Environmental Law: Are Oklahoma Environmental Permits Valid Under the Fourteenth Amendment's Due Process Clause?

DuLaney v. Oklahoma State Department of Health

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I. Introduction

(T)he granting of the permit itself does not interfere with the use and enjoyment of . . . property in a constitutional sense . . . . For us to conclude otherwise we would have to rule, as a matter of law, all landfills are nuisances and the State by permitting them in an effort to protect the public health and environment must itself pay compensation to individuals who at some subsequent time in the future may be injured by the operation.¹

Although once considering it untenable;² in DuLaney v. Oklahoma State Dept. of Health,³ the Oklahoma Supreme Court recently embraced the above position. In fact, the DuLaney court declared that "notice and an opportunity for a hearing must be afforded to citizenry whose health, property use, and drinking water may be affected by the location of a landfill site."⁴ This undefined statement constitutes the significance of DuLaney. The Oklahoma Supreme Court not only fails to limit the infinite realm of potentially affected parties, but it also applies this statement retroactively, creating a cloud of uncertainty as to the validity of all environmental permits.

In light of the Oklahoma Supreme Court's ideological shift in DuLaney, this note will examine the legality of the environmental permitting process in Oklahoma. This evaluation will begin with an historical overview of Oklahoma environmental permits, then proceed to the current state of the law under DuLaney. Finally, this note will explore DuLaney's impact on Oklahoma environmental permits.

II. History

In the past two decades, society's concern for ecological decay has increased dramatically.⁵ In the wake of this heightened awareness, both Congress and state

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2. Actually, the Oklahoma Supreme Court considered this position to be untenable in 1990, only three years prior to the DuLaney ruling.
4. Id. at 683 (emphasis added).
legislatures have struggled with the issue of environmental pollution⁶ and enacted a complex structure of environmental regulations and controls.⁷

The Oklahoma legislature responded to environmental pollution by enacting the Oklahoma Environmental Quality Act⁸ and the Oklahoma Environmental Quality Code.⁹ Under these statutes, the Department of Environmental Quality (DEQ) is the official state agency that is to cooperate with federal agencies in the areas of point source pollution, water quality, air quality under the Clean Air Act,¹⁰ Superfund responsibilities under CERCLA,¹¹ solid waste, and hazardous waste.¹² The DEQ established various divisions to perform these statutory responsibilities. The Office of Business Assistance, for instance, is responsible for assisting business in understanding the process for the issuance of permits and licenses necessary to comply with the Oklahoma Environmental Quality Code.¹³ The permitting process is one of the DEQ's primary responsibilities.

Environmental litigation generally involves a review of administrative decisions because causes of action are routinely based on the issuance or denial of permits. Prior to DuLaney, however, every Oklahoma court hearing a challenge to the issuance of a permit had dismissed the environmental permitting agency from the litigation.¹⁴ A private party pursuing a claim against an administrative agency must overcome three judicial obstacles: (1) the doctrine of standing, (2) judicial review of discretionary agency action, and (3) the legislature's ability to exercise valid police power. The doctrine of standing requires that the litigant is the real party in interest.¹⁵ The real party in interest is defined as the party legally entitled to the proceeds or the control of the claim, the party who by substantive law has the right of action.¹⁶

The standing doctrine requires that courts not rule on hypothetical situations.¹⁷ A party must have a "personal stake" in the outcome of the litigation because of an actual or threatened distinct injury which has a causal connection with the alleged wrong and the challenged actions.¹⁸ While this distinct injury requirement may

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7. After legislatures promulgate these rules and delegate authority to administrative agencies, these agencies maintain the principle responsibility to implement environmental programs.
8. 27A OKLA. STAT §§ 1-1-101 to 1-3-103 (Supp. 1994).
9. Id. §§ 2-1-101 to 2-14-304.
11. Id. §§ 9601-9673
12. All of the responsibilities of the DEQ are illustrated in 27A OKLA. STAT. §§ 1-3-101(B), 2-3-101(B) (Supp. 1994).
13. Id. § 2-3-101(F)(2).
include such things as aesthetic, conservational, or recreational injuries, the litigant must have suffered a cognizable injury to have standing.\textsuperscript{19}

Standing to appeal an administrative agency's decision involves a separate set of requirements. Generally, a party must be aggrieved. An administrative decision must have a substantial, adverse effect that is direct and immediate rather than contingent on some remote or possible consequence.\textsuperscript{20}

In a case similar to DuLaney, the District of Columbia Court of Appeals advocated a three-prong test to determine whether a party can compel the review of an administrative agency's decision. A petitioner must allege that: (1) the challenged action caused an injury in fact, (2) the interest sought to be protected is within the zone of interests protected by the statute in question, and (3) no clear legislative intent to withhold judicial review exists.\textsuperscript{21}

In addition, the separation of powers\textsuperscript{22} has deterred courts from reviewing statutorily authorized action. The judiciary does not have the power to act as "a super-legislature by re-writing legislative enactments to conform with its views of public policy."\textsuperscript{23} There is a strong presumption favoring legislative acts. A statute will be upheld unless it is clearly inconsistent with established law.\textsuperscript{24}

Courts are also reluctant to review administrative agency rulings with pronounced scrutiny. The deference a court will give an agency decision depends upon the role of the agency in the challenged action. Administrative agencies have two primary functions: (1) rule-making or legislative and (2) adjudicative.\textsuperscript{25} Generally, courts attach great weight to the expertise of an administrative agency in its legislative functions and presume their validity.\textsuperscript{26} Courts do not substitute their own judgment for that of the administrative agency, particularly if the question falls within the agency's expertise.\textsuperscript{27} Adjudicatory actions of an agency, however, receive less deference.\textsuperscript{28}

