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ORDER OF THE TEXAS SUPREME COURT DENYING PETITION FOR REVIEW (FEBRUARY 18, 2022)

SUPREME COURT OF TEXAS

AC INTERESTS, L.P.

v.

TEX. COMM'N ON ENVTAL. QUALITY

RE: Case No. 21-0078

COA #: 01-19-00387-CV

TC#: D-1-GN-005160

Today the Supreme Court of Texas denied the Petition for review in the above-referenced case.

MEMORANDUM OPINION OF THE COURT OF APPEALS, FIRST DISTRICT OF TEXAS (DECEMBER 17, 2020)

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

AC INTERESTS, L.P., FORMERLY AMERICAN COATINGS, L.P.,

Appellant,

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,

Appellee.

No. 01-19-00387-CV

On Appeal from the 345th District Court
Travis County, Texas
Trial Court Case No. D-1-GN-14-005160[1]

Before: Terry ADAMS, Justice.

[1] The Texas Supreme Court transferred this appeal from the Third Court of Appeals in Austin to this Court, as a routine docket-equalization matter. *See* Tex. Gov't Code § 73.001. We are unaware of any conflict between the Third Court's precedent and our own. *See* Tex. R. App. P. 41.3.

MEMORANDUM OPINION

The dispute in this case arises from the air-emission-credits program established by the Texas Commission on Environmental Equality (the "TCEQ").[2] The purpose of the voluntary program "is to allow the owner or operator of a facility . . . to generate emission credits by reducing emissions beyond the level required by any applicable local, state, or federal requirement," which the facility owner or operator then may use in accordance with the program rules.[3]

Appellant AC Interests, L.P., formerly American Coatings, L.P. ("AC Interests"), applied to the TCEQ for emission credits. After the TCEQ denied the application, AC Interests sought judicial review but its appeal of the decision to the district court was dismissed under Texas Rule of Civil Procedure 91a for lack of proper statutory service. The Texas Supreme Court reversed and remanded.[4]

On remand, the TCEQ filed a plea to the jurisdiction, arguing the case became moot when any emission credits AC Interests might have generated at its facility expired and, thus, any judgment rendered by a court will be without any practical legal effect. The district court granted the plea to the jurisdiction, and AC Interests appealed the dismissal order.

In this appeal, AC Interests contends (1) the mootness doctrine does not apply, (2) the TCEQ's denial of

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2 *See* 30 Tex. Admin. Code §§ 101.300–.311.

3 *See id.* § 101.301.

4 *AC Interests, L.P. v. Tex. Comm'n on Envtl. Quality*, 543 S.W.3d 703 (Tex. 2018).

emission credits is an unconstitutional taking, and (3) it is entitled to a jury trial.

Based on the record and arguments presented to us, we conclude the controversy is moot and affirm.

BACKGROUND

The TCEQ administers the Texas Clean Air Act, which establishes a regulatory framework to "safeguard the state's air resources from pollution."[5] As part of the Act's implementation and to incentivize the voluntary reduction of emissions, the TCEQ has adopted rules authorizing it to grant emission credits, including emission reduction credits ("ERCs").[6] An ERC is a "certified emission reduction . . . that is created by eliminating future emissions and quantified during or before the period in which emission reductions are made from a facility."[7] They do not constitute a property right; rather, they are a limited authorization to emit pollutants.[8] And the TCEQ retains authority to "terminate or limit such authorization."[9]

One way a company may generate emission credits is by permanently shutting down a facility that lawfully emits certain pollutants.[10] The emission reduction must be certified, meaning the reduction must be

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5 *See* Tex. Health & Safety Code § 382.002(a); *see also id.* § 382.011(a)(1).

6 *See* 30 Tex. Admin. Code §§ 101.300–.304.

7 *Id.* § 101.300(10).

8 *See id.* § 101.302(k).

9 *See id.*

10 *See id.* §§ 101.302(a)(1), .303(a)(1)(A).

"enforceable, permanent, quantifiable, real, and surplus."[11] If the TCEQ certifies the reduction, the facility owner or operator may use, trade, sell, or bank the emission credit for later use.[12]

Under this regulatory framework, AC Interests asked the TCEQ to certify ERCs purportedly generated at an AC Interests facility that had ceased emissions. But the TCEQ denied the application, prompting AC Interests to timely file a petition for judicial review in December 2014.[13]

The petition alleged that the AC Interests facility was destroyed by fire in July 2010. Although it obtained a permit to reconstruct the facility from the TCEQ in May 2013, AC Interests ultimately decided against rebuilding. Instead, AC Interests applied for certification of ERCs in October 2013—and then revised its application three times between November 2013 and July 2014—based on a permanent-shutdown emissions reduction strategy.[14] The TCEQ denied the certification of ERCs, stating in its decision letter that AC Interests had provided "contradictory emissions information" and that the TCEQ could not determine that the emissions reduction was "quantifiable and real" or "surplus."

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[11] *See id.* § 101.302(d)(1)(A).

[12] *See generally id.* §§ 101.306(a), .309(d).

[13] A person "affected by" a TCEQ decision may appeal by filing a petition in a Travis County district court. Tex. Health & Safety Code § 382.032(a).

[14] The regulatory framework for emission credit applications provides that an application may be revised upon written notice from TCEQ of its denial. *See id.* § 101.302(f)(3).

According to AC Interests, the TCEQ's refusal to certify ERCs violated "statutory provisions, exceeded [TCEQ's] statutory authority, and was arbitrary and capricious." AC Interests requested in its petition that, among other things, the district court: (1) set aside the TCEQ's decision; (2) remand to the TCEQ for further administrative proceedings on AC Interests's application for ERC certification; and (3) order that the "TCEQ issue an Emission Banking Credit and Allowance Certificate to AC Interests," along with costs, attorney's fees, and all other relief to which AC Interests was entitled.

The district court initially dismissed AC Interests's appeal in March 2015 because AC Interests did not timely serve the TCEQ with the petition for judicial review. But the Texas Supreme Court reversed and remanded, concluding that the late service did not require dismissal.[15]

On remand, the TCEQ again sought dismissal through a plea to the jurisdiction. The TCEQ asserted for the first time that the appeal was moot because any ERCs that could have been certified expired 60 months after the date of the emissions reduction at AC Interests's facility. By the TCEQ's calculation, any ERC that AC Interest might have generated expired 60 months after the facility shut down, which was either the date of the facility fire, in July 2010, or the date AC Interests decided not to reconstruct the facility, in October 2013.[16]

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15 *AC Interests, L.P.*, 543 S.W.3d 714–15.

16 The TCEQ asserted its mootness contention for the first time in its jurisdictional plea filed with the district court in November 2018. *See id.*; *AC Interests, L.P. v. Tex. Comm'n on Envtl. Quality*,

In other words, according to the TCEQ, a live controversy ceased to exist between the parties on July 31, 2015, during the prior appeal, or, at the latest, by October 2018, and thus any decision by the district court would be without "a practical legal effect on the alleged controversy related to [the] TCEQ's denial of AC Interests's ERC application." The district court granted the TCEQ's plea to the jurisdiction.

STANDARD OF REVIEW

The district court's subject matter jurisdiction may be challenged through a plea to the jurisdiction. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2004). Whether subject matter jurisdiction exists is a question of law we review de novo. *See Miranda*, 133 S.W.3d at 226; *see also Chambers-Liberty Ctys. Navigation Dist. v. State*, 575 S.W.3d 339, 345 (Tex. 2019). We look first to the pleadings to determine if the plaintiff has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *See Miranda*, 133 S.W.3d at 226. We construe the pleadings liberally in favor of the plaintiff, looking to its intent, and accept as true the factual allegations in the pleadings. *Id.* We also consider any evidence introduced by the plaintiff that is relevant to the jurisdictional inquiry. *See City of Elsa v. Gonzalez*, 325 S.W.3d 622, 625 (Tex. 2010). If the issue is one of pleading sufficiency, the plaintiff should be afforded

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521 S.W.3d 58 (Tex. App.—Houston [1st Dist.] 2016), *rev'd by* 543 S.W.3d at 707–15.

the opportunity to amend unless the pleadings affirmatively negate jurisdiction. *Miranda*, 133 S.W.3d at 226–27.

MOOTNESS DOCTRINE

The Texas Clean Air Act permits a person adversely affected by a TCEQ ruling to appeal, as AC Interests did here, by filing a petition in a district court in Travis County within 30 days of the ruling. Tex. Health & Safety Code § 382.032(a). The primary question before us, which we consider de novo, is whether AC Interests's appeal of the TCEQ's refusal to certify ERCs has become moot because the lifespan of the resulting litigation has exceeded the lifespan of any ERC that AC Interests may have generated by its facility shutdown. *See Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002) (existence of subject matter jurisdiction is legal question reviewed de novo); *see also Speer v. Presbyterian Children's Home & Serv. Agency*, 847 S.W.2d 227, 229 (Tex. 1993) (mootness doctrine implicates subject matter jurisdiction).

Courts are limited by the mootness doctrine to deciding cases in which an actual controversy exists. *See, e.g.*, *State ex rel. Best v. Harper*, 562 S.W.3d 1, 6 (Tex. 2018). An actual controversy must exist between the parties at every stage of the legal proceedings. *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001). Mootness may occur at any time, including on appeal. *See Heckman v. Williamson Cty.*, 369 S.W.3d 162, 166–67 (Tex. 2012) ("[C]ourts have an obligation to take into account intervening events that may render a lawsuit moot.").

Mootness occurs if a controversy ceases to exist or the parties lack a legally cognizable interest in the outcome. *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 642 (Tex. 2005). The same is true when a judgment would not have any practical effect upon a then-existing controversy. *See Best*, 562 S.W.3d at 6 (case is moot when events make it impossible for court to grant relief requested or otherwise affect parties' rights or interests); *see also Heckman*, 369 S.W.3d at 162 (same); *City of Hous. v. Kallinen*, 516 S.W.3d 617, 622 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (same). When a case becomes moot, the court loses jurisdiction and cannot hear the case. *Best*, 562 S.W.3d at 6.

AC Interests timely sought judicial review of the TCEQ's decision to deny certification of ERCs, alleging that the decision violated procedural and substantive due process, was arbitrary and capricious, and exceeded the TCEQ's authority. The foundation of AC Interests's request for relief is its claimed entitlement to ERCs based on the emission reductions achieved by the permanent shutdown of its facility.

