essence override the Railroad Commission's regulation of the industry in that county by its tertiary decisions?

ATTORNEY DANIEL GEYSER: They cannot override the Railroad Commission's authority to grant or deny permits.

JUSTICE DALE WAINWRIGHT: That's-- I'm not asking that. I know that. But it can in effect change the decision by precluding the supporting structures in order to make that injection well or other type of well productive.

ATTORNEY DANIEL GEYSER: That could give rise to an interesting [inaudible]

question whether the legislature's decision to pass the Railroad Commission with determining the environmental soundness and the efficiency of putting an injection well looking solely at considerations related to parks and natural resources and preserving the fresh water supply, whether that would be directly [inaudible] other local authority. But I--

JUSTICE DALE WAINWRIGHT: I'm asking that question because a minute ago, you said that the other agencies' decisions would trump the Railroad Commission decision.

ATTORNEY DANIEL GEYSER: It would if it's based on considerations not about the concerns about the fresh water supply, not about the need for preserving the state's natural resources.

JUSTICE HARRIET O'NEILL: Let me follow up on those interests. If Pioneer were injecting municipal waste into the same well and all other things were equal, then there would be the requirement to look at traffic safety concerns, right? I mean, it would be under the TCEQ, I understand, and they would look at traffic safety concerns. But visa vie the public interest, same well, just different material being injected, same truck traffic, one group can look at traffic safety, one can't. What's the sense in that visa vie the public interest?

ATTORNEY DANIEL GEYSER: Mr. Chief Justice, my time.

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes, please answer the question.

ATTORNEY DANIEL GEYSER: Thank you. First, I think it's important to note that in that case, TCEQ would be working to subsection [inaudible] and not public interest clause. So I think it's actually very important to know that they are not, the legislature did not task the TCEQ to look at the traffic safety in those circumstances as a matter of public interest.

JUSTICE HARRIET O'NEILL: I understand that's arguable, but if I'm a family there with my home and my children are playing on that road, I'm going to be told that traffic safety cannot be considered because it's an only gas injection well, but if it's municipal waste it can be and what sense does that make to me as a citizen?

ATTORNEY DANIEL GEYSER: Well, it's a question of who has authority to regulate it. It's not saying that [inaudible] extremely important and the Railroad Commission recognizes how important they are. The question is which body is the appropriate body for regulating those kinds of problems. And to go back to Justice Wainwright's questions, if they are looking at problems that are unrelated to those issues, the issues that are at the core of the Water Code Commission the Railroad Commission [inaudible], then certainly those bodies would have jurisdiction and their decision would trump. I'm simply saying that if they were to be solely to the subject matter at this part of the water code and the Railroad Commission's authority, that would raise an interesting question and I don't think we're prepared now to give the answer whether it, in fact, would preempt the local authority or not, but that's a different question than the one presented here.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Geyser. The Court will hear from Pioneer Exploration.

ATTORNEY DAVID GROSS: May it please the Court, David Gross representing Pioneer. The discussion we just had, I would point out that in the City of Ft. Worth, it's a daily matter where oil and gas companies are required to obtain drilling permits from the Railroad Commission for wells before they can identify that the City of Ft. Worth were a city permit [inaudible] well. The fact that you have a Railroad Commission permit for oil is not guaranteed by any means you will be able to obtain a city permit, which is necessary to drill so in other words, the concept is Railroad Commission fulfills its piece of the [inaudible] business by considering [inaudible].

JUSTICE HARRIET O'NEILL: Is the city permit required for an injection well?

ATTORNEY DAVID GROSS: I believe it is. Any well within the city limits.

CHIEF JUSTICE WALLACE B. JEFFERSON: And what factors go into whether or not a city permit is given? Is there a public safety factor? Is there regulation of traffic? What?

ATTORNEY DAVID GROSS: Absolutely, public safety and public use and, in fact, there are minimum distances on public buildings. There are minimum distances imposed on schools. All those things are taken into account [inaudible] and works for this [inaudible].

JUSTICE EVA GUZMAN: So is that you need to the City of Ft. Worth or all over the state? I mean would that be the case? You go to the Railroad Commission and then you go to the local authority?