The proper exercise of state police power may curtail an individual's claimed due process rights. Certainly, some discretionary government functions are not subject to the Due Process Clause.\textsuperscript{29} Under a state's police power, a legislature may regulate the

\textsuperscript{19} Sierra Club v. Morton, 405 U.S. 727, 738 (1972).
\textsuperscript{20} Turley, 782 P.2d at 135 (citing Shop & Swap Advertiser, Inc. v. Oklahoma Tax Comm'n, 774 P.2d 1058, 1060 (Okla. 1989); Whitman v. Whitman 397 P.2d 664, 667 (Okla. 1964); Love v. Wilson, 75 P.2d 876, 878 (Okla. 1938)).
\textsuperscript{22} The separation of powers doctrine dictates that each government branch — the legislative, executive, and judicial — should remain independent, separate, and distinct. State ex rel. York v. Turpen, 681 P.2d 763, 767 (Okla. 1984).
\textsuperscript{27} Id. (citing Tulsa Area Hosp. Council v. Oral Roberts Univ., 626 P.2d 316, 320 (Okla. 1981)).
\textsuperscript{29} Meachum v. Fano, 427 U.S. 215, 228-29 (1976). While the claimed discretionary function
use of a private individual's property to protect the public interests of health, safety, and welfare. In fact, the exercise of state police power in a lawful manner is due process of law.

In Oklahoma, the DBQ exercises police power under the Oklahoma Solid Waste Management Act (OSWMA). The OSWMA serves to regulate the collection, transportation, processing, and disposal of solid waste. The OSWMA's objective is to protect public health, safety, and welfare, protect the environment, conserve natural resources, enhance the beauty and quality of the environment, and encourage the recycling of solid waste.

Protecting the status of the environment in the interest of public health and safety are valid motivations for the proper exercise of state police power. In this sense, the rights of the individual will be balanced with the general welfare of the public. Generally, "a valid exercise of the police power . . . which limits or infringes upon private rights does not, ipso facto, violate the due process clauses of the state or Federal constitutions."

Recently, public awareness and concern for environmental health and safety have dramatically increased. Legislative bodies have attempted to be responsive to and remain in touch with societal sentiment. Initially, legislative response to ecological pollution received much deference. Recent judicial scrutiny has increased the complex nature of environmental laws — laws that may sacrifice individual rights for widespread public benefit. Against this backdrop, the Oklahoma Supreme Court decided DuLaney v. Oklahoma State Department of Health.

III. DuLaney v. Oklahoma State Department of Health

A. Facts

The Oklahoma Department of Health (the Department) issued a landfill permit to Six-Hart Services and Resources, Inc. (Six-Hart) after denying the mineral interest owners and adjacent landowners an evidentiary hearing. Pursuant to the Oklahoma Administrative Procedures Act (OAPA), the mineral interest owners and adjacent

33. Id. § 2-10-102.
36. See supra note 5 and accompanying text.
38. Id. at 679.
39. 75 OKLA. STAT. § 306 (1991) (stating that the validity or applicability of a rule may be challenged by declaratory judgment in a district court if the threatened application interferes with or
landowners filed a declaratory judgment action in district court against the Department and Six-Hart. They challenged the OSWMA for its failure to include "trial-type" proceedings in the issuance of a landfill permit. The trial court found the permit process invalid for the failure to notify the proper parties and conduct an individual, "trial-type" proceeding.

B. Issue

When an applicant seeks a permit, under Oklahoma law, to operate a solid waste disposal site, are adjacent landowners and mineral interest owners entitled to notice and the opportunity to be heard?

C. Holding

1. Who Is Entitled to Notice and an Opportunity to be Heard?

Prior to DuLaney, claims that the issuance of environmental permits denies a party due process protection were unsuccessful in Oklahoma. The Due Process Clause in the Oklahoma Constitution is consistent with the United States Constitution.

To establish a procedural due process violation, a party must allege two elements: (1) the deprivation of a constitutionally protected life, liberty, or property interest and (2) the lack of procedural safeguards to adequately protect the deprived interest. Property interests are not constitutionally created but are created and defined by state statutes and rules. A person must have a legitimate and immediate claim or entitlement which cannot be arbitrarily denied to have a protected property interest. Due process protects against arbitrary, capricious, and unreasonable government action. Notice and an opportunity to be heard are the essential elements of due process.

In DuLaney, the Oklahoma Supreme Court faced due process claims instituted by adjacent landowners and mineral interest owners. The right to enter land for oil and gas exploration is a constitutionally protected property right for the purposes of the Due Process Clause. Because mineral interest owners clearly possess a

impairs the legal right or privileges of the plaintiff.

42. DuLaney, 868 P.2d at 679.
43. Id.
44. The relevant statute was located at 63 Okla. Stat. § 2258.2 (Supp. 1983) when the cause of action accrued, 63 Okla. Stat. § 1-2415 (1991) when the case reached the Oklahoma Supreme Court, and is currently found at 27A Okla. Stat. § 2-10-303 (Supp. 1994).
45. DuLaney, 868 P.2d at 677-78.
47. U.S. Const. amend. XIV, § 1.
52. Id. at 589.
54. DuLaney, 868 P.2d at 680 (citing Anschutz Corp. v. Sanders, 734 P.2d 1250, 1291 (Okla. 1987);
constitutionally protected property right, this note will concentrate on the rights of the undefined adjacent landowners.