The TCEQ derives its argument that the controversy is moot from the rules for emission credit banking and trading codified in the Administrative Code. *See* 30 Tex. Admin. Code §§ 101.300, *et seq*. Specifically, the TCEQ looks to administrative rule 101.309(b), which establishes a 60-month lifespan for emission credits:

> Emission credits certified as part of an administratively complete EC-1 Form, Application for Certification of Emission Credits, received after January 2, 2001 shall be available for use for 60 months from the date of the emission reduction.

30 Tex. Admin. Code § 101.309(b)(3).[17] The TECQ argues that this case became moot 60 months after the "date of the emission reduction" at AC Interests's facility —when the July 2010 fire shut down the facility and emissions ceased as a result or, at the latest, when AC Interests opted not to reconstruct the facility in October 2013 and instead applied for certification of ERCs. *See id.* §§ 101.300(27) (shutdown means "permanent cessation of an activity producing emissions at a facility or mobile source"), 101.303(a)(1)(A) (emission credits may be generated by "permanent shutdown of a facility that causes a loss of capability to produce emissions"). According to the TCEQ, because the facility shutdown occurred more than 60 months ago and any ERCs that AC Interests may have generated have since expired, the courts can no longer grant AC Interests any relief that will have a practical legal effect.

AC Interests argues the district court erred by accepting the TCEQ's mootness argument because any 60-month "emission clock" has not yet expired in this case for two reasons. First, AC Interests contends that the language of rule 101.309(b)(3) prevents the clock from starting before an application for certification of

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[17] The version of the rule 101.309 applicable in this case defines the lifespan of an emission credit in subsection (b)(3). *See* Former 30 Tex. Admin. Code § 101.309(b)(3). In the current version of the rule, the lifespan of an emission credit is moved to subsection (b)(2) and amended in a non-substantive way to provide that an "emission credit certified as part of an administratively complete application received after January 2, 2001 shall be available for use for 60 months from the date of the emission reduction." Current 30 Tex. Admin. Code § 101.309(b)(2). For the purpose of this opinion, all citations to rule 101.309 are to the former version of rule.

emission credits is "administratively complete," which AC Interests asserts never occurred here because TCEQ denied its applications. According to AC Interests, an application is "administratively complete" once the TCEQ has reviewed it and declared it so.

Second, AC Interests contends that, even if the clock started running, the lifespan of an emission credit should be tolled based on events that occurred before and during litigation. Specifically, AC Interests asserts that the clock stopped (1) when the TCEQ initially denied the ERCs in December 2013, (2) when the TCEQ finally denied the ERCs in November 2014, (3) when the TCEQ initially moved to dismiss the case due to untimely service in January 2015, and (4) when the trial court erroneously dismissed in the case on that motion in March 2015, forcing an appeal to the Texas Supreme Court. We disagree.

Because the TCEQ is the agency charged with administering the Texas Clean Air Act, the TCEQ's interpretation of rule 101.309 is entitled to deference unless it is "plainly erroneous, or inconsistent with the language of the statute, regulation, or rule." *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011). We further construe administrative rules, like statutes, using traditional principles of statutory construction. *Id.*; *Heritage on San Gabriel Homeowners Ass'n v. Tex. Comm'n on Envtl. Quality*, 393 S.W.3d 417, 424–25 (Tex. App.—Austin 2012, pet. denied). Our primary objective is to give effect to the intent of the issuing agency and legislature, "which, when possible, we discern from the plain meaning of the words chosen." *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2004) (addressing statutory construction); *see Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248,

254 (Tex. 1999) (addressing rule construction). The statute or rule must be considered as a whole. *TGS-NOPEC*, 340 S.W.3d at 439. And its meaning may be informed by factors that include the law's objective. *See Shumake*, 199 S.W.3d at 284; *see also* Tex. Gov't Code § 311.023(1).

The plain language of rule 101.309(b)(3) does not include any extension of the life of an emission credit under the circumstances urged by AC Interests. *See* 30 Tex. Admin. Code § 131.309(b)(3). While the rule defines the lifespan of emission credits "certified as part of an administratively complete application received after January 2, 2001," nothing in the rule suggests that the life of an emission credit is tolled until an application is deemed administratively complete. *See id.*

Neither does any language actually used in the rule suggest that the life of an emission credit is tolled during the administrative review of an application or in litigation resulting from TCEQ's decision on an application for such credits. The rule unambiguously states: "Emission credits . . . *shall be* available for use for 60 months *from the date of the emission reduction*." 30 Tex. Admin. Code § 101.309(b)(3) (emphasis added). It does not define the life of an emission credit according to when the emission credit is finally certified by the TCEQ, whether as part of the initial administrative proceedings or after judicial review.

To hold that the rule incorporates a tolling mechanism would be to read additional language into the rule, which is contrary to the rules of construction

and not the role of this Court.[18] *See TGS-NOPEC*, 340 S.W.3d at 439 ("We presume that the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.").

In addition, a conclusion that rule 101.309 does not include a tolling mechanism is supported by reading the administrative rules for emission credit banking and trading as a whole. *See TGS-NOPEC*, 340 S.W.3d at 439. In rule 101.304, for example, the TCEQ expressly extended the lifespan of certain other emission credits by one year. 30 Tex. Admin. Code § 101.304(e) (certain

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[18] Although AC Interests did not provide authority for its argument that the lifespan of an emission credit is tolled during the period of any litigation arising from TCEQ's decision on an application to certify emission credits in its initial appellate briefing, at oral argument in this case AC Interests indicated that its contention is premised on the equitable doctrines that toll statutory limitations periods. *See generally Young v. United States*, 535 U.S. 43, 49 (2002) (limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with text of relevant statute). The authorities on which AC Interest relied at oral argument concern the tolling of limitations when the outcome of an initial case determines the viability of a subsequent cause of action, for example, as in a legal malpractice action. *See, e.g.*, *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 155 (Tex. 1991) (statute of limitations in legal malpractice case is tolled until appeals are exhausted on underlying suit in which malpractice allegedly occurred); *Pollard v. Hancshen*, 315 S.W.3d 636, 638–39 (Tex. App.—Dallas 2010, no pet.) (same). But this is not a case that involves a second or dependent cause of action in which AC Interests's claim depends on an adjudication in another suit. AC Interests timely filed its petition for judicial review within 30 days of the TCEQ's decision. And the litigation-related delays about which AC Interests complains occurred during the course of the proceedings in this single action. The cases that AC Interests provided us at oral argument are thus inapposite.

mobile emission reduction credits "shall be available for use for 72 months from the date of the emission reduction in lieu of the provisions outlined in § 101. 309(b)(2) of this title (relating to Emission Credit Banking and Trading")). This suggests that any extension of credit life was intended to apply only in a small subset of the potential population of emission credits—a subset of mobile emission reduction credits not at issue here—for a specified time period. *See id.*; *see also In re Bell*, 91 S.W.3d 784, 790 (Tex. 2002) (courts should presume that words excluded from statute have been excluded purposefully and should not insert words into statute except to give effect to clear legislative intent).

A construction that does not extend the lifespan of an emission credit also is consistent with the purpose of the rules regulating and controlling air pollution and contaminants, which is to aid the implementation of the Texas Clean Air Act, and the Texas Clean Air Act itself, which is to "safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property. . . . " *See* Tex. Health & Safety Code § 382.002(a); *see also* 30 Tex. Admin. Code §§ 101.300–.311. The Act provides that its provisions are to be "vigorously enforced." Tex. Health & Safety Code § 382.002(b).

Accordingly, for all these reasons, we conclude that the plain language of rule 101.309 does not include any tolling mechanism that would extend the lifespan of an emission credit beyond "60 months from the date of the emission reduction" for the purpose of this mootness analysis. *See* 30 Tex. Admin. Code § 101.309(b)(3).

There may be a disagreement about the "date of the emission reduction" in this case, but we need not resolve that disagreement in order to determine mootness. Both parties tie the "date of emission reduction" to the shutdown of AC Interests's facility. *See* 30 Tex. Admin. Code § 101.300(27) (defining "shutdown" as "permanent cessation of an activity producing emissions at a facility or mobile source"). Regardless of whether the facility shutdown occurred in July 2010, as the TCEQ asserts, or as late as October 2013, as AC Interests asserts, both dates are more than 60 months in the past.

Neither AC Interests's pleadings in the district court nor its briefing in this Court include any argument or allegation as to the usefulness of ERCs beyond their 60-month lifespan that might preserve the controversy over TCEQ's denial of ERCs. *See generally Kallinen*, 516 S.W.3d at 622 (case is not moot if some issue remains in controversy). Based on the limited record before us, we can discern none.[19] For example, subpart (e) of rule

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[19] With a limited exception for the purpose of determining jurisdiction, not invoked here, our review on appeal is limited to the facts in the record. *Cf. Freedom Commc'ns, Inc. v. Coronado*, 372 S.W.3d 621, 623–24 (Tex. 2012) (citing Tex. R. Evid. 201 and noting that appellate court may take judicial notice of relevant facts outside record to determine jurisdiction); *Bridgeport Indep. Sch. Dist. v. Williams*, 447 S.W.3d 911, 916 (Tex. App.—Austin 2014, no pet.) (taking notice of letter not in appellate record as it was undisputed and impacted court's jurisdiction). In this case, the appellate record includes only select pleadings and documents from the district court's file and the record of the previous service-related appeal. Although AC Interests's briefing includes citations to the administrative proceedings before TCEQ and it appears that the administrative record was transmitted to the district court, the administrative record itself was not designated for inclusion in the appellate record or transmitted to this Court. The only part of the administrative record before us is TCEQ's

101.309 suggests a permissible use of expired emissions credits—"[r]eductions certified as emissions credits may still be used by the original owner as an emission reduction for netting purposes after the emission credits have expired, as provided in § 116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas)." 30 Tex. Admin. Code § 101.309(e). There are no netting allegations in either AC Interests's pleadings or briefing. AC Interests's only allegation as to the continued usefulness of the expired emission credits concerns whether the litigation-related delay will diminish their value in the "emission credit market." But that allegation ignores that emission credits are transferrable at "any time *before the expiration date* of the emission credit[.]" 30 Tex. Admin. Code § 101.309(d) (emphasis added).

Absent any basis for concluding either that the emission credits AC Interests may have generated have not expired or have some usefulness despite their expiration, we hold that AC Interests's request for judicial review of the TCEQ's denial of its applications for certification of ERCs is moot.[20] *Cf. Tex. Comm'n*

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decision letters, which were attached as exhibits to AC Interests's response to the plea to the jurisdiction.