ATTORNEY DAVID GROSS: Yes. Yes, and the City of Houston has [inaudible] permanent ordinances. Many of the smaller cities surrounding the Dallas-Ft. Worth area cities that [inaudible].

JUSTICE DAVID M. MEDINA: What happens if there's a conflict? Can the city regulating usurp the authority of the Railroad Commission?

ATTORNEY DAVID GROSS: Oh absolutely. [inaudible] drilling permit, but the city will not grant you a permit. You cannot drill the well.

JUSTICE HARRIET O'NEILL: Were if it were municipal waste and the TCEQ had considered traffic safety and said no issues. We find there are no traffic safety concerns and then you went for the city municipal waste permit and the city said there are concerns, what would happen in that situation?

ATTORNEY DAVID GROSS: I think the city's ordinance would trump and here's what I mean. For example, the City of Ft. Worth [inaudible] has specific minimum distances that a well must be from a school. Even if TCEQ under A6 were to say no concern regarding public roadways, the city could say no, you are closer than our minimum distance to a school. Consequently, we're

going to [inaudible] the city permit [inaudible].

JUSTICE DALE WAINWRIGHT: But for municipal waste, A6 doesn't apply. A6 is just for hazardous waste injection right?

ATTORNEY DAVID GROSS: Right. And I would also point out it's interesting you know thinking about the rules of statutory construction, the presumption is that legislature was aware of all the law. It was aware of an audience [inaudible] two agencies [inaudible] granted this jurisdiction. The rule which says that provisions which are included are included intentional provisions which are excluded, our exclusion will be regarded.

JUSTICE EVA GUZMAN: Except the term public interest is very broad. It's really not limited in the statute and conceivably could encompass any number of factors.

ATTORNEY DAVID GROSS: Well, it could, and as I read the court of appeals' opinion, I don't sense that the court of appeals felt this was a compelling public safety concern [inaudible] addressed and that's why it felt the commission was too narrow with construction. And I will just point out that the legislature absolutely dealt with public interest, more than public interest, public safety. If you look at 02, the definition of pollution, it specifically states that pollution is an alteration of the quality of water [inaudible] injurious to humans, injurious to public health and safety.

CHIEF JUSTICE WALLACE B. JEFFERSON: Do you agree with Mr. Geysler or at least what I understand his position to be that if the commission had considered traffic patterns and determining whether to issue this permit for an injection well that that would also, in effect, be not reviewable--that that would be within their discretion?

ATTORNEY DAVID GROSS: I believe their discretion is broad and I believe that a subsequent commission might take a broader view. That's a question for the future. I believe that they would have taken a broader interpretation that would be in their discretion subject to court's review. However, I do not believe that it is an abuse of the commission's discretion for it to not consider the factor the legislature specifically required the TCEQ to consider an A6, which specifically did not require.

JUSTICE DALE WAINWRIGHT: But A6 doesn't apply here.

ATTORNEY DAVID GROSS: Well that's right, but again it's a single statute in which the legislature [inaudible] two agencies jurisdiction over the different wells.

JUSTICE DALE WAINWRIGHT: Your argument would work if A6 concerned municipal waste, but it doesn't. So the legislature has not said anything about regulating public roadways for TCEQ or the Railroad Commission right? Unless you include it in a definition of public interest?

ATTORNEY DAVID GROSS: Well I agree completely, but the legislature didn't assign that [inaudible] TCE-Q regulatory authority over [inaudible] the

only time it's mentioned in A6 if you notice they approach public roadways [inaudible] they say the applicant must make a reasonable [inaudible]. Had the legislature said the TCEQ has made a determination the approval of this permit will foster safe use of public roadways or something to that effect, I think they would have been exceeding their jurisdiction. Each agency, whether it's TxDOT, the county, the city, [inaudible].

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Gross. The Court has--

JUSTICE PAUL W. GREEN: I just have one question.

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes, Justice Green.

JUSTICE PAUL W. GREEN: Just quickly, just to be clear. You mentioned start off by talking about the city permitting process. There's no city permit involved in this? Okay.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you. The Court is now ready to hear argument from the respondents.

MARSHAL: May it please the Court. Ms. Perales will present argument for the respondent.