As noted above, the DuLaney court stated that "notice and an opportunity for a hearing must be afforded to citizenry whose health, property use, and drinking water may be affected by the location of a landfill site." Within these broad and undefined terms, the Oklahoma Supreme Court included adjacent landowners, whose "concerns include the potential for harmful contaminates in both the air and ground water underlying their property." Initially, the court revisited the precedent rulings on the issue of adjacent landowners' rights to notice and the opportunity to be heard in the permitting process. This examination involved two recent cases, Stewart v. Rood and Sharp v. 251st Street Landfill. Because, as it claimed, Sharp relied upon Stewart, the court focused its attack on Stewart.

In Stewart, the Oklahoma Supreme Court faced the issues of whether adjacent landowners have a protected property interest, and whether the mere granting of a landfill permit constitutes a governmental taking. These issues were matters of first impression.

The Stewart court questioned the claimants' standing. To contest an administrative decision, a party must be adversely affected by an agency's decision in a manner that is direct and immediate, rather than based upon a remote possibility. In a holding that DuLaney would later sharply contradict, the Stewart court held that: "The mere granting of a permit itself for one individual to use their land for a landfill does not invade a legally recognized interest of adjoining landowners." It does not interfere with the use and enjoyment of the property in a constitutional sense. In fact, the adverse effects claim was based upon remote occurrence. Consequently, without the deprivation of a protected property right, courts need not consider the reasonableness of the particular process afforded the claimant.

In Stewart, the Oklahoma Supreme Court relied on Fusco v. State of Connecticut and BAM Historic District Ass'n v. Koch for additional support of its rejection of

Hinds v. Phillips Petroleum Co., 591 P.2d 697, 698-99 (Okla. 1979)).
55. DuLaney, 868 P.2d at 683 (emphasis added).
56. Id. at 682.
59. DuLaney, 868 P.2d at 682.
60. Stewart, 796 P.2d at 326.
61. Id. at 333 (citing First Nat'l Bank v. Oklahoma Sav. & Loan Bd., 569 P.2d 993, 996 (Okla. 1977)). See supra note 20 and accompanying text.
62. Stewart, 796 P.2d at 334. The DuLaney dissent properly illustrates the limitless ramifications if due process rights are implicated when a governmental agency issues a permit to a private party. Must an individual, trial-type proceeding challenge the issuance of even a driver's license? See infra note 161 and accompanying text.
63. Stewart, 796 P.2d at 336.
64. Id. at 334.
66. 723 F.2d 233 (2d Cir. 1983).
the adjacent landowners' due process claim. In Fusco and BAM, the United States Court of Appeals for the Second Circuit held that the mere diminution in property values as a result of state action does not deprive a person of property within the context of the Fourteenth Amendment. The Oklahoma Supreme Court expressly accepted this finding and decreed: "[T]o rule otherwise would set a dangerous precedent and would be an unwarranted expansion of recognized due process concepts." Therefore, a cognizable loss of property must exist before such an interest demands due process protection.

Finally, the Stewart court evaluated the issue of governmental taking based on the issuance of the landfill permit. The court held that the mere granting of a permit for the operation of a sanitary landfill to a neighbor does not constitute a taking. Again, the Stewart court did not find a deprived property interest. Instead, the court found the permitting procedure to be a valid exercise of police power to protect the public health and the environment.

In overruling Stewart and, therefore, Sharp, the DuLaney court set forth two arguments. First, the court contended that the Oklahoma legislature had overruled these two cases by amending the statutory right to notice. While the legislature had amended the statutory right to notice, the effective date of the revised statute had been strictly limited. Under section 2-10-303(C) of the OSWMA, the administrative procedural changes should not be applied to any landfill permits issued prior to the statutory effective date. Therefore, Stewart and Sharp would still apply to the DuLaney claimants' due process rights.

In its second contention, the DuLaney court sought to distinguish the DuLaney facts from those in the three cases relied upon in Stewart. The DuLaney court pointed out that none of these cases involved the operation of a sanitary landfill adjacent to residences. The DuLaney court attempted to distinguish the remedial difficulty of its alleged harm from the temporariness and correctability of the harm in Stewart. If the remediation of the harm is the central distinction, then the DuLaney court should have considered the presence of alternative common law remedies.

The DuLaney court also focused on the nature of the claimed injuries. These injuries were contamination of air and groundwater underlying the property, odor,

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67. Stewart, 796 P.2d at 334.
68. Fusco, 815 F.2d at 206; BAM, 723 P.2d at 237.
69. Stewart, 796 P.2d at 334.
70. Id. at 336.
71. Id.
72. DuLaney, 868 P.2d at 682.
73. See infra note 125 and accompanying text.
75. DuLaney, 868 P.2d at 682.
76. Id.
77. See infra notes 120, 121 and accompanying text.
78. DuLaney, 868 P.2d at 682.
safety hazards, and property devaluation. The Oklahoma Supreme Court, however, has already established that property devaluation does not constitute a deprivation under the Fourteenth Amendment. In addition, though offering several injuries to distinguish DuLaney from the Stewart authority, the Oklahoma Supreme Court relied on claimed groundwater contamination as the sole property interest demanding Fourteenth Amendment protection. Even if the nature of the injuries may differ, this does not require the conclusion that the principles cannot be consistently applied to each fact pattern as suggested by the DuLaney court.

The DuLaney court cited Brown's Ferry Waste Disposal Center, Inc. v. Trent to support its shift in position. In Brown's Ferry, the Alabama Supreme Court held that unless affected persons are given notice and an opportunity to be heard prior to the issuance of a solid waste disposal contract, the contract is void. The Alabama Supreme Court determined that the demands of constitutional due process require such a holding. The Brown's Ferry court defined affected persons as those within the county in which the facility would operate.