[20] Although there is not a prior Texas case that directly addresses whether a claim involving emission credits becomes moot upon the credits' expiration, more than one federal case recognizes that claims involving permits issued by the Environmental Protection Agency can become moot during litigation upon the expiration of the subject permit. *See, e.g.*, *DJL Farm LLC v. U.S. Envtl. Prot. Agency*, 813 F.3d 1048, 1051 (7th Cir. 2016) (agreeing with agency and company that landowners' action challenging permits issued for construction and operation of carbon dioxide was moot because challenged permits expired and, thus, court could not award meaningful relief); *Madison v. Tulalip Tribes of*

on Envtl. Quality v. Gonzales, No. 03-18-00803-CV, 2019 WL 5582236, at *1–2 (Tex. App.—Austin Oct. 30, 2019, no pet.) (mem. op.) (dispute over air quality permit became moot upon expiration of permit); *City of Shoreacres v. Tex. Comm'n on Envtl. Quality*, 166 S.W.3d 825, 831 (Tex. App.—Austin 2005, no pet.) (dispute over validity of permit became moot when requested relief would no longer have any practical legal effect).

In that regard, AC Interests has not asserted or established, in either this Court or the district court, that any exception to the mootness doctrine preserves its cause,[21] and AC Interests reconfirmed that position during oral argument. *See, e.g.*, *Gen. Land Office of Tex. v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990) (identifying limited exceptions to mootness doctrine for controversies that (1) are capable of repetition yet evading review or (2) involve collateral consequences);

Wa., 163 Fed. Appx. 499 (9th Cir. 2006) (appeal challenging expired permit governing storm water discharge was moot). We find these cases to be persuasive for the purpose of our mootness inquiry.

[21] *See, e.g.*, *Ackels v. United States Envtl. Prot. Agency*, 7 F.3d 862, 868 (9th Cir. 1993) (challenge to requirements of discharge permits became moot when permits expired and permit requirements were not likely to be reimposed so as to invoke exception to mootness doctrine); *Humane Soc'y of United States v. Envtl. Prot. Agency*, 790 F.2d 106, 113 (D.C. Cir. 1985) (fact that experimental use permits expired before case reached oral argument did not render moot petition for review because permits' one-year life span did not allow completion of review before expiration and there was reasonable expectation that future permits would be challenged by petitioner); *Montgomery Envtl. Coal. v. Costle*, 646 F.2d 568, 578–80 (D.C. Cir. 1980) (portion of appeal challenging expired permits issued to sewage treatment plants was moot when decision would be mere academic exercise but not moot as to portion of appeal involving recurring issues).

Williams, 52 S.W.3d at 184 (to invoke "capable of repetition, yet evading review" exception to mootness doctrine, "a *plaintiff must prove* that . . . ") (emphasis added). Moreover, there are no allegations in AC Interests's pleadings that suggest to us the applicability of any exception to the mootness doctrine. This jurisdictional defect is not one of pleading sufficiency that can be cured by repleading. *See Miranda*, 133 S.W.3d at 227.

CONCLUSION

Accordingly, having concluded that AC Interests's request for judicial review is moot, based on the record and arguments presented to us, we hold the trial court did not err by granting the TCEQ's plea to the jurisdiction.[22]

We affirm the trial court's judgment.

Terry Adams
Justice

Panel consists of Justices Goodman, Landau, and Adams.

[22] Our conclusion on mootness precludes us from considering AC Interests' other issues challenging the constitutionality of rule 103.309 and asserting a right to a jury trial. *See Williams*, 52 S.W.3d at 184 (court loses jurisdiction when case becomes moot). Accordingly, we do not reach those issues.

ORDER GRANTING TCEQ PLEA TO JURISDICTION, 345TH DISTRICT COURT, TRAVIS COUNTY, TEXAS (APRIL 26, 2019)

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS, 345TH JUDICIAL DISTRICT

AC INTERESTS, L.P., FORMERLY AMERICAN COATINGS, L.P.,

Plaintiff,

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,

Defendant.

No. D-1-GN-14-005160

Before: Hon. Jan SOIFER, 345th District Court, Travis County.

ORDER GRANTING THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S PLEA TO JURISDICTION

On April 18, 2019, the Court heard arguments on the Texas Commission on Environmental Quality's (the Commission) Plea to the Jurisdiction and AC Interests' Request for a Jury Trial. After considering the same and hearing argument of counsel, the Court

finds that Defendant's Plea to the Jurisdiction should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that TCEQ's Plea to the Jurisdiction is GRANTED. All other relief sought that is not specifically granted herein is DENIED.

SIGNED on this 26th day of April 2019.

/s/ Hon. Jan Soifer
345th District Court,
Travis County

Approved as to Form:

/s/ Lisa McClain Mitchell

OPINION AND ORDER OF THE TEXAS SUPREME COURT REVERSING AND REMANDING (MARCH 23, 2018)

IN THE SUPREME COURT OF TEXAS

AC INTERESTS, L.P., FORMERLY AMERICAN COATINGS, L.P.,

Petitioner,

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,

Respondent.

No. 16-0260

On Petition for Review from the Court of Appeals for the First District of Texas

Argued October 11, 2017

JUSTICE DEVINE delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE GUZMAN, JUSTICE LEHRMANN, AND JUSTICE BROWN joined.

JUSTICE BOYD filed a dissenting opinion, in which JUSTICE JOHNSON joined.

JUSTICE BLACKLOCK did not participate in the decision.

The Texas Clean Air Act provides that a person adversely affected by a Texas Commission on Environmental Quality (TCEQ) ruling may appeal by filing a petition in a Travis County District Court within 30 days of the ruling. Tex. Health & Safety Code § 382.032(a), (b). The Act further requires serving citation on the TCEQ within 30 days of filing the petition. *Id.* § 382.032(c). The petitioner here failed to meet this latter requirement, and the district court dismissed the appeal on the TCEQ's motion. The court of appeals affirmed, concluding that the service deadline was mandatory and required dismissing the appeal. 521 S.W.3d 58, 62-63 (Tex. App.—Houston [1st Dist.] 2016) (mem. op.). We do not understand the Act to require dismissal under the circumstances here. Accordingly, we reverse and remand.

I. Background

The TCEQ is charged with administering the Texas Clean Air Act, which establishes a regulatory scheme to "safeguard the state's air resources from pollution." Tex. Health & Safety Code §§ 382.002(a), .011(a)(1). As part of the Act's implementation, the TCEQ has adopted rules to regulate and control air pollution and contaminants. *See* 30 Tex. Admin. Code §§ 101.300-.304 (Tex. Comm'n on Envtl. Quality, Emission Credit Program) (2018). These rules authorize the TCEQ to grant Emission Reduction Credits (ERCs) when certain authorized emissions are reduced or eliminated under an emissions banking and trading program. *See id.* § 101.301. A company may generate ERCs, for example, by permanently shutting down a facility that lawfully emits volatile organic compounds or nitrogen oxides. *Id.* §§ 101.302(a)(1), .303(a)(1)(A).

An ERC created under the TCEQ's rules is a limited authorization to emit pollutants. *Id.* § 101.302(k). The emission reduction, however, must be certified, which means that the reduction must be "enforceable, permanent, quantifiable, real and surplus," among other things. *Id.* § 101.302(d)(1)(A). If the TCEQ certifies the reduction, the company may trade or use its ERCs within a designated area, for example, to offset emissions from a new source. *Id.* § 101.306(a)(1).

In 2013, AC Interests asked the TCEQ to certify ERCs. The TCEQ reviewed and denied the application. This prompted AC Interests to seek judicial review. AC Interests filed its petition in Travis County District Court on December 10, 2014, and hand delivered a copy to the TCEQ a couple of days later. But AC Interests did not formally serve the TCEQ until 58 days after filing the petition. In the interim, the TCEQ moved to dismiss because it had not been served within 30 days of the petition's filing, per § 382.032(c). The district court granted the motion and dismissed the petition. AC Interests appealed, and this Court transferred the appeal from the Third Court of Appeals in Austin to the First Court in Houston, as a routine docket-equalization matter. *See* Tex. Gov't Code § 73.001 (granting the Supreme Court authority to transfer appellate cases); *see also Miles v. Ford Motor Co.*, 914 S.W.2d 135, 137 (Tex. 1995) (noting authority typically exercised to equalize dockets). The First Court, applying the Third Court's precedent, affirmed the dismissal. 521 S.W.3d at 63 & n.3 (citing Tex. R. App. P. 41.3).

II. The Standard of Review

The TCEQ asserted Rule 91a as the basis for its dismissal motion. *See* Tex. R. Civ. P. 91a. Rule 91a

permits a party to "move to dismiss a cause of action on the grounds that it has no basis in law or fact." *Id.* 91a.1. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id.* "A cause of action has no basis in fact if no reasonable person could believe the facts pleaded." *Id.* The motion must (1) state that it is made pursuant to Rule 91a, (2) "identify each cause of action to which it is addressed," and (3) "state specifically the reasons the cause of action has no basis in law, no basis in fact, or both." *Id.* 91a.2. The court is not to consider evidence but "must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59." *Id.* 91a.6.

The TCEQ's motion does not address the pleadings or the deficiency of any cause of action. It instead asks the court to dismiss the appeal because AC Interests failed to comply with a statutory requirement—the timely service of citation. We review Rule 91a motions *de novo*, but as the court of appeals correctly points out, that was not the proper motion to file. *See* 521 S.W.3d at 60 (stating the matter is not one "that can be resolved by looking only at the allegations in the pleadings"). Even so, the court concluded that the TCEQ's motion was in substance a general motion to dismiss that the court could review. *Id.* Further, because the motion concerned a legal question requiring statutory construction—the consequences for AC Interests's failure to comply with the Clean Air Act's 30-day service deadline—the court declared that the standard of review was *de novo*. *Id.* at 61 (quoting *City of Rockwall*

v. Hughes, 246 S.W.3d 621, 625 (Tex. 2008) ("Statutory construction is a legal question we review *de novo*.").