ORAL ARGUMENT OF MARISA PERALES ON BEHALF OF THE RESPONDENT

ATTORNEY MARISA PERALES: First as an ordinary matter, this case is not about the interpretation of an ambiguous statute. The Railroad Commission must consider the public's interest before issuing an injection well permit.

JUSTICE DAVID M. MEDINA: Well why is this interpretation of public interest and reasonable?

ATTORNEY MARISA PERALES: First, there are multiple responses to that question, Your Honor.

JUSTICE DAVID M. MEDINA: [inaudible]

ATTORNEY MARISA PERALES: Well, first of all, the Railroad Commission was not attempting to interpret the term public interest. They did not promulgate any regulation. They did not issue any policy statement. They did not put out any guidance document. They simply were not interpreting the term public interest.

JUSTICE DAVID M. MEDINA: [inaudible] inconsistent with anything that it's done previously?

ATTORNEY MARISA PERALES: Yes, it is.

JUSTICE DAVID M. MEDINA: How so?

ATTORNEY MARISA PERALES: For one, there's the Berkeley case that was be-

fore the court of appeals in Amarillo, and in that case, the court of appeals in affirming or upholding the Railroad Commission's issuance of an injection well permit, they went through the evidence that was presented during the administrative hearing and among the types of evidence that the Railroad Commission considered in that case was public interest evidence, evidence related to public safety concerns.

JUSTICE EVA GUZMAN: Do they have to consider every possible safety concern out there even though they may not have any expertise and even though the costs may be so prohibitive to the parties asserting. I mean where do you draw the line?

ATTORNEY MARISA PERALES: Well, I think that the line is already drawn and the procedural rules that are in place in the Railroad Commission. Those procedural rules affect what types of people and what types of concerns are brought before the Commission. For instance, at the outset, an individual cannot participate in a Railroad Commission hearing unless he or she has a justiciable interest that's sufficiently affected by the proposed permit. This limits the number of people who even get to come in and participate in the process and express their concerns. Second, after the process commences, there are discovery procedures in place and this allows the applicant, such as Pioneer, to determine precisely what types of issues and concerns the protesting parties are going to raise. During the hearing, the parties including the protesting party, must present evidence in support of any of the concerns that they've raised and this means that they're going to be presenting witnesses, sometimes experts that address the concerns.

JUSTICE EVA GUZMAN: So that sort of goes to my question. So you want them to consider traffic. What else, where do you draw the line if they have no expertise on any safety concerns? Where do you draw the line?

ATTORNEY MARISA PERALES: Well I think that, in fact, the Railroad Commission does have expertise in the term public interest and so I don't know that it's for me to draw the line. I think that whatever public interest concerns are raised before the Railroad Commission, they must consider them. The legislature did not limit that term in any way and when the legislature enacted the statute, it was well aware that the term public interest is a broad term and it chose not to limit it. In public interest, when construing a statute, the cardinal rule is that first you look at the plain meaning of the statute's words. The term public interest is not really a technical term. It's a term that is capable of plain definition, plain meaning.

JUSTICE HARRIET O'NEILL: Maybe it's just me, but as I read the examiner's opinion, which the Commission adopted, it's not just real clear to me that they said we don't have jurisdiction to consider public interest. What the examiner said is the Commission doesn't have jurisdiction to regulate truck traffic on the state's roads and they don't. That's true. And then they say we sympathize with the concerns, but we conclude Pioneer's [inaudible] burden of proof including the public interest. So I know the briefing seems to be focused on the Commission making some broad statement that it does not have jurisdiction over the issue, but I don't read the

order to be such a succinct statement.

ATTORNEY MARISA PERALES: Well, I have two responses to that. First, throughout these proceedings in the Travis County District Court and the court of appeals, the state has taken the position that it simply did not have the statutory authority to consider this evidence, to consider public safety concerns and that's been its position throughout.

JUSTICE HARRIET O'NEILL: So you'd agree that the order doesn't exactly say that?

ATTORNEY MARISA PERALES: It doesn't exactly say that, but what I think a fair reading of the order and of the hearing examiner's decision is that the Commission and the hearing examiner refused to weigh the various factors that are encompassed by the public interest analysis. They did not look at competing policies or competing concerns and determine this concern trumps this one or we sympathize with you, but on the grand scale of things, your concern is here and the recovery of oil and gas is here. That simply did not occur and I don't think that the order reflects that and I think that we've heard from the state that the Commission doesn't feel that it has the authority to do that.