The dicta in DuLaney, however, is more vague: "[N]otice and an opportunity for a hearing must be afforded to citizenry whose health, property use, and drinking water may be affected by the location of the landfill site." The Oklahoma Supreme Court failed to define the phrase "citizenry [who] . . . may be affected." It is unclear whether the permitting agency must provide notice and the opportunity to be heard to citizens in the same county, state, region, or even country. Due to the ambient nature of air, for example, the air quality of citizenry in downwind states certainly may be affected. Must all persons who possibly may be affected receive notice and the opportunity for a hearing, especially in an individual, trial-type proceeding, to contest the issuance of each and every Oklahoma environmental permit?

Without solving this dilemma, the Oklahoma Supreme Court evaluated the sufficiency of the property interest alleged in DuLaney. First, the court referred to the expansive nature of a such an interest. In fact, the United States Supreme Court has recognized that aesthetic and environmental well being are important components of the quality of life. While property interests can be liberally established, the DuLaney court decision would create uncertainty in the law. Under the DuLaney analysis, any conceivable adverse environmental effect would implicate constitutional due process claims. Therefore, the validity of all previously issued environmental permits would be jeopardized.

79. Id.
80. See supra notes 68, 69 and accompanying text.
81. DuLaney, 868 P.2d at 684. See infra notes 94, 95 and accompanying text.
82. 611 So. 2d 226 (Ala. 1992).
83. DuLaney, 868 P.2d at 682.
84. Brown's Ferry, 611 So. 2d at 230.
85. Id.
86. Id. at 228.
87. DuLaney, 868 P.2d at 683 (emphasis added).
88. Id.
This improperly applies the Due Process Clause. There are limitations to protected property rights under the Fourteenth Amendment. First, these rights are established by local statutes. If no statutory right to property exists, no due process claim can survive. Second, there must be a deprivation. Without the deprivation of a statutory property right, the establishment of that right is irrelevant.

The DuLaney majority eventually emphasized groundwater rights as the remaining source worthy of constitutional protection. "Water rights are property which are an important part of the landowners' bundle of sticks."* Certainly, the landowner owns water flowing under the land. The Oklahoma Supreme Court stumbled upon a statutory property right protected by the Due Process Clause of the Fourteenth Amendment.

The DuLaney court should have evaluated the evidence to determine whether the operation of the solid waste landfill would threaten the adjacent landowners' groundwater. Instead, the court expressed that the adjacent mineral interest owners' drilling operations "could potentially contaminate the groundwater supply." The court reasoned that since the mineral interest owners are being constitutionally protected, so too should the adjacent landowners. The court, in the process, failed to offer persuasive legal analysis.

Unfortunately, the DuLaney decision does not clarify the entitlement of notice and the opportunity to be heard. In effect, it disregards the need for a claimant to have a deprived, protected property right. Consequently, the DuLaney decision confuses the issue.

2. What Type of Hearing Is Mandated?

The DuLaney court also poorly decided the issue of determining the correct due process procedure. The essential elements of due process require notice and the

91. Id.
92. At the administrative level the validity of a deprivation claim is certainly suspect. At the issuance of the permit, landowners adjacent to the proposed landfill site have not been deprived of anything, much less a constitutionally protected property right. After the operation of the landfill commences, on the other hand, the adjacent landowner may experience property interference. Not until that point, however, can a deprivation surface. To appeal an administrative agency's decision, a party must have an immediate adverse effect rather than contingent on a possible consequence. See supra note 20 and accompanying text.
93. DuLaney, 868 P.2d at 684 (quoting 60 OKLA. STAT. § 60 (1991)).
94. Id.
95. Id.
96. Id.
opportunity to respond.\textsuperscript{98} Under the OSWMA, the statutory notice requirement merely directed that the applicant "give notice by one publication in two newspapers local to the proposed disposal site of opportunity to oppose the granting of such permit by requesting a formal public meeting."\textsuperscript{99}

The \textit{DuLaney} court did not perceive the "formal public meeting" to be a sufficient opportunity to respond. Instead, the court announced that the OAPA\textsuperscript{100} provides for an individual proceeding.\textsuperscript{101} In effect, the Oklahoma Supreme Court allowed the OAPA's apparent requirement of a quasi-judicial, "trial-type" proceeding to preempt the formal public meeting standard as provided in the OSWMA.

Other commentators, however, do not hold the same convictions. For instance, one commentator explained: "The Administrative Procedures Act only regulates the exercise of power already vested in an agency. To determine what power or authority a particular agency might have, a person must examine the statute . . . which created the agency."\textsuperscript{102} Once an administrative agency is vested with statutory authority to perform specific functions, the operation of these functions does not require consistency with the Administrative Procedures Act.

In addition, the Administrative Procedures Act does not dictate the utilization of an individual trial-type proceeding in all licensing procedures, but only when the permitting decision is required to be preceded by notice and an opportunity to be heard.\textsuperscript{103} Without some underlying basis for a quasi-judicial proceeding, the Oklahoma Administrative Procedures Act itself does not require one.