We agree that the TCEQ's dismissal motion is premised on matters of statutory construction rather than on any matter subject to Rule 91a and, therefore, treat it as a general motion to dismiss or dilatory plea premised on the TCEQ's interpretation of the statute. *Cf. Bland Indep. Sch. Dist. v. Blue,* 34 S.W.3d 547, 554 (Tex. 2000) ("The purpose of a dilatory plea is not to force the plaintiffs to preview their case on the merits but to establish a reason why the merits of the plaintiff's claim should never be reached."); *Kelley v. Bluff Creek Oil Co.*, 309 S.W.2d 208, 214 (Tex. 1958) (noting "a speedy and final judgment may be obtained on the basis of matters in bar and without the formality of a trial on the merits, if the parties so agree"). AC Interests complains here that its district court appeal should not have been dismissed because either (1) the Clean Air Act's 30-day service deadline does not apply to AC Interests, or (2) if it does, the requirement is neither mandatory nor a legitimate basis for dismissal. We consider these issues in turn.

III. Analysis

A. Does the Clean Air Act's 30-day service requirement in Tex. Health & Safety Code § 382.032(c) apply to AC Interests's appeal?

In the court of appeals, AC Interests argued that the 30-day-service requirement did not apply because its TCEQ appeal was premised on the Water Code, not the Clean Air Act. Like the Clean Air Act, the Water Code requires that an appeal must be filed within 30 days of the TCEQ's ruling. Tex. Water Code § 5.351(b).

Unlike the Clean Air Act, the Water Code does not provide for the service of citation within 30 days of the petition's filing. *Compare* Tex. Water Code § 5.351, *with* Tex. Health & Safety CODE § 382.032(c). Instead, the Water Code provides for dismissal one year after the petition's filing if the plaintiff has not secured proper service or prosecuted the suit within that time, unless good cause exists for the delay. Tex. Water Code § 5.353. AC Interests therefore concludes that its service on the TCEQ a mere 58 days after the filing of its petition was timely.

The court of appeals recognized that the Water Code provides general authority for judicial review of TCEQ rulings. *See* 521 S.W.3d at 62 (citing Tex. Water Code § 5.351). The court also acknowledged that AC Interests's petition in the district court cites both the Water Code and the Clean Air Act, but necessarily relies on the Clean Air Act as "the authority for the TCEQ to regulate air emissions." *Id.* at 63. And because the Clean Air Act not only authorizes the particular TCEQ decision but also specifically provides for its judicial review, the court concluded that the Clean Air Act controls over the more general Water Code provision. *See id.* (quoting "the traditional statutory construction principle that the more specific statute controls over the more general" from *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000)).

We agree that the Clean Air Act controls AC Interests's request for judicial review in the district court and that the 30-day service requirement was therefore applicable. *See* Tex. Health & Safety Code § 382.032(c).

B. Is the Clean Air Act's 30-day service requirement in Tex. Health & Safety Code § 382.032(c) mandatory or directory?

The Clean Air Act provides successive 30-day deadlines in connection with the appeal of a TCEQ ruling. The first deadline is to file the petition that initiates the appeal. Tex. Health & Safety Code § 382. 032(a)-(b). The second is to serve citation on the TCEQ. *Id.* § 382.032(c). The parties agree that the filing deadline is a mandatory, jurisdictional requirement and that the service deadline is not jurisdictional. The parties disagree about whether the service deadline is mandatory and about what consequence follows failing to meet this service deadline.

AC Interests argues that the service deadline is directory and that, because AC Interests complied with the statute's essential purpose by hand-delivering the petition to the TCEQ two days after filing, dismissal is not required. It submits 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. *Chisholm v. Bewley Mills*, 287 S.W.2d 943, 945 (Tex. 1956). 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. *Helena Chem. Co. v. Wilkins,* 47 S.W.3d 486, 495 (Tex. 2001). But, AC Interests concedes, this is not always the case; the lack of a stated consequence cannot be interpreted to defeat the statute's essential purpose. *See Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 392, 403 (Tex. 2009). AC Interests submits

that § 382.032's essential purpose is to provide a process for appealing the TCEQ's ruling and that the two deadlines exist to expedite that process. It contends that it substantially complied with that process by timely filing its petition and providing actual notice of the filing to the TCEQ two days later. *See id*. (noting that the issue is not substantial compliance with the filing deadline but rather substantial compliance with the statute's "application process, one requirement of which was the filing deadline").

The TCEQ responds that the language and purpose of the statute demonstrate that the service requirement is mandatory. The statute states that "service of citation *must* be accomplished within 30 days." Tex. Health & Safety Code § 382.032(c). (emphasis added). The word "must" indicates a condition precedent "unless the context in which the word or phrase appears necessarily requires a different construction," according to the Code Construction Act. Tex. Gov't Code § 311.016. The TCEQ therefore concludes that AC Interests had to serve process within 30 days to accrue its right to judicial review. But the TCEQ also concedes that serving citation, unlike filing the petition, is not jurisdictional. Nevertheless, it contends that the Legislature intended the same mandatory effect because it used the same mandatory term—"must"—and a similar timing provision. Thus, even though timely service is not a jurisdictional prerequisite, a failure to meet the deadline should, according to the TCEQ, yield the same consequence: dismissal. Finally, the TCEQ submits that the service deadline is not onerous because any party appealing a TCEQ ruling knows where to serve the TCEQ, having already appeared before the agency. The TCEQ submits that "[i]n this respect, serving citation

is more like filing a notice of appeal than serving citation for a common-law lawsuit." But the TCEQ also submits that the service deadline does not merely provide prompt notice of the appeal but also eliminates any due-diligence argument that might otherwise excuse late service.

The "fundamental rule" for determining whether a statutory provision is mandatory or directory "is to ascertain and give effect to the legislative intent." *Chisholm*, 287 S.W.2d at 945. But the legislative intent is often unclear when the Legislature creates a deadline but expresses no penalty or consequence for failing to meet it. In situations like that, we have acknowledged that no "absolute test" exists for distinguishing the mandatory from the directory. *Id.* And to punctuate the point, we offered these additional observations sixty years ago:

> Although the word "shall" is generally construed to be mandatory, it may be and frequently is held to be merely directory. In determining whether the Legislature intended the particular provision to be mandatory or merely directory, consideration should be given to the entire act, its nature and object, and the consequences that would follow from each construction. Provisions which are not of the essence of the thing to be done, but which are included for the purpose of promoting the proper, orderly and prompt conduct of business, are not generally regarded as mandatory. If the statute directs, authorizes or commands an act to be done within a certain time, the absence of words restraining the doing thereof afterwards or stating the consequences of

> failure to act within the time specified, may be considered as a circumstance tending to support a directory construction.

Id.

The words "shall" and "must" in a statute are generally understood as mandatory terms that create a duty or condition. *Wilkins*, 47 S.W.3d at 493 (citing Tex. Gov't Code § 311.016(2), (3)). But we have cautioned that such labels can be misleading absent context. *See State v. $435,000*, 842 S.W.2d 642, 644 (Tex. 1992) (per curiam). "More precisely the issue is not whether 'shall' [or 'must'] is mandatory, but what consequences follow a failure to comply." *Id.* Thus, "[t]o determine whether a timing provision is mandatory, we first look to whether the statute contains a noncompliance 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." *Wilkins*, 47 S.W.3d at 495. But, of course, we will not interpret silence regarding the consequences for noncompliance to undermine the statute's purpose. *See Hines v. Hash*, 843 S.W.2d 464, 468 (Tex. 1992) (stating that when the statute is silent, we may look to its purpose for guidance). And again "[t]he fundamental rule is to ascertain and give effect to the legislative intent," *Chisholm*, 287 S.W.2d at 945, which "is best revealed" by the language enacted. *In re Office of Attorney Gen.*, 422 S.W.3d 623, 629 (Tex. 2013). We must, therefore, look at the Clean Air Act's text for clues of the intended consequence for late service.

The Act states that a person affected by a TCEQ ruling "may appeal the action *by filing a petition*." Tex. Health & Safety Code § 382.032(a) (emphasis

added). "The petition must be filed within 30 days after . . . the effective date of [the TCEQ's] ruling." *Id.* § 382.032(b). This means that a person may appeal only if the petition complies with the 30-day filing requirement—*i.e.*, a person who fails to comply may *not* appeal; hence, any attempt to appeal should be dismissed. Filing a timely petition under the statute is a jurisdictional requirement. *See* Tex. Gov't CODE § 311.034. When a party's failure to comply results in a court lacking jurisdiction, the necessary consequence for that failure is dismissal. Similarly, when the deadline relates to the very act necessary to establish a claim, right, or benefit under the statute, the deadline is usually considered mandatory and its neglect fatal. *See, e.g., Chem. Lime, Ltd.*, 291 S.W.3d at 404-05 (holding that applicant was not entitled to a ground water permit because it failed to submit proof of its historical water usage by deadline). But no such consequence for failing to comply with the 30-day *service* deadline is stated or necessary here. The Act states that "[s]ervice of citation on the commission must be accomplished within 30 days after the date on which the petition is filed." *Id.* § 382.032(c). It states only a requirement, not a consequence; you "may appeal . . . by filing a petition," not by serving citation. Both the service and petition deadlines "must" be met, but only the petition deadline has a clear consequence for noncompliance—you may *not* appeal.

The court of appeals dealt with this dilemma by concluding that the service deadline was mandatory, rather than directory, and required dismissal, relying on precedent from the Austin Court of Appeals. 521 S.W.3d at 61-62 (following *TJFA, L.P. v. Tex. Comm'n on Envtl. Quality*, 368 S.W.3d 727 (Tex. App.—Austin

2012, pet. denied)); *see also* TEX. R. APP. P. 41.3 (requiring that the transferee court apply the transferor court's precedent in cases transferred by the Supreme Court). *TJFA* dealt with a Solid Waste Act provision that provided a similar 30-day deadline to serve the TCEQ. *TJFA*, 368 S.W.3d at 729; *see* Tex. Health & Safety Code § 361.321(c). The Austin Court held that the 30-day service deadline was mandatory because the statute did not expressly provide for any exceptions and was written with mandatory language, which had to be afforded some significance. *TJFA,* 368 S.W.3d at 735. Like the statute here, the Solid Waste Act does not specify the consequence for noncompliance with the service deadline. The Austin Court, however, determined that the consequence for noncompliance was dismissal because the Legislature placed the service and filing deadlines in the same subsection. This, the court reasoned, indicated that the service deadline should be treated like the filing one. *Id.* at 735-36.

We are not convinced that this placement indicates anything significant. But even if it does, the service and filing deadlines here are in different subsections. *See* Tex. Health & Safety Code § 382.032(b), (c). Thus, what the court found significant in *TJFA* does little to help resolve this case.