JUSTICE DALE WAINWRIGHT: Back to Justice Guzman's question about what specific things you think the Commission should order in the interest of public safety in this case. In your brief, you suggest that the Commission could limit the number of trucks hauling this water to the site each day could regulate the hours of operation or require construction of a safer entrance. Would those three things alone satisfy all your concerns and if not, what else specifically should the Commission have done here?

ATTORNEY MARISA PERALES: Well, my clients would argue that their public interest concerns more into denial of the permits and that would have been what he ultimately and the group ultimately would have sought. I think those examples were intended to express that to the extent that there is any ambiguity here, it's not with regard to the meaning of the term public interest. It's with regard to how agencies are to weigh the factors that are encompassed by the public interest and what they're supposed to do about it. So simply because different agencies might give different weight to different public interest concerns and reach different results doesn't mean that it's ambiguous. It means that they're acting within their statutory framework, within their statutory context and in this case, those were the tools.

JUSTICE DALE WAINWRIGHT: Assume there's a new hearing. Let me ask it this way and the Commission says well, we're going to take evidence on public interest. What should it have done, what would your client say it should the Commission should have ordered to address public safety and make the permit permissible, if you will? I mean it's one thing to argue they were wrong, but tell us why.

ATTORNEY MARISA PERALES: Well, they were wrong because they didn't consider the public interest.

JUSTICE DALE WAINWRIGHT: What should they have done?

ATTORNEY MARISA PERALES: They should have weighed the factors. I mean [inaudible]--

JUSTICE DALE WAINWRIGHT: And if they weighed the factors, what would they have ordered or should they have ordered?

ATTORNEY MARISA PERALES: Well, what we argued to the Railroad Commission is that they should have denied the permit. I will concede that it is within the Railroad Commission's discretion to do something short of that, to implement those tools that I outlined in the brief and perhaps even to issue the permit if in conducting their analysis they did consider the public interest concerns, afforded them the weight that they should have been afforded, and then concluded that the permit should still have been issued.

JUSTICE DAVID M. MEDINA: Well how do we measure that? What if this case goes back down and we tell them to do exactly what you said and they came up with the same result. How are we to measure that?

ATTORNEY MARISA PERALES: In that case, I believe that I would if I intended to appeal the decision, it would be under a substantial evidence standard of review, and if they, indeed, considered all of the requirements the legislature mandated that it consider, including the public interest requirements and it properly weighed all of the evidence that was presented on all of those factors and still determined the permit should have been issued, then I believe that the substantial evidence standard of review would apply.

JUSTICE HARRIET O'NEILL: And what's wrong with the argument about sort of divorcing these determinations and letting other agencies that are more able to deal with traffic-related concerns and we're focusing on traffic here because that's just more tangible than these quality-of-life issues, but what would be wrong with requiring that to be made by an agency or the city that's more qualified or used to dealing with those sort of determinations and precluding any sort of overlap, conflicting decisions?

ATTORNEY MARISA PERALES: Well, the first thing is that the legislature directed the Railroad Commission to consider the public interest and did not limit it in any way. The second thing is that as this case illustrates, not all of these injection wells are proposed to be constructed in the city and counties don't have any [inaudible] ordinance. Furthermore, there are lots of agencies that have regulations and statutes in place that arguably overlap with the statutory authority that's been committed to another agency. For instance, at the TCEQ, when one is applying for a landfill permit, the legislature has directed that the TCEQ consider land use compatibility. Within land use compatibility, you have factors such as how close is this landfill to a church? How close is this landfill to a school? And then you also have this kind of catchall. You must consider the distance to a church, the distance to water wells and any other public interest factors that--

JUSTICE HARRIET O'NEILL: Well and to key off of that, why do you think the legislature added these specific considerations if it were a hazardous

waste facility with the TCEQ and didn't do the same with the Railroad Commission?