The \textit{Stewart} court properly held that no mandate exists in the OAPA for an individual trial-type proceeding prior to the issuance of a landfill permit. First, while such a permit would fall under the definition of a license under the OAPA,\textsuperscript{104} a quasi-judicial proceeding does not have to precede the issuance of every license.\textsuperscript{105} Such proceedings are only required when an underlying basis in the law demands notice and the opportunity to be heard.\textsuperscript{106} The underlying basis may be another state statute, the Oklahoma Constitution, or the United States Constitution.\textsuperscript{107}

The \textit{Stewart} court further determined that the legislature did not intend the granted "formal public meeting"\textsuperscript{108} to mean a quasi-judicial proceeding as requested by the adjacent landowners.\textsuperscript{109} Clearly, the court reasoned, if the legislature sought to give

\begin{thebibliography}{99}
\bibitem{99} 63 OKLA. STAT. § 2258.2 (Supp. 1983).
\bibitem{100} 75 OKLA. STAT. § 314(A) (1981).
\bibitem{101} \textit{DuLaney}, 868 P.2d at 681.
\bibitem{102} Brief in Chief of Appellant at 10, \textit{DuLaney} (Nos. 70498, 70524) (quoting Michael P. Cox, \textit{The Oklahoma Administrative Procedures Act: Fifteen Years of Interpretation}, 31 OKLA. L. REV. 886, 899 (1978)).
\bibitem{103} 75 OKLA. STAT. § 314(A) (1981).
\bibitem{104} 75 OKLA. STAT. § 250.3(3) (Supp. 1989).
\bibitem{105} \textit{Stewart} v. Rood, 796 P.2d 321, 327 (Okla. 1990).
\bibitem{106} \textit{Id.} at 328 (citing Maurice H. Merrill, \textit{Oklahoma's New Administrative Procedure Act}, 17 OKLA. L. REV. 1, 39-40 (1964)).
\bibitem{107} \textit{Id.}
\bibitem{108} 63 OKLA. STAT. § 2258.2 (1981).
\bibitem{109} \textit{Stewart}, 796 P.2d at 330-31.
\end{thebibliography}
interested parties the right to an individual "hearing," then the language of the statute would expressly delineate this desire.\textsuperscript{110} In fact, the Oklahoma legislature had given this effect to other statutes.\textsuperscript{111} Instead, the court determined that the legislature meant to comply with the Federal Solid Waste Disposal Act,\textsuperscript{112} which sets forth requirements for public participation.\textsuperscript{113} Therefore, no statutory basis afforded the adjacent landowners the opportunity to a permit hearing.\textsuperscript{114}

In Mathews v. Eldridge,\textsuperscript{115} the United States Supreme Court identified three specific factors in determining the sufficiency of the afforded due process: (1) the affected private interest, (2) the risk of erroneous deprivation as a result of the procedures used and the probable value of suggested additional or substitute procedural safeguards, and (3) the government's interest, including administrative burdens, that the additional or alternative procedures would entail.\textsuperscript{116} Once the claimant establishes an affected private interest, the preferable line of analysis would be to apply the established Mathews factors.

Under the Mathews analysis, the DuLaney court should have evaluated the claimants' access to substitute or additional procedural safeguards. In fact, this is the essence of the Sharp holding, overruled by DuLaney. In Sharp, a group of area residents and landowners challenged the issuance of an OSWMA permit for a solid waste landfill.\textsuperscript{117} After the trial court denied the group judicial review of the permit procedure under the Oklahoma Administrative Procedure Act, they sought and received injunctive relief.\textsuperscript{118} The Oklahoma Supreme Court held that the OSWMA does not preempt a common law nuisance action.\textsuperscript{119}

Though disregarded by the DuLaney court, the Sharp holding is significant to the analysis of the DuLaney decision. Resolving the central issue in DuLaney, in fact, depends upon the Sharp holding. The presence of state common law remedies can serve as adequate procedural protection even when there is a deprivation of a protected interest.\textsuperscript{120} If the state provides a means of redress for such a deprivation, a predeprivation hearing is not always mandated.\textsuperscript{121} The force and significance of this analysis cannot be disarmed by summarily dismissing Sharp.

Under the Mathews approach, the DuLaney court also should have evaluated the government's interest and the administrative agency's burden of an individual trial-type proceeding instead of a formal public meeting. The state's interest in regulating sanitary landfills, maintaining public health and safety, and environmental quality is

\begin{thebibliography}{99}
\bibitem{110} Id.
\bibitem{111} Id.
\bibitem{112} 42 U.S.C.A. §§ 6901-6992k (West 1995).
\bibitem{113} Stewart, 796 P.2d at 332.
\bibitem{114} Id.
\bibitem{115} 424 U.S. 319 (1976).
\bibitem{116} Id. at 335.
\bibitem{117} Sharp v. 251st St. Landfill, 810 P.2d 1270, 1272 (Okla. 1991).
\bibitem{118} Id.
\bibitem{119} Id. at 1275.
\bibitem{120} Ingraham v. Wright, 430 U.S. 651, 676 (1977).
\end{thebibliography}
substantial. The increased burden of providing fully developed, individual, trial-type hearings instead of public meetings is also significant. This is especially true since the DuLaney court grants any citizen who may be affected this right.

To support its broad coverage, the DuLaney court relied upon the Alabama Supreme Court's ruling in Brown's Ferry.122 Facially, Brown's Ferry would seem to demand that the adjacent landowners in DuLaney be provided with notice and the opportunity to be heard. Brown's Ferry, however, is clearly distinguishable from DuLaney. By recognizing a protected property right of adjacent landowners for the purposes of due process protection, the Alabama Supreme Court merely found notice and the opportunity to be heard as the process due.123 The Brown's Ferry holding does not delineate the necessity of a trial-type proceeding.