The TCEQ nevertheless argues that we must afford some significance to the statute's use of the word "must," which, under the Code Construction Act, indicates a condition precedent "unless the context . . . necessarily requires a different construction." Tex. Gov't Code § 311.016. As a condition precedent, the TCEQ claims, the statutory provision is mandatory,

which means that AC Interests's suit should be dismissed. But that argument misses the point. Even if the service requirement is a condition precedent and, hence, mandatory, that does not resolve what the consequence is for *late* service. It is too quick to say that "must" is mandatory language, therefore failure to comply results in dismissal. *See $435,000*, 842 S.W.2d at 644 (noting that the issue is not the use of mandatory language "but what consequences follow a failure to comply"). That goes too far as a statutory-construction approach because it assumes, without more, that *any* noncompliance with a condition precedent results in dismissal. But other possible consequences exist. *See, e.g., Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999) (per curiam) (noting that failure to comply with mandatory notice provision under worker's compensation law did not require dismissal of action for judicial review); *Hines v. Hash,* 843 S.W.2d 464, 467-69 (Tex. 1992) (determining abatement to be the consequence for failure to give required statutory notice); *$435,000*, 842 S.W.2d at 644 (concluding that failure to hold forfeiture case hearing within statutorily required 30-day period did not require dismissal); *Tex. Dep't of Pub. Safety v. Gratzer*, 982 S.W.2d 88, 90-91 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (holding that officer's failure to comply with statutory deadline regarding notice of license suspension did not render DWI-warning form inadmissible because statute did not provide a consequence and driver did not assert any prejudice).

We recently held in *BankDirect Capital Finance, LLC v. Plasma Fab, LLC* that the failure to meet a statutory timelimit could not be excused, but that situation is distinguishable from the present one. 519

S.W.3d 76, 78 (Tex. 2017). There, the issue was whether the Insurance Code permitted BankDirect, a premium finance company, to cancel an insured's policy even though BankDirect did not comply with a statutory timelimit for doing so. *Id.* at 79. The statute required BankDirect to mail an intent-to-cancel notice to the insured stating a deadline of not less than ten days to cure the insured's default. *Id.* at 80. BankDirect's notice did not provide this minimum deadline to cure. *Id.* at 79. The statute in *BankDirect*, however, unlike the statute here, states a consequence for such non-compliance: a finance company "may not cancel" an insured's policy unless the statutory notice is given. Tex. Ins. Code § 651.161(a)-(b). Because BankDirect did not comply with the statute, it was not allowed to cancel the policy. *See BankDirect*, 519 S.W.3d at 86 (noting the statute's "austere consequence for noncompliance: BankDirect 'may not cancel' the policy"). Thus, *BankDirect* does not control this case.

The statutory provision at issue here does not state a consequence and, importantly, no consequence is logically necessary. *See* Tex. Health & Safety Code § 382.032(c). Contrast this with a jurisdictional requirement, where failure to comply results in dismissal because the failure means that jurisdiction never obtains. *See*, *e.g., id.* § 382.032(a). In that situation, dismissal is logically necessary though not explicitly stated. But the service requirement here is not jurisdictional. *See Roccaforte v. Jefferson Cty.*, 341 S.W.3d 919, 925 (Tex. 2011) (holding that failure to give statutorily required post-suit notice is not jurisdictional). That is, even if it is a condition precedent to *something*, it is not a condition precedent to suit, and no other particular consequence for noncompliance is logically necessary. Hence,

deeming the service requirement a "condition precedent" does not resolve the issue of what a court is to do here.

The dissent, however, argues that subsections (a), (b), and (c) are *all* conditions precedent to appeal. *Post* at ___ (Boyd, J., dissenting). That is, the dissent thinks that you "may appeal" only by (1) filing a petition, (2) doing so within 30 days, and (3) serving citation within 30 days. But that is not how the statute is written. Nowhere does the statute state that a party "may appeal" by filing a petition *and* serving citation. It states, in subsection (a) only, how a party "may appeal": "by filing a petition." *Compare* Tex. Health & Safety Code § 382.032(a), *with id.* § 382.032(b), (c). There is no conjunction linking subsections (a) and (c), or (a) and any other subsection. *See id.* § 382.032. Without a conjunction, there is no plain-language argument that subsection (c) refers back to subsection (a)'s "may appeal" language and, hence, is a condition precedent to appeal. Subsection (c) states, in its entirety: "Service of citation on the [TCEQ] must be accomplished within 30 days after the date on which the petition is filed. Citation may be served on the executive director or any [TCEQ] member." *Id.* § 382.03(c). We cannot conclude from this that the service deadline, like the petition-filing requirement, is a condition precedent to appeal.

The dissent further argues that there is no principled reason to construe the petition deadline as a condition precedent to appeal but not to do so for the service deadline. *Post* at ___. Respectfully, we disagree. Subsections (a) and (b) are linked because subsection (b) lists the requirements for filing the petition identified in subsection (a)—these requirements are

simply what subsection (a) means by "filing a petition." If you do not meet these requirements, you have not filed a petition and, therefore, may not appeal. We think that conclusion is logically necessary given that you must file a petition in order to appeal. But subsection (c) is not defining a term in subsection (a), and again, does not in any way refer back to subsection (a)'s "may appeal." Thus, we cannot similarly conclude that failing to meet the service deadline means that you may not appeal.

The dissent's argument that subsection (c) is just as much a condition precedent to appeal as subsection (b) is a perfectly reasonable one, but it is based on an inferential leap that is not needed when making the same conclusion about subsection (b). That inference is that the Legislature intended for subsection (a)'s "may appeal" language to apply to subsection (c), too. Such an inference is reasonable, and reasonable minds will disagree about whether subsection (c) was meant as a condition precedent to appeal. But that is exactly the point: the dissent's reading is reasonable and logical, but it is not logically *necessary*. Also reasonable is concluding that serving citation is a *post*-suit requirement or that its purposes was merely to provide notice. All of these conclusions are reasonable, but they all require us to make inferences beyond what the text provides. None are logically necessary. Thus, the dissent's subsection (c) conclusion, though reasonable, is principally distinct from our subsection (b) conclusion, which is logically necessary.

Of course, had AC Interests *never* served citation, this failure to ever perform the condition precedent—accomplishing service—means that AC Interests would be prohibited from *continuing* to appeal. But that, by

itself, still does not mean that failing to serve within 30 days requires dismissal. Dismissal might occur eventually, as the Act's one-year presumption-of-abandonment provision suggests: "If the plaintiff does not prosecute the action within one year after the date on which the action is filed, the court shall presume that the action has been abandoned." Tex. Health & Safety Code § 382.032(d). Indeed, in that situation, a court is required to "dismiss the suit on a motion for dismissal . . . unless the plaintiff . . . can show good and sufficient cause for the delay." *Id.* But before one year has elapsed, the only logically necessary consequence for failing to serve the citation is that, until it *is* served, AC Interests cannot pursue a remedy under the Act. After a year, this failure might result in dismissal. *See id.* In that sense, serving citation is mandatory—it must be done at some point. But AC Interests *did* serve citation; it simply did so more than 30 days after filing the petition. Thus, even if the service deadline is mandatory and, hence, failing to ever accomplish service—a condition precedent—could eventually result in dismissal, that consequence is not logically necessary when service is merely beyond 30 days. So we are back to the initial question: what is the consequence for noncompliance with the service-of-citation deadline?

But the dissent protests that serving citation is a constitutionally required step that is "inherent in the act of filing a petition" and is jurisdictional. *Post* at ___. Even if serving citation is jurisdictional, *contra Roccaforte*, 341 S.W.3d at 925, or constitutionally required, doing so within 30 days is not. The 30-day deadline is a creature of the statute, not the constitution or our jurisdiction jurisprudence. And 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.

As the above discussion demonstrates, that "must" creates a condition precedent under the Code Construction Act does not determine the consequence for noncompliance here. Even if the provision is mandatory in the sense that failure to *ever* effect service cannot be excused, the statute does not give any guidance for determining the consequence for *late* service. This leaves us with essentially the same question as before—is the 30-day aspect of the service requirement mandatory or directory?—with no statutory guidance to answer it. But ironically, this lack of guidance is what guides us. Our acknowledgment of this uninformed choice between mandatory and directory is what informs our analysis, because 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.

Presuming that the 30-day requirement is mandatory entails judicial guesswork to resolve the case. Indeed, such a presumption requires choosing legal consequences without any direction from the text. When no stated or logically necessary consequence for noncompliance can be tethered to the text, choosing between dismissal, abatement, or some other consequence presents an intractable problem. Hence the presumption that a timing provision that fails to state the consequences for noncompliance should be considered

directory rather than mandatory. *Wilkins*, 47 S.W.3d at 495; *Chisholm*, 287 S.W.2d at 945. But this presumption cannot be used to undermine the statute's purpose. Thus, when the statute is otherwise silent on the subject, we look to its purpose for guidance in divining the consequence for noncompliance. *See Chem. Lime*, 291 S.W.3d at 404. In other words, if a particular consequence is logically necessary to accomplish the statute's purpose, the courts will apply that consequence.

The statute's purpose here is to provide a process for the judicial review of TCEQ decisions. *See* Tex. Health & Safety Code § 382.032 ("Appeal of Commission Action"). The successive 30-day deadlines indicate a further purpose to expedite filing and notice and presumably the appeal itself. *Id.* § 382.032(b)-(c). The TCEQ emphasizes that the service requirement is not merely a notice requirement but also a service-of-process requirement, implying strict compliance. We, however, see no textual basis to conclude that serving citation within 30 days of filing the petition is so essential to the statute's purpose that the Legislature intended anything less than strict compliance to require dismissal. *Cf. Roccaforte,* 341 S.W.3d at 926 (concluding under another statute requiring expedited notice that the failure to strictly comply with the manner of notice was not fatal because the statute's purpose was not "to create a procedural trap allowing a county to obtain dismissal even though the appropriate officials have notice of the suit").

The dissent agrees with our identified purpose—providing a process for judicial review and expediting appeals—but claims that "construing the service-of-citation requirement as a condition precedent to judicial review best promotes that purpose." *Post* at ___.

Maybe so, but that the dissent's construction promotes the purpose does not mean that the construction is required to satisfy that purpose. Appeals under this statute are more expedient when the 30-day deadline is met, but missing that deadline does not make the appeal so prolonged that it is delayed to the point of failing this "expedience" purpose. That is, this particular deadline, even if it helps to make appeals more expedient, is not so essential to "expediency" that failure to meet the deadline necessarily entails dismissal. We should be careful not to confuse incrementally promoting a purpose with being fundamentally required by it—*i.e.*, just because "expediency" is a purpose does not mean that being less-expedient requires dismissal.