ATTORNEY MARISA PERALES: Well, I did a little bit of legislative history and I don't have a concrete answer to that. I cannot tell you what the legislature was thinking, but I can say that practically speaking, the what I call 27051(a), it creates a different process is what it does so that when an applicant goes to the TCEQ and seeks one of these permits for hazardous waste injection well, let's say, upfront it is required, for instance, in its application. It must address these factors and it must show to the TCEQ we have looked at what types of burdens this well will impose upon emergency safety personnel or on public roadways and we have attempted to mitigate it in this way. That is a showing that must be made upfront as the statute states. In the Railroad Commission case, the way the process would work would be that you must satisfy all of these requirements, but there's no requirement that upfront you must show that you have attempted to mitigate any burdens that this well might be imposing on public roadways and so forth. In other words, I think that the purpose of 27051(a) is that it creates a different process. It simply requires the applicant to make this showing upfront to the commissioners.

JUSTICE PAUL W. GREEN: Well, what happens, if say we agree with you in this particular case and so now there's this judicially created additional factor or factors that has to be considered by the Railroad Commission and then later on another applicant comes up with a permit and says well, you know, there's yet another factor that you didn't consider and you should have and so we have to create yet another judicially created factor. Where does this end?

ATTORNEY MARISA PERALES: I don't think that it's necessary to come up with a judicially created factor. I think that once again, the term public interest is not really an ambiguous term. It was intended to be a broad term and so all that the court of appeals did in this case was instruct the Railroad Commission, you read it too narrowly. You've only considered one factor when, in fact, the term public interest is intended to be broad. So [audible]--

JUSTICE PAUL W. GREEN: So you think that it is open-ended? Somebody could come in and say yes, there is something else that you should have considered that you didn't.

ATTORNEY MARISA PERALES: Yes I do, but my hope would be that it's not, that the argument would not be yet here's yet another factor that you failed to consider. My hope would be that the Railroad Commission would indeed interpret the term public interest broadly as it was intended to be interpreted and would consider all these factors.

JUSTICE EVA GUZMAN: Well in the last 40 years though, they've never considered traffic or safety concerns. How does that factor fit in with the argument you just made that you would hope that they would now suddenly decide to do this?

ATTORNEY MARISA PERALES: Well I don't think that there's been any evidence

presented by the state that, in fact, the Railroad Commission has consistently interpreted the term public interest in such a narrow manner. As I mentioned in the brief and earlier, the Berkeley case that was in front of the Amarillo Court of Appeals illustrates that, in fact, the Railroad Commission has considered evidence of other public safety type concerns and--

JUSTICE EVA GUZMAN: Traffic patterns though or other public safety concerns?

ATTORNEY MARISA PERALES: In that case, I believe it was, I think it was factored in the safety type concerns.

JUSTICE PHIL JOHNSON: If the Railroad Commission, in fact, considers traffic, does that preclude your clients from going to some other agency and asking that they consider traffic also?

ATTORNEY MARISA PERALES: No because--

JUSTICE PHIL JOHNSON: So you would get several bites at the apple then, so to speak wherever you could find someone who thought traffic was in the public interest. You could go and ask them to look at it and then ask the next one to look at it and ask the next agency to look at it, wherever you could find an agency who was willing to say traffic's in the public interest, we're going to look at that again.

ATTORNEY MARISA PERALES: Well, again, there are limits to that ability.

JUSTICE PHIL JOHNSON: What is the limit? Is there any other agency that can look at the traffic aspect as to this well other than the Railroad Commission?

ATTORNEY MARISA PERALES: As to the well, no. And I think that's the limit. I mean--

JUSTICE PHIL JOHNSON: So you're saying one and done so to speak on this? If the Railroad Commission does, in fact, consider it on this well, there's no other agency that would have any jurisdiction for your clients to go to and have this relooked at?

ATTORNEY MARISA PERALES: That's correct with regard to the well.

JUSTICE EVA GUZMAN: What about the cities and counties though that also have, in some cases, to issue permits.

ATTORNEY MARISA PERALES: The counties don't have any zoning authority.

JUSTICE EVA GUZMAN: What about the cities then?

ATTORNEY MARISA PERALES: The cities I suppose that our client could go to the city and make a case under the city's own, I mean the city cannot deny a permit that's been issued by the Railroad Commission. If there is a zoning ordinance that applies, then my client could conceivably make an argu-

ment to the city, but the city only has the tools that are at its disposal. Similarly, if you know--

JUSTICE PHIL JOHNSON: Well we're talking traffic here is what we're talking about. We're not talking about another well permit. We're talking about traffic specifically.