The requirement of an individual, trial-type proceeding, however, is the other major issue presented by DuLaney. If Brown's Ferry represents adequate process to safeguard the property interests of adjacent landowners, then the issuance of the challenged permit in DuLaney did not violate the Due Process Clause. The public meeting afforded in DuLaney provided the "opportunity to be heard" required by Brown's Ferry. Clearly, the Oklahoma Supreme Court has provided authority which undercuts its own analysis.

3. Retroactive Effect

The DuLaney court's analysis includes a final and significant flaw in the last paragraph of its decision. In this paragraph the majority decreed: "Our decision today is given the effect in the immediate cause, all appellant and certiorari cases in the appellate pipeline, and prospectively to all future cases after the issuance of the mandate."124 The DuLaney court did not announce that prior permits issued under a former version of the OSWMA without a trial-type proceeding are void. By allowing the holding to apply to all future cases, however, the majority clearly indicated that they are voidable. Thus, the majority improperly placed no limitation on the retroactive application of DuLaney.

The majority completely disregarded the letter and intent of the OSWMA. The statutory parameters of the amended OSWMA provide: "The provisions of this section shall not affect any pending applications and any pending litigation related to the procedures by which the Department has issued permits before September 1, 1990."125 The role of the judiciary is to give effect to legislative acts, not to circumvent them by substituting its own concept of prudent policy for that of the legislature.126 "Neither the Supreme Court nor a district court may expand the plain wording of a statute by construction where the legislature has expressed its intention

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122. DuLaney, 868 P.2d at 682-83 (citing Brown's Ferry Waste Disposal Ctr. v. Trent, 611 So. 2d 226, 228 (Ala. 1992)).
123. Brown's Ferry, 611 So. 2d at 230.
124. DuLaney, 868 P.2d at 685.
in the statute as enacted." The court exceeded its interpretive duty by disregarding the Oklahoma legislature.

In addition, the Oklahoma Supreme Court ignored the standard for determining retroactive application established by judicial precedent. Because there is no constitutional decree to determine the effective date of a judicial decision, judicial policy determines whether, and to what extent, a holding will have retroactive operation. Two distinct standards have guided the courts in determining the extent to which a decision should be applied retroactively. The \textit{Linkletter v. Walker} test considers three factors: (1) the new rule's purpose, (2) the extent of reliance on the old doctrine, and (3) the likely burden on the administration of the legal process as a result of the increased volume of curative judicial action.

The other established standard, from \textit{Chevron Oil Co. v. Huson}, also uses a tripartite test to determine retroactivity. The \textit{Chevron} test considers whether: (1) the decision must overrule clear past precedent on which the litigants may have relied or be an issue of first impression not clearly foreshadowed, (2) retroactive application will progress or hinder the operation of new law, and (3) hardship and injustice can be avoided by nonretroactive application.

In the past, the Oklahoma Supreme Court has evaluated both tests. In \textit{DuLaney}, the court apparently found the application of these tests to be irrelevant. The application of either test, however, might have produced a different result.

Under the \textit{Linkletter} test, there is strong opposition to retroactive application in \textit{DuLaney}. The Oklahoma legislature passed the OSWMA in 1970 to regulate solid waste to protect the health, safety, and welfare of the public and to beautify and enhance the quality of the environment. Under the authority of the legislature, the respective permitting agency has relied on the legality of its procedures for years in the issuance of countless permits. The \textit{DuLaney} result could be a complete invalidation of them. The operating landfills, necessary to the health and safety of the public, would be placed in jeopardy by complete retroactive application. In addition, the burden on courts, agencies, and facility operators would far exceed the denial of

\begin{itemize}
\item 128. Board of Regents v. Roth, 408 U.S. 564, 579 (1972). While the \textit{Roth} Court referred specifically to the duty of the United States Supreme Court, certainly the clear notion exists that a reviewing court's adjudicative responsibility centers on interpreting law. Reconsidering a legislative policy decision, then, is outside the powers of any judiciary.
\item 131. 381 U.S. 618, 629 (1965).
\item 132. \textit{Carlile}, 732 P.2d at 445.
\item 134. \textit{Id.}
\end{itemize}
prospective rights of adjacent landowners because of a permitting procedural defect. If the permitted operations of a landfill had truly denied adjacent landowners sufficient property rights, then why have nuisance actions not already been pursued?

The *Chevron* test provides even more formidable opposition to complete retroactivity. Undeniably, the *DuLaney* decision overruled *Stewart* and *Sharp*. As expressed by the court while denying complete retroactive application in another case, the "new norms pronounced by us here represent a clear break with contrary statutory policy of long standing." In addition, neither *Stewart* nor *Sharp* foreshadowed the new rule. Due to the hardship that can be avoided by nonretroactive application, the Oklahoma Supreme Court should have limited the retroactivity of its holding.

The court does correctly apply the direct review factor of retroactivity. The court recognizes that: "The action here is a direct, not a collateral attack." Certainly, the determination whether a suit represents a direct review versus a collateral attack also factors into the retroactive determination. While collateral attacks impose significant hardship on the administration of the legal process, direct reviews are perceived quite differently. The application of retroactivity "is confined to those civil disputes over the constitutionality of a state statute in which the challenge is made by direct rather than collateral attack.

Nonetheless, all permits previously issued by administrative agencies without affording notice and individual, trial-type proceedings to all parties entitled thereto are still voidable. Those that would represent a collateral attack are overruled, while the remainder are voidable by direct review.

D. Dissent

The *DuLaney* dissent clarified the errors inherent in the majority's flawed analysis. Initially, the dissent expressed the restraints to the Due Process Clause availability, which were completely ignored by the majority. The existence of alternative remedies, the lack of direct injury to the adjacent landowners, and the strength of the state's interest in exercising police power all curtail the due process violation claim by the adjacent landowners in *DuLaney*.

