

1.a.: Likely causes of action:

Clean Water Act – wetlands – facially applicable, but need to verify that they meet definition of wetlands (hydric soils, hydrophitic vegetation, periodic inundation). If they do, need to also confirm whether they fall within definition of “navigable waters” under SWANCC. Point out the two definitions, and split of authority between “both” or “nexus”. If yes, can file citizen suit seeking injunction to halt destruction of wetlands.

Endangered Species Act – “taking” through destruction of critical habitat. Need to confirm presence of endangered and threatened species, and determine if area is critical habitat. If yes, can file citizen suit for Section 9 violation. If construction of road spur requires federal action, can also file citizen suit claiming Section 7 violation for failure to consult. Remedy for both is an injunction. NB: Migratory Bird Treaty Act may provide for direct liability, but unclear if citizen suit available (it doesn’t).

NEPA – approval by Texas Department of Transportation may signal some other federal agency involvement. Need to determine whether any other major federal agency action may be required, including permit approvals or funding. If so, the federal agency may have to undertake an Environmental Assessment (unless it qualifies for a categorical exclusion) and/or an Environmental Impact Statement. Remedy is an injunction pending remand to agency for reconsideration.

Tort – neighbors (especially if members) may be able to sue in tort for Prairie Pavilion’s use of land that might constitute a nuisance. Injunction and damages.

Indirect attack on permits – if NPDES permit, PSD/NSR permit, or RCRA permit required, can challenge. Storm water permit for non-point source discharges. The construction of large buildings and a power substation implies substantial on-site usage that might generate water, air or solid waste discharges. Notably, the facility might trigger GHG emission requirements if its power usage is high enough to fall under the Tailoring Rule. Remedy is denial of permit or suspension of activity during permit reconsideration.

1b. Defenses and Strategies

Generally, standing will apply to all citizen suit actions. Can challenge for both lack of direct, concrete and particularized interest. Also can attack whether there is no substantive “procedural right” that provide standing. Can also challenge whether injunctions are the appropriate remedy. Balancing of equities and irreparable harm.

The description of claims hints at statute-specific defenses: CWA raises navigable water issue, tort claim raises question of whether unsightly neighbor constitutes an impairment of your ability to use your own property; NEPA doesn’t require any substantive change in agency decision, but only to take hard look.

Strategies – wetland mitigation, ESA habitat conservation agreement, NEPA enforceable mitigation steps to lead to a FONSI, aggressive proactive development of permits and supporting record.