Moreover, that dismissal under subsection (d) can occur only after failing to "prosecute the action within one year," Tex. Health & Safety Code § 382.032(d), shows that dismissal for missing this 30-day deadline is not essential to the purpose. Because AC Interests could sit on its hands for almost an entire year after filing its petition and serving citation before the statute allows for dismissal based on this lack of expediency, delays short of that one-year mark cannot be so contrary to "expediency" that they *require* dismissal. Indeed, even at the one-year mark, the statute allows for AC Interests to avoid dismissal by showing "good and sufficient cause for the delay." *Id.* Whatever consequence the Legislature might have had in mind when writing subsection (c), we cannot conclude that it was dismissal when subsection (d) allows for such a significant delay, and then an opportunity to provide an excuse, before dismissing.

The dissent also claims that the statute's purpose is to detail when the Legislature waives the TCEQ's

sovereign immunity. *Post* at ___. Even if we agreed with this alleged purpose, there is no ambiguity regarding what the Legislature has waived sovereign immunity for: appealing "a ruling, order, decision, or other act" of the TCEQ or executive director. *Id.* § 382.032(a). There is nothing regarding the breadth of sovereign immunity to broadly or narrowly construe here. The TCEQ's waiver of immunity is equally limited under both our analysis and the dissent's. We disagree whether the service deadline is a condition precedent to bringing an appeal, but that does not affect how limited the waiver is. Regardless, immunity was waived when AC Interests properly filed its petition. The dissent's argument that serving citation is also required to waive immunity rests on its premise that the service deadline is jurisdictional and constitutionally required. But we have already discussed why we disagree with that argument. Thus, missing the 30-day deadline cannot be so essential to the statute's purpose that dismissal is logically necessary.

Whatever gap a court must bridge between a statute's language and its intended result, it is a wider gap if the statute's language is presumed to be mandatory rather than directory. Thus, when a statutory provision has mandatory language, but is not jurisdictional, and does not have an explicit or logically necessary consequence, we presume the provision was intended as a direction rather than a mandate. Doing so ends the judicial inquiry, or at least the difficult part of it. Because such a provision is directory, courts are not forced to blindly search for or invent a particular consequence that the Legislature failed to provide. But just because a provision such as this is directory does not make it a mere suggestion that can

be disregarded at will. If a party does not comply with such a provision, an opposing party can, upon a showing of prejudice, have that prejudice remedied as the court determines that justice requires. This might mean, for example, abatement, attorney's fees, or expediting subsequent proceedings as appropriate. In extreme situations where the noncompliance prevents the opposing party from adequately presenting its case, it might mean dismissal. Failure to comply with a directory provision has consequences, but they are not always fatal.

* * * * *

Here, AC Interests served citation on the TCEQ after the 30-day statutory deadline. Because the Legislature expressed no particular consequence for failing to meet that deadline and none is logically necessary, we presume that the Legislature intended the requirement to be directory rather than mandatory and that the Legislature did not intend for late service to result in the automatic dismissal of AC Interests's appeal. Because the court of appeals erred in upholding the dismissal, we reverse its judgment and remand the cause to the district court for further proceedings consistent with this opinion.

John P. Devine
Justice

Opinion Delivered: March 23, 2018

DISSENTING OPINION OF JUSTICE BOYD, JOINED BY JUSTICE JOHNSON (MARCH 23, 2018)

IN THE SUPREME COURT OF TEXAS

AC INTERESTS, L.P., FORMERLY AMERICAN COATINGS, L.P.,

Petitioner,

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,

Respondent.

No. 16-0260

On Petition for Review from the Court of Appeals for the First District of Texas

JUSTICE BOYD, joined by JUSTICE JOHNSON, dissenting

The Texas Clean Air Act provides that a person "may appeal" a Texas Commission on Environmental Quality decision "by filing a petition in a district court of Travis County." TEX. HEALTH & SAFETY CODE § 382.032(a). The petition "must be filed within 30 days after" the decision's effective date, *id.* § 382.032(b), and service of citation on the Commission "must be accomplished within 30 days after the date on which the petition is filed," *id.* § 382.032(c). AC Interests

filed this suit to appeal the Commission's decision to deny AC Interests's claim to certain emission-reduction credits. It timely filed its petition within thirty days after the Commission's decision, but it did not serve citation on the Commission until fifty-eight days later. The primary issue is whether AC Interests may pursue the appeal after missing the statute's service-of-citation deadline.

The Court holds that subsection (c)'s deadline is merely "directory," rather than "mandatory," so AC Interests's failure to meet the deadline does not preclude it from pursuing the appeal. *Ante* at ___. The Court agrees that the deadline creates a condition precedent, *ante* at ___, but it identifies no right or duty that is conditioned on the precedent.[1] Under the Court's reasoning, the deadline is a condition precedent that conditions nothing at all. As a result, the deadline means nothing at all. I disagree. The deadline—which subsection (c) says the party "must" meet—must be a condition on <u>something</u>, and the only thing it *can* be a condition on is the right to pursue the appeal. The statute's plain language compels that result, and that result promotes the statute's apparent purposes. I would hold that because AC Interests failed to serve citation on the Commission within thirty

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[1] "A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation." *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992) (citing *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976)); *see also Helton v. R.R. Com'n of Tex.*, 126 S.W.3d 111, 119 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) ("By not serving Harris with a copy of the petition for judicial review, as mandated by section 2001.176(b)(2) of the APA, however, Helton did not meet a necessary condition on which its right to seek judicial review of the commission's order depended.").

days, as the statute says a party who wants to appeal a Commission decision "must" do, it cannot pursue this appeal. Because the Court holds otherwise, I respectfully dissent.

I. The Statute's Plain Language

The Clean Air Act prescribes a specific process for those who want to appeal a Commission decision, and it does so by using varying directives—"may," "must," or "shall"—for each step along the way:

- A person "may" appeal the Commission's decision "by filing a petition in a district court of Travis County."[2]
- The petition "must be filed within 30 days" after the decision's effective date.[3]
- Service of citation on the Commission "must be accomplished within 30 days" after the plaintiff files the petition.[4]
- The citation "may" be served on the executive director or any member of the Commission.[5]
- The plaintiff "shall" pursue the action with reasonable diligence.[6]
- The court "shall" presume the action has been abandoned if the plaintiff fails to prosecute the

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[2] Tex. Health & Safety Code § 382.032(a).

[3] *Id.* § 382.032(b).

[4] *Id.* § 382.032(c).

[5] *Id.*

[6] *Id.* § 382.032(d).

action within one year after the date on which the action is filed.[7]

– The court "shall" dismiss the suit upon the attorney general's motion, unless the plaintiff "can show good cause for the delay."[8]

We need not guess at the meanings of these directives, as the Legislature has defined them in the Code Construction Act. When a statute uses the term "must," it "creates or recognizes a condition precedent," Tex. Gov't Code § 311.016(3); when a statute uses the term "shall," it "imposes a duty," *id.* § 311.016(2); and when a statute uses the term "may," it "creates discretionary authority or grants permission or a power," *id.* § 311.016(1). These definitions apply to all statutes "unless the context in which the word or phrase appears necessarily requires a different construction" or "a different construction is expressly provided by statute." *Id.* § 311.016. The Clean Air Act does not provide an alternative meaning for these terms and, contextually, nothing compels a contrary conclusion. In the context of the Clean Air Act's procedural provisions, affording these words their statutorily prescribed meaning enforces the orderly administrative process the Legislature provided for claimants to appeal the Commission's decisions. *See* Tex. Health & Safety Code § 382.032.

Applying the definitions the Legislature has provided, I would follow a simple, plain-language approach and construe the statutorily-required process as follows:

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[7] *Id.*

[8] *Id.*

- *"May" appeal*: AC Interests had statutory permission to appeal the Commission's decision, and it could exercise that right "by filing a petition in a district court of Travis County," but it was not required to appeal.
- *"Must" file within thirty days*: As a condition precedent to pursuing its appeal, AC Interests was required to file its petition within thirty days after the decision's effective date. If AC Interests failed to file its petition within that time frame, it could not pursue its appeal.
- *"Must" accomplish service of citation within thirty days*: As *another* condition precedent to pursuing its appeal, AC Interests was required to accomplish service of citation within thirty days after filing its petition. If AC Interests failed to effectuate service within that time frame, it could not pursue its appeal.
    - *"May" serve on director or members*: In effecting service, AC Interests had statutory permission to serve the citation either on the Commission's executive director or any Commission member.
- *"Shall" pursue with diligence*: After it completed the first three steps, AC Interests had a duty to prosecute its action with reasonable diligence.
- *"Shall" presume abandoned and "shall" dismiss*: If AC Interests failed to prosecute the appeal within one year, the court had a duty to presume that AC Interests had abandoned the suit—and a duty to dismiss the suit—absent a showing of good cause for the delay.

The Court rejects this construction, at least of the service-of-citation deadline, because the statute does not expressly state that the suit will be dismissed if the claimant fails to meet that deadline. *Ante* at ___. According to the Court, even though the statute uses the word "must," even though that word creates a condition precedent, and even though it is therefore "mandatory" under any ordinary understanding, the requirement is merely directory because the statute does not expressly state that AC Interests cannot pursue its appeal if it fails to effectuate service of citation within thirty days.

This Court has struggled for decades—without much meaningful success—to identify a clear standard for determining whether a statutory requirement is "mandatory" or "directory." *See Chisholm v. Bewley Mills*, 287 S.W.2d 943, 945 (Tex. 1956) ("There is no absolute test by which it may be determined whether a statutory provision is mandatory or directory."). We have said that, in general, in determining "whether the Legislature intended a provision to be mandatory or directory, we consider the plain meaning of the words used, as well as the entire act, its nature and object, and the consequences that would follow from each construction." *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 494 (Tex. 2001). When the statute expressly states a consequence for noncompliance, of course, the Court's task is simply to apply that consequence. But when the statute fails to expressly state a consequence for noncompliance, our task becomes more difficult. We have concluded that the absence of any stated consequence "may be considered as a circumstance tending to support a directory construction," meaning the statute imposes no consequence for noncompliance.