ATTORNEY MARISA PERALES: Right.

JUSTICE PHIL JOHNSON: So can the city look at traffic patterns in regard to well access, can cities do that?

ATTORNEY MARISA PERALES: I don't, I mean, I think it would be something that you would have to look on a case-by-case basis. I'm not sure.

JUSTICE PHIL JOHNSON: It seems like that would be a little bit of an interest matter here if you're going to have someone trying to get a well permitted and then you have to have them go, we have a serial series of complaints about traffic over the same well in different jurisdictions saying okay, we'll look at it now. It seems like you could tie this process up for a long time unless there's somewhere that it can be cut off. Where can it be cut off?

ATTORNEY MARISA PERALES: Well I think that in Pioneer's brief, they made the statement that the Railroad Commission is intended to be a sort one-stop shopping and with regard--

JUSTICE PHIL JOHNSON: What is your position on where it can be cut off? If your client goes to the Railroad Commission in regard to a well and the Railroad Commission considers the traffic patterns, does that preclude your client from seeking any other agency looking at the traffic patterns again?

ATTORNEY MARISA PERALES: In this case, it does. This permit was not within a city limit. It was within the county.

JUSTICE PHIL JOHNSON: Okay, let's talk about in the city limits. Would that preclude your client? Railroad Commission says we've looked at the traffic. We've looked at your efforts and we decided it's all right for this well and that's not, we're not going to preclude that. Is it your position that your client would then not be able to re-litigate that very same issue with the city?

ATTORNEY MARISA PERALES: With regard to, once again, I think it would depend upon what the zoning ordinances are. With regard to--

JUSTICE PHIL JOHNSON: Do you know what your client's position is on that question?

ATTORNEY MARISA PERALES: I don't because we were not within, this permit was not within a city limit, but I would suspect that if the Railroad Commission has addressed an issue that's within its statutory framework. For instance, it has concluded that this well is going to be protective of

surface water and groundwater, unless the city has some other requirements, some additional hurdle, something a little stricter, I think that the Railroad Commission has made its statement. This well is going to protect surface water and groundwater.

CHIEF JUSTICE WALLACE B. JEFFERSON: Ms. Perales, you say the public interest is broad, but that statement is broad, but when you look at the purpose of the statute, it doesn't talk about things like traffic regulations. It's looking at questions of pollution or preventing waste or exploiting a natural resource and that sort of thing. Should we be looking at what public interest means in terms of the overall purpose of the statute for well injections?

ATTORNEY MARISA PERALES: Yes, we should, but there are already statutes in place, for instance, that protect against [inaudible]. There are already statutes in place that protect groundwater and surface water and so the term public interest itself is not limited. The meaning of the term public interest is not limited. Rather the tools that are within the Railroad Commission's authority, the tools at its disposal, those are limited by the statutory framework. So, for instance, the Railroad Commission could not go to TexDOT or to the county and say you need to improve your roads. That's simply not within its statutory authority and that is where the limitation comes in.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, are there any other questions? Thank you, Ms. Perales.

ATTORNEY MARISA PERALES: Thank you.

REBUTTAL ARGUMENT OF DANIEL L. GEYSER ON BEHALF OF PETITIONER

JUSTICE HARRIET O'NEILL: Mr. Geysler, looking at the text of Section 27051(b), it says that the permit may be granted if and let me look at 2, 3 and 4, it won't endanger or injure oil, gas or other mineral formation, that it protects ground and surface water pollution and that there's a showing of financial responsibility. Isn't then number one about the public interest entirely superfluous under your argument?

ATTORNEY DANIEL GEYSER: Not at all, Your Honor. 2, 3 and 4 look at negative effects on the environment and negative effects on any oil, gas and mineral formation. The Commission actually looks and sees and asks whether this would be an economical and efficient use of resources? Is this well needed in order to fully maximize the states production of its natural resources? That's a different question. It looks at the affirmative benefits of imposing or allowing the permit for this particular well and that's exactly what the Commission historically has done. I think too and a very important point is that this statute is undefined and I think both Justice Green and Justice Guzman are correct. There is no limiting principle to the court of appeals construction of this statute. The Commission was entirely within its discretion to look at the statutory text, the competing clauses, the 40 years of unbroken history of not considering the traffic and road construction.