140. *DuLaney*, 868 P.2d at 685.
142. Id. at 448.
143. Id. (citing *Mackey* v. United States, 401 U.S. 667, 683 (1971) (Harlan, J., concurring)).
144. Id. at 448 n.46 (citing *Kirchberg* v. *Feenstra*, 450 U.S. 455, 462-63 (1981)).
145. To truly understand the shift from the Oklahoma Supreme Court's holding in regard to adjacent landowners' right to due process in *Stewart* and *Sharp* to that in *DuLaney*, the most effective investigation might be to look at the personnel of the court. The majority in *Stewart* and *Sharp* is now dissent in *DuLaney*, while the majority in *DuLaney* was the dissent in *Stewart* and *Sharp*. Gone from the court is Justice Doolin. Added is the Oklahoma Supreme Court's newest member, Justice Watt. Will another change in personnel precipitate another change in the law?
Proper Due Process Clause analysis involves the consideration of alternative remedies available to the claimant.\textsuperscript{146} When alternative remedies do exist, it necessarily follows that the claimant's rights are not denied because the injured party has access to remediation. Although the adjacent landowner in \textit{DuLaney} did not participate in the desired trial-type hearing, the dissent correctly argued that this party could pursue a damages claim against the landfill operators if the operation of the landfill proved to be injurious.\textsuperscript{147} In addition, the claimant could have sought an injunction or claimed anticipatory nuisance if the evidence indicated that the landfill would harm the groundwater beneath the adjacent landowner's property.\textsuperscript{148} There is no indication that the majority considered the availability of alternative remedies.

The central fallacy in the majority's reasoning as to adjacent landowners is that it fails to recognize the licensing process, \textit{directed as it is to another person's land}, does not implicate in any direct, substantial and immediate way any property interests of adjacent landowners subject to constitutional due process protection at the administrative level.\textsuperscript{149}

In the above quotation, the dissent revealed yet another aspect of the due process analysis disregarded by the majority. The administrative agency's permit issuance was directed at the applicant, not the adjacent landowners. Since claimed constitutional property deprivation would be an indirect effect of the permit issuance, it cannot implicate the Due Process Clause.\textsuperscript{150} The dissent offered both United States Supreme Court and Oklahoma Supreme Court authority for this assertion.\textsuperscript{151}

The United States Supreme Court recognized that the Due Process Clause only refers to direct interference with protected rights, not consequential injuries resulting from the valid exercise of state power.\textsuperscript{152} The United States Supreme Court held that due process protection does not cover the indirect injuries of a claimant when the challenged government action was directed at a third party.\textsuperscript{153}

In \textit{State ex rel. Oklahoma Corporation Commission v. Texas County}, the Oklahoma Supreme Court also held that an administrative agency's issuance of a permit to an applicant does not implicate the due process rights of third parties seeking protection.\textsuperscript{154} Instead, the \textit{Texas County} court found that the agency's action constituted the proper exertion of police power.\textsuperscript{155} It correctly pointed out that all privately owned property remains subject to the state's valid police power.\textsuperscript{156}

\textsuperscript{146} See supra note 120 and accompanying text.
\textsuperscript{147} \textit{DuLaney}, 868 P.2d at 686 (Lavender, V.C.J., dissenting).
\textsuperscript{148} \textit{Id.} (citing \textit{Stewart}, 796 P.2d at 324 n.2; \textit{Sharp}, 810 P.2d at 1275-76).
\textsuperscript{149} Id. (emphasis added).
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.} (citing \textit{O'Bannon v. Town Court Nursing Ctr.}, 447 U.S. 773 (1980); \textit{State ex rel. Corporation Comm'n v. Texas County Irrigation & Water Resources Ass'n}, 818 P.2d 449 (Okla. 1991)).
\textsuperscript{152} \textit{DuLaney}, 868 P.2d at 686 (Lavender, V.C.J., dissenting) (citing \textit{O'Bannon}, 447 U.S. at 789).
\textsuperscript{153} \textit{Id.} (citing \textit{O'Bannon}, 447 U.S. at 788).
\textsuperscript{154} \textit{Texas County}, 818 P.2d at 452.
\textsuperscript{155} \textit{Id.} at 453.
\textsuperscript{156} \textit{Id.}
The claimed property deprivation in *Texas County*, as in *DuLaney*, was protected water rights.\(^{157}\) Contrary to *DuLaney*, however, the *Texas County* court expressed: "The infliction of such loss is not a deprivation of property without due process of law; the exertion of the police power upon subjects lying within its scope, in a proper and lawful manner, is due process of law."\(^{115}\) Again, the majority failed to balance the rights of the individual property owner against the rights of the state in exercising valid police power.

Clearly, the licensing agency of solid waste landfills exercises valid police power. The OSWMA serves to protect the public's health, safety, and welfare and protect the quality of the environment.\(^{159}\) The permitting process under the OSWMA, then, inherently considers the degree to which the operation of the landfill will affect health and safety. The rights of the landfill applicant are not the only issues confronting the licensing body. Unfortunately, the operation of the landfill may prove to infringe upon rights of individuals after the permit has been issued. Under its police power authority, however, the administrative agency has not denied the potentially injured party due process. As argued by the dissent, the proper remediation would be to challenge the landfill operator, not the permitting agency.\(^{160}\)

In addition, the dissent recognized the burdensome ramifications of holding that due process rights of private parties may be implicated when a governmental agency issues a permit to a third party. "Such a holding opens up a myriad of licensing proceedings similar to due process challenges, e.g. licenses for a laundry, a tavern, a liquor store, a slaughterhouse, a gas station or a convenient store."\(^{161}\) Even the issuance of a driver's license without giving potentially affected citizens the right to notice and a trial-type proceeding may violate the Due Process Clause under the majority's holding.