Chisolm, 287 S.W.2d at 945. But we have also warned that this holding "does not suggest that when no penalty is prescribed, 'must' is non-mandatory." *Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 392, 404 (Tex. 2009).

Ultimately, we have concluded that when "the statute is silent about consequences of noncompliance, we look to the statute's purpose in determining the proper consequence of noncompliance." *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999) (per curiam); *see Hines v. Hash*, 843 S.W.2d 464, 468 (Tex. 1992) ("When the statute is silent, we have looked to its purpose for guidance."). Applying this approach here, I conclude that the Clean Air Act requires timely service of citation as a condition precedent to a suit for judicial review both because the statute's text and context compel that result and because that result best supports the statute's presumed purposes.

II. Text and Context

Reading subsection 382.032(c)'s service-of-citation deadline in context makes dismissal the only logical consequence for noncompliance. Subsections (a), (b), and (c) together stipulate that a person "may appeal" a Commission decision by filing a petition, but the petition must be filed within thirty days after the decision, and service of citation must be accomplished within thirty days after filing. The Court agrees that a party who misses subsection (b)'s filing deadline "may not appeal," because that deadline is "jurisdictional" and "relates to the very act necessary to establish a claim, right, or benefit under the statute."

Ante at ___.[9] But according to the Court, a party who misses subsection (c)'s service-of-citation deadline may still appeal because subsection (a) says the party "may appeal" by filing the petition, not by serving the citation. *Ante* at ___. According to the Court, we can only conclude that dismissal is the consequence for failing to timely serve citation by "blindly searching" the statute and then "creating" or "inventing" that consequence. *Ante* at ___.

I disagree. If, as the Court suggests, merely filing a petition is the sole condition precedent to appeal, then the mere filing of a petition would always be sufficient, and subsection (b)'s deadline for that filing would not be a condition precedent. But if timely filing the petition is also a condition precedent to the right to appeal, as the Court agrees it is, then we must read subsections (a) and (b) together to determine the effect of missing that deadline. But then there is no principled reason to read subsection (c)—or to understand its application to subsection (a)—differently from subsection (b) and its application. Even after the plaintiff has filed a petition, the trial court's "jurisdiction is dependent upon citation issued and served in a manner provided for by law," and "[a]bsent service, waiver, or citation, mere knowledge of a pending suit does not place any duty on a defendant to act." *Wilson*

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[9] The Court cites to section 311.034 of the Government Code for the proposition that "Filing a timely petition under the statute is a jurisdictional requirement." *Ante* at ___ (citing Tex. Gov't Code § 311.034). But section 331.034 actually supports the notion that serving citation and any embedded timing requirements are also jurisdictional requirements. *See* Tex. Gov't Code § 311.034 ("Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.").

v. Dunn, 800 S.W.2d 833, 836–37 (Tex. 1990). Service of citation, in other words, is effectively as "jurisdictional" as the filing of the petition, and equally as "necessary to establish a claim, right, or benefit under the statute." *Ante*, at ___.

A claimant cannot obtain judicial review simply by filing a petition. While subsection (a)— when read alone—says that a person "may appeal by filing a petition," subsection (c) recognizes that inherent in the act of filing a petition is the constitutionally required step of serving process on the named defendant. The "mere filing of the plaintiff's petition is not all that is required to 'commence' the suit," *Owen v. City of Eastland*, 78 S.W.2d 178, 179 (Tex. Comm'n App. 1935) (addressing statutes of limitations), because "those not properly served [with citation] have no duty to act, diligently or otherwise," *Ross v. Nat'l Ctr. for the Emp't of the Disabled*, 197 S.W.3d 795, 798 (Tex. 2006) (per curiam). Initiating a lawsuit is always a two-step process of filing and serving process, and subsections (b) and (c) impose deadlines on both of those steps.

The Court asserts that subsections (a) and (b) must be read together because both refer to the filing of the petition and subsection (b) simply defines what it means to file a petition as subsection (a) requires. *Ante* at ___. Thus, according to the Court, if you file a petition (as subsection (a) requires) but fail to file it within thirty days (as subsection (b) requires), "you have not filed a petition and, therefore, may not appeal." *Ante* at ___. The statute's language does not support that construction. If you file a petition but fail to file it within thirty days, you have still filed a petition, but you have not filed it timely. Because subsection (b) says you "must" file it timely—making

timely filing a condition precedent to appeal—you cannot pursue the appeal even though you have filed a petition. In the same way, because subsection (c) says you "must" timely serve citation on the Commission, you cannot pursue the appeal even though you have timely filed the petition. Without service of citation, the filed petition cannot provide any basis for judicial review. For this reason, I conclude that the statute requires that the consequence for failing to timely serve citation on the Commission is dismissal of the petition seeking judicial review. The person who elects to appeal by filing a petition "must" timely file the petition and "must" timely serve citation, and the consequence for failing to comply with either requirement is simply that the person cannot appeal.

Under the Court's approach, by contrast, the term "must" requires dismissal if the person fails to timely file the petition, but the same term imposes no consequence at all if the person fails to timely serve citation. The Court reasons that, unlike a "jurisdictional requirement, where failure to comply results in dismissal," subsection (c) "does not state a consequence and, importantly, no consequence is logically necessary." *Ante* at ___.[10] But serving citation *is* jurisdictional, as is any requirement that can be fairly characterized as a "statutory prerequisite." *See* Tex. Gov't Code § 311.034. ("Statutory prerequisites to a suit, including the

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[10] The Court also cites *Roccaforte v. Jefferson County*, 341 S.W.3d 919, 925 (Tex. 2011) for the proposition that "failure to give statutorily required post-suit notice is not jurisdictional." *Ante* at ___. The statute in that case did not address service of citation, but rather general notice. *See Roccaforte*, 341 S.W.3d at 927 ("Roccaforte's claims against the county should not have been dismissed for lack of notice.").

provision of notice, are jurisdictional requirements in all suits against a governmental entity."). The Court's construction improperly renders the service-of-citation deadline completely meaningless. *See Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 390 (Tex. 2014) ("We presume the Legislature chose statutory language deliberately and purposefully. We must not interpret the statute 'in a manner that renders any part of the statute meaningless or superfluous.'") (citing *Tex. Lottery Com'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010) and quoting *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008)). If AC Interests can pursue this appeal even though it failed to serve citation within thirty days, then it is not true that the claimant "must" accomplish service of citation within thirty days. According to the Court's reading, AC Interests "can," "could," "may," "might," or even "should" serve citation within thirty days, but it cannot be said that it "must" do so, even though that's what subsection (c) in fact says.

The Court attempts to avoid this reality by suggesting that "other possible consequences exist," *ante* at ___, but it cannot identify any other consequences that could apply to the failure to timely serve citation under subsection (c). The only "other consequence" the Court suggests is abatement, *ante* at ___, but it makes no effort to explain how abatement would ever be appropriate to address the late service of citation, and I cannot see how it would. The only "possible" consequence that could appropriately result from missing the service-of-citation deadline is the one the statute itself requires by using the word "must": the loss of the right to pursue the appeal. *See, e.g.*, *Edwards Aquifer*, 291 S.W.3d at 404 ("The only penalty the [act at issue]

suggests is that late applications will not be considered.").

We have recognized that, when a particular statutory provision imposes a requirement without expressly stating a consequence for noncompliance, other provisions of the same statute may provide guidance as to what the consequence should be. In *Helena Chemical*, for example, although the statute required that a claim for arbitration be filed by a particular time, we concluded that the failure to timely file the claim did not require dismissal because another provision of the statute required trial courts to take into account the arbitrators' findings "as to the effect of delay in filing the arbitration claim." 47 S.W.3d at 494. Here, however, other statutory provisions support the conclusion that the consequence for failing to timely serve citation is dismissal.

First, the Legislature's inclusion of a good-cause exception for delay in subsection (d)—which applies only after a claimant has timely filed its petition and timely served citation— evidences the Legislature's intent that a claimant strictly comply with the filing and service deadlines in subsections (a), (b), and (c), none of which contain a good-cause exception. This is not a novel concept. *See PPG Indus., Inc. v. JMB/ Hous. Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 84 (Tex. 2004) ("When the Legislature includes a right or remedy in one part of a code but omits it in another, that may be precisely what the Legislature intended. If so, we must honor that difference."). As the court of appeals correctly noted, the thirty-day service provision "does not have an exception for good and sufficient cause." 521 S.W.3d at 63; *see also TJFA, L.P. v. Tex. Com'n on Envtl. Quality*, 368 S.W.3d 727, 737 (Tex.

App.—Austin 2012, pet. denied) ("The legislature's decision to not include a provision allowing a party to explain why compliance with the deadline was not achieved is instructive. This seems particularly true in this case in light of the fact that in the very next provision, the legislature afforded parties the ability to explain why their suit should not be dismissed for failure to pursue the claim 'with reasonable diligence.'").

Second, the Legislature's decision to include a specific time period compels the conclusion that dismissal is required, and that decision must be afforded some significance. *See Edwards Aquifer*, 291 S.W.3d at 403 ("The importance of a fixed filing deadline is apparent in the [Edwards Aquifer Authority Act]. The Legislature picked a specific, calendar date by which permit applications were required to be filed."); *TJFA*, 368 S.W.3d at 735 (concluding that an analogous provision regarding service of citation under the Solid Waste Disposal Act was mandatory and that by providing an explicit deadline, "the legislature has indicated its intention to foreclose the possibility of excusing delays between filing and executing service due to diligent efforts at service undertaken by plaintiffs").