JUSTICE DAVID M. MEDINA: Well what about this Berkeley case, what guidance if any does that provide?

ATTORNEY DANIEL GEYSER: With respect to my friend, she's actually misreading the Berkeley decision. On pages 12 and 13 of our reply brief, we explain why, but very briefly, in that case just like this case, people who were objecting to the permit suggested that there would be evidence of traffic problems as a result of the well. The Commission did not consider that evidence there just as they didn't consider it here. So Berkeley actually--

JUSTICE HARRIET O'NEILL: I'm still confused about your answer. If they had considered it, you think that's within their discretion to consider it?

ATTORNEY DANIEL GEYSER: Not under their current reading of the statute. They would have to adopt a very different reading of the statute.

JUSTICE HARRIET O'NEILL: And if they did that though, you'd say that would be within their discretion?

ATTORNEY DANIEL GEYSER: Again, I think that would be a much harder case because in that case you'd have to ignore the underlying purpose of the statute.

JUSTICE HARRIET O'NEILL: Okay, so could they then if they thought there were traffic problems, could the Commission say we are going to grant the permit with these few conditions? You can only bring so many trucks across the road at a given time. You can't come during school hours or things like that. Could they impose conditions?

ATTORNEY DANIEL GEYSER: If they thought that public interest included those considerations, but I think respectfully, the legislature did not want the Commission engaging that inquiry because it would lead to an inefficient use of resources. The Commission does not have the institutional confidence or the expertise to decide whether the objections that are raised or comparing are, in fact, valid or not.

CHIEF JUSTICE WALLACE B. JEFFERSON: Did Pioneer present evidence on traffic patterns or regulations or trucks or anything like that? Did they try to contest the petitioner's complaint?

ATTORNEY DANIEL GEYSER: My time is up but--

CHIEF JUSTICE WALLACE B. JEFFERSON: You can answer that.

ATTORNEY DANIEL GEYSER: I hesitate to answer definitively for my friend, but I do not believe that they contested the evidence because it simply is not within the purview of the Commission as they construed the statute.

JUSTICE HARRIET O'NEILL: And just a quick question. What do you do when you're outside the city's jurisdiction? What do you do when you're in the county and if there are traffic problems with no zoning authority with the county commissioners, what happens if there is a problem with traffic safety?

ATTORNEY DANIEL GEYSER: If there is a regulatory board, then the answer is not that the Commission assumes that the legislature passed it with the extraordinary responsibility of hearing every conceivable [inaudible] policy even to a different agency to fill the regulatory void.

JUSTICE HARRIET O'NEILL: Where? In this case, where?

ATTORNEY DANIEL GEYSER: Whoever has jurisdiction over those roads and if there is a problem and, in fact, no one has jurisdiction, then it's up to the legislature to create a body or at least to designate an appropriate agency for handling those problems. They did not do that with respect to--

JUSTICE HARRIET O'NEILL: But how would one do that? I was trying to figure out if I'm in the county and I want to get some safety measure passed, where do I go and I'm not sure I have a clear answer on that?

ATTORNEY DANIEL GEYSER: I think the answer may be if there truly is no one at the county level who can handle it, you might go to the state and the legislature and they could amend the statute either to give the Commission---

JUSTICE EVA GUZMAN: Don't you go to a county commissioner's court when you have business relating to the county and you need them to approve or disapprove roads, expenditures, anything else, is that where you go?

ATTORNEY DANIEL GEYSER: I think that could very well handle the problem. I was taking the presumption of the hypothetical to be that there is no such court or a court wouldn't have that authority, but I think the answer then is the legislature can amend the statute, give that responsibility to the commissioner or to someone else and the fact that they have amended the statute and have not added traffic considerations as part of the public interest inquiry shows I think that they've endorsed the commission's longstanding practice of not considering those factors and adopting a reasonable and limited view of the public interest.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Geyser. The cause is submitted and the Court will take a brief recess.

MARSHAL: All rise.

2010 WL 1625290 (Tex.)

END OF DOCUMENT