Certainly, the judiciary must act within the confines of its adjudicative power, as suggested by the dissent.\(^{162}\) The separation of powers must exist to serve as adequate checks and balances between the governmental branches while contemporarily allowing the uninfringed performance of delegated governmental responsibilities. The *DuLaney* majority, however, has not only contradicted recent Oklahoma Supreme Court authority,\(^{163}\) but also has assumed legislative capacity.\(^{164}\) "[T]he majority has improperly stepped into the role of a super-legislature in this particular case by mandating constitutional due process protections where no constitutionally protected interests exists."\(^{165}\)

\(^{157}\) *Id.* at 450.

\(^{158}\) *Id.* at 453 (citing Anderson-Prichard Oil Corp. v. Corporation Comm'n, 241 P.2d 363, 372 (Okla. 1951) (quoting Lombardo v. City of Dallas, 73 S.W.2d 475 (Tex. 1934))).

\(^{159}\) 27A OKLA. STAT. § 2-10-102 (Supp. 1994).

\(^{160}\) *DuLaney*, 868 P.2d at 686 (Lavender, V.C.J., dissenting).

\(^{161}\) *Id.* at 687.

\(^{162}\) *Id.* at 687-88.

\(^{163}\) *Id.* at 688 (citing Turley v. Flag-Redfern Oil Co., 782 P.2d 130 (Okla. 1989)). The *Turley* court ruled that adjacent landowners have no due process rights at the administrative level. In addition, if an alternative statutory remedy adequately protects a constitutional interest, then no due process violation occurs at the administrative level. *Id.* at 135-36.

\(^{164}\) *DuLaney*, 868 P.2d at 689 (Lavender, V.C.J., dissenting).

\(^{165}\) *Id.*
IV. Ramifications of DuLaney

A. Validity of Prior Landfill Permits

The potential for complete retroactive application of the DuLaney decision questions the validity of all landfill permits similarly issued without provision of notice to all potentially affected citizenry and an individual, trial-type proceeding. The only limitation for such claims would be applicable statutes of limitation. While the Oklahoma Statutes provide no express limitation for actions based on a denial of constitutional rights, a catch-all provision exists for actions not based on real property claims.\(^{166}\) Generally, the statute of limitations begins to run when a cause of action accrues, based upon the time when a plaintiff could first maintain an action to a successful result.\(^{167}\) Arguably, since this same cause of action had been previously alleged unsuccessfully in front of the Oklahoma Supreme Court,\(^{168}\) an adjacent landowner could not maintain this cause of action with a successful result prior to DuLaney.

The statute of limitations, then, would not begin to run until the DuLaney decision. Consequently, the applicable statute of limitations has only recently began running on all previously issued landfill permits under the former version of the OSWMA, which did not grant a right for all potentially affected citizenry to have notice and the opportunity to participate in a trial-type hearing. The completely retroactive holding, therefore, places in doubt the validity of all OSWMA permits issued prior to the DuLaney decision.

B. Validity of Other Environmental Permits

The Oklahoma Supreme Court's decision in DuLaney, in fact, challenges the validity of all environmental permits. The court expressed the broad applicability of its holding by legitimizing the various concerns of the adjacent landowners and any other citizenry who may be affected. Further, the DuLaney court recognized that any adverse environmental effects could implicate Due Process Clause protection.

Certainly, solid waste landfills are not the only facilities necessitating the issuance of permits by the DEQ. The Oklahoma Environmental Quality Code lists permitting procedures for the Oklahoma Clean Air Act,\(^{169}\) the Oklahoma Pollutant Discharge Elimination System Act,\(^{170}\) and the Oklahoma Hazardous Waste Management Act.\(^{171}\) The DuLaney decision requires each of these statutes to provide notice and individual, "trial-type" hearings prior to the issuance of an environmental permit. In


\(^{170}\) Id. § 2-6-205.1.

\(^{171}\) Id. §§ 2-7-113, 2-7-116, 2-7-123.
response to DuLaney and the inconsistencies between the various environmental permitting statutes, the Oklahoma legislature has recently amended the statutes to create uniformity in these procedures.172

V. Conclusion

The Oklahoma Supreme Court's vague, expansive, and retroactive decision in DuLaney has created widespread uncertainty in Oklahoma environmental law. In particular, the court broadly authorized a fully developed, "trial-type" proceeding to all citizenry who may be affected. This broad class of persons is without any clearly specified limitation. The court, in effect, has rendered meaningless the standing doctrine. In addition, the DuLaney court applied this unlimited standing to not only all previously issued landfill permits but also all environmental permits. Through this broad application, unless overruled, limited, or clarified, the DuLaney decision clouds the validity of all Oklahoma environmental permits.

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172. Senate Bill No. 997, the Oklahoma Uniform Environmental Permitting Act, was approved June 1994. 1994 Okla. Sess. Laws 1870 (ch. 373). Section 2 defines the intent as to provide uniform permitting provisions regarding notice and public participation opportunities for permits issued by the DEQ. Id. § 2, 1994 Okla. Sess. Laws at 1871. Section 15(B)(1) provides the opportunity to request an administrative hearing on an application for certain permits. Id. § 15(B)(1), 1994 Okla. Sess. Laws at 1882. Section 15(B)(4) provides that the hearing shall be a quasi-judicial proceeding in accordance with the Administrative Procedures Act. Id.