Recently, we noted that "absent statutory language to the contrary, a statutorily imposed time period does not allow for substantial compliance." *BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 83 (Tex. 2017). In addition, we have recognized that a deadline "is not something one can substantially comply with. A miss is as good as a mile." *Edwards Aquifer*, 291 S.W.3d at 403. And although the Court may be concerned that dismissal is too harsh a remedy, we noted in *BankDirect* that "[s]tatutes that impose

timelines naturally burden those who miss them." 519 S.W.3d at 85. When the statute's words are clear, equity must give way to certainty and predictability. This is especially true in the service-of-citation context, which generally requires strict compliance in one form or another. *See Wilson*, 800 S.W.2d at 836; *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884, 885 (Tex. 1985) (per curiam) ("Moreover, failure to affirmatively show strict compliance with the Rules of Civil Procedure renders the attempted service of process invalid and of no effect.") (citing *McKanna v. Edgar*, 388 S.W.2d 927, 929 (Tex. 1965)).[11]

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[11] *See also Wilson*, 800 S.W.2d at 836 ("Absent service, waiver, or citation, mere knowledge of a pending suit does not place any duty on a defendant to act."); *Royal Surplus Lines Ins. Co. v. Samaria Baptist Church*, 840 S.W.2d 382, 382–83 (Tex. 1992) ("[U]se of certified mail by a public official to effect service of process when a statute provides only for registered mail does not violate our strict compliance standard for service of process."); *McKanna*, 388 S.W.2d at 929 (reversing default judgment when plaintiff failed to strictly comply with rules for service of citation and stating that its holding "is in accord with the established law of this State that it is imperative and essential that the record affirmatively show a strict compliance with the provided mode of service"); *In the Interest of K.M.C.*, No. 05-16-00635-CV, 2017 WL 745802, at *1 (Tex. App.—Dallas Feb. 27, 2017, no pet.) (mem. op.) ("Strict compliance with the rules governing service of citation is mandatory, and failure to comply constitutes error on the face of the record."); *Nat'l Sur. Corp. v. Anderson*, 809 S.W.2d 313, 316 (Tex. App.—Houston [1st Dist.] 1991, no writ) ("Because rule 101 applies and appellant was served more than 90 days after issuance of the citation, the citation was void and appellant was not required to answer") (citing *Lewis v. Lewis*, 667 S.W.2d 910, 911 (Tex. App.—Waco 1984, no writ)); *Lewis*, 667 S.W.2d at 911 ("Since service of citation on defendant was 96 days after its issuance, such was ineffective; defendant was not required to answer; and the default judgment must be vacated."); *Mega v. Anglo Iron & Metal Co. of Harlingen*, 601 S.W.2d 501, 503 (Tex.

III. The Statute's Purposes

Even if we concluded that the statute's plain language does not make the timely service of citation a condition precedent to pursuing the appeal, and we were thus required to "look to the statute's purpose in determining the proper consequence of noncompliance," *Albertson's*, 984 S.W.2d at 961, I would reach the same conclusion. In the broadest sense, the Clean Air Act's "policy and purpose is 'to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants.'" *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013) (quoting Tex. Health & Safety Code § 382.002(a)). The Court suggests that the Act's judicial-review provisions' more specific purpose is to "provide a process for the judicial review of [Commission] decisions" and "to expedite filing and notice and presumably the appeal itself." *Ante* at ___.

Even assuming that correctly states the statute's purpose, construing the service-of-citation requirement as a condition precedent to appeal best promotes that purpose. By conditioning the right to appeal on the claimant's fulfillment of a duty to diligently and timely seek such review, the statute ensures that any

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Civ. App.—Corpus Christi 1980, no writ) ("The Texas Rules of Civil Procedure relating to the issuance, service and return of citation are generally regarded as mandatory, and failure to show affirmatively a strict compliance with the Rules will render the attempted service of process invalid and of no effect."); *Lemothe v. Cimbalista by Gates*, 236 S.W.2d 681, 681–82 (Tex. Civ. App.—San Antonio 1951, writ ref'd) ("[A]ll other rules relating to the issuing and serving of processes are generally regarded as mandatory, and failure to comply with such rules renders the service thereunder of no effect.") (citations omitted).

appeal from a Commission decision must be pursued and resolved in an efficient and expedited manner. This is consistent with other language in the statute, which places particular emphasis on timeliness and strict compliance, noting that each chapter must be "vigorously enforced" and that violations of Commission rules or orders must result in "expeditious initiation of enforcement actions." Tex. Health & Safety Code § 382.002(b). As a court, we have no power to say otherwise. *Borowski v. Ayers*, 524 S.W.3d 292, 305 (Tex. App.— Waco 2016, pet. denied) ("The courts possess no legislative powers; therefore, the courts cannot excuse plaintiffs' noncompliance with statutory requirements merely because defendants, despite plaintiffs' noncompliance, are able to accomplish some of the Legislature's purpose in imposing the statutory requirements.").

The Court, however, makes no effort to address whether and how its construction supports this purpose. Instead, it simply concludes that, even though the statute's purpose is to expedite the resolution of appeals from Commission decisions, it finds "no textual basis to conclude that serving citation within 30 days of filing the petition is so essential to the statute's purpose that the Legislature intended anything less than strict compliance to require dismissal." *Ante* at ___. But because subsection (c) addresses constitutional service of citation, without which the trial court lacks jurisdiction, the Commission has no duty to appear or take any action, and the suit cannot begin at all, until citation is served. *See Wilson*, 800 S.W.2d at 836–37; *El Paso Indep. Sch. Dist. v. Alspini*, 315 S.W.3d 144, 149 (Tex. App.—El Paso 2010, no pet.) ("Citation serves the purposes of giving the court jurisdiction over the

defendant, satisfying due process requirements, and giving the defendant an opportunity to appear and defend.") (citing *Cockrell v. Estevez*, 737 S.W.2d 138, 140 (Tex. App.—San Antonio 1987, no writ)); *Cockrell*, 737 S.W.2d at 140 ("The purpose of citation is to give the court proper jurisdiction of the parties and to provide notice to the defendant that he has been sued and by whom and for what so that due process will be served and he will have an opportunity to appear and defend the action."); *see also Tex. Nat. Res. Conservation Com'n v. Sierra Club*, 70 S.W.3d 809, 813 (Tex. 2002) ("[A] 'citation' is directed to the defendant, telling the defendant that he or she has been sued and commanding the defendant to appear and answer the opposing party's claims.").

Thus, service of citation is different from mere notice, and we should be loath to confuse the two. *See Perez v. Perez*, 59 Tex. 322, 324 (1883) ("The words citation and notice are by no means synonymous. . . . A notice is much less formal."). Indeed, we have observed that "service of citation" is "a term of art that describes the formal process by which a party is informed that it has been sued." *Sierra Club*, 70 S.W.3d at 813. Contrary to the Court's suggestion, the statute provides a "textual basis to infer that" service of citation "is essential to the statute's purpose" because, until citation has been served on the Commission, the process of judicial review cannot commence at all.

Beyond the Court's identified purpose of expediting appeals from Commission decisions, I would conclude that another "purpose"—or, I would say, "effect"—of the statute is to express the Legislature's policy decisions as to when to waive the Commission's sovereign immunity and allow for judicial review of

executive-branch decisions. Because the statute provides a limited waiver of immunity, we must construe it narrowly in favor of retaining the State's immunity. *See In re Smith*, 333 S.W.3d 582, 587 (Tex. 2011) ("First, a statutory waiver of sovereign immunity must be construed narrowly.") (citing *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008) ("We interpret statutory waivers of immunity narrowly. . . . ")); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003) ("[W]hen construing a statute that purportedly waives sovereign immunity, we generally resolve ambiguities by retaining immunity."); *Tex. Nat. Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 854 (Tex. 2002) ("Subjecting the government to liability may hamper governmental functions by shifting tax resources away from their intended purposes toward defending lawsuits and paying judgments."); *Magnolia Petroleum Co. v. Walker*, 83 S.W.2d 929, 934 (Tex. 1935) ("'Legislative grants of property, rights, or privileges must be construed strictly in favor of the state. . . . '") (quoting *Empire Gas & Fuel Co. v. State*, 47 S.W.2d 265, 272 (Tex. 1932)). Construing the statute to permit judicial review only when the claimant has complied with the statute's express requirements best fulfills this purpose of providing a limited waiver of immunity.

IV. Conclusion

The Clean Air Act allows a person to appeal a Commission decision by filing a petition in a Travis County district court. The petition "must" be filed within thirty days after the decision and service of citation "must" be accomplished within thirty days after filing. The filing and service requirements are conditions precedent to the right to pursue the appeal.

The statute's plain language compels this result, and the statute's effects likewise support this conclusion. I would hold that because AC Interests failed to serve citation on the Commission within thirty days, as the statute says it "must" do, it cannot pursue this appeal. Because the Court holds otherwise, I respectfully dissent.

Jeffrey S. Boyd
Justice

Opinion delivered: March 23, 2018

ENTRY OF JUDGMENT
(MARCH 23, 2018)

IN THE SUPREME COURT OF TEXAS

AC INTERESTS, L.P., FORMERLY AMERICAN COATINGS, L.P.,

Petitioner,

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,

Respondent.

No. 16-0260

On Petition for Review from the Court of Appeals for the First District of Texas

THE SUPREME COURT OF TEXAS, having heard this cause on petition for review from the Court of Appeals for the First District, and having considered the appellate record, briefs, and counsel's argument, concludes that the court of appeals' judgment should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The court of appeals' judgment is reversed;

2) The cause is remanded to the trial court for further proceedings consistent with this Court's opinion; and

2) AC Interests, L.P., shall recover, and the Texas Commission on Environmental Quality shall pay, the costs incurred in this Court and in the court of appeals.

Copies of this judgment and the Court's opinion are certified to the Court of Appeals for the First District and to the District Court of Travis County, Texas, for observance.

Opinion of the Court delivered by Justice Devine, joined by Chief Justice Hecht, Justice Green, Justice Guzman, Justice Lehrmann, and Justice Brown

Dissenting opinion filed by Justice Boyd, joined by Justice Johnson

Justice Blacklock did not participate in this decision

March 23, 2018

ORDER OF THE TEXAS SUPREME COURT DENYING MOTION FOR REHEARING OF DENIAL OF PETITION FOR REVIEW (APRIL 22, 2022)

SUPREME COURT OF TEXAS

AC INTERESTS, L.P.,

v.

TEX. COMM'N ON ENVTAL. QUALITY.

RE Case No. 21-0078

COA #: 01-19-00387-CV

TC#: D-1-GN-005160

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review. Justice Boyd notes his dissent from the Court's denial of the motion for rehearing.

COMBINED STATE ERC SUMMARY TOTALS

COMBINED STATE ERC PLUS CALIFORNIA LOCAL PROGRAM ERC SUMMARY TOTALS			
ERC Lifetime Category	**Total**	**% of Total**	**Notes**
Unlimited Life ("UL")	29	75.7	
UL but discounted after 5 to 15 years	2	5.4	Discount up to 50%
2 or 5 Years	2	5.4	May be Renewed Indefinitely in both cases
Subtotal: Effectively UL	**33**	**86.5**	
10 Years	4	10.8	UL with Certain Conditions in both cases
5 Years, plus time for construction	1	2.7	
Subtotal: 10 Years or less	**5**	**13.5**	
Total	**38**	**100.00**	