Seventh Annual Texas Environmental Superconference

August 3-4, 1995

"Elvis on Environmental Law"



Four Seasons Hotel

98 San Jacinto Blvd.

Austin, Texas



1995 *Seventh Annual*
Texas Environmental Superconference

1995 SEVENTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE
PRE-REGISTRATION ATTENDANCE ROSTER
July 31, 1995

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SEVENTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

August 3 - 4, 1995
Four Seasons Hotel
Austin, Texas

PROGRAM EVALUATION QUESTIONNAIRE

Please complete this questionnaire and leave the completed form on the registration table. Your response will assist us in preparing for the 1996 Eighth Annual Environmental Superconference. Thank you.

5=Excellent 4=Good 3=Average 2=Below Average 1=Poor

1.	In general, the program was	5	4	3	2	1
2.	The course materials were	5	4	3	2	1
3.	The program arrangements were	5	4	3	2	1
4.	The hotel accommodations and services were	5	4	3	2	1

5. Are you an attorney / engineer or scientist / student / other?

6. Are you in the public sector / private sector?

7. Suggested topics and/or speakers for the 1996 conference.

8. Suggested themes for the 1996 conference.

9. Other comments....

SPEAKER	ORAL PRESENTATION	COURSE MATERIALS	COMMENTS
Legislative Update			
Gary Newton	5 4 3 2 1	5 4 3 2 1	
Key Issues in Administrative Law			
Linda Secord	5 4 3 2 1	5 4 3 2 1	
TNRCC Permit Processing and Enforcement Hearing Rules			
Jim Phillips	5 4 3 2 1	5 4 3 2 1	
Key Issues in Air Quality			
Jerry Demo	5 4 3 2 1	N/A	
David Duncan	5 4 3 2 1	N/A	
Karen Olson	5 4 3 2 1	N/A	
Jeff Saitas	5 4 3 2 1	N/A	
Group	5 4 3 2 1	N/A	
TNRCC Policies			
Dan Pearson	5 4 3 2 1	5 4 3 2 1	
RCRA/Superfund Update			
Keith Hopson	5 4 3 2 1	5 4 3 2 1	
Waste Classification and Recycling			
Catriona Bartlett	5 4 3 2 1	5 4 3 2 1	
Key Issues in Water Quality			
Jim Davenport	5 4 3 2 1	5 4 3 2 1	

SPEAKER	ORAL PRESENTATION	COURSE MATERIALS	COMMENTS
Spill Reporting			
Marianne Baker	5 4 3 2 1	5 4 3 2 1	
Robert Pressley	5 4 3 2 1	5 4 3 2 1	
Risk Reduction Rules			
Robert Hahn	5 4 3 2 1	5 4 3 2 1	
Natural Resource Damages			
Ramon Dasch	5 4 3 2 1	5 4 3 2 1	
The Endangered Species Act			
Francesca Ortiz	5 4 3 2 1	5 4 3 2 1	
Toxic Tort			
Michael Gibson	5 4 3 2 1	5 4 3 2 1	
Criminal Enforcement			
Bill Ballard	5 4 3 2 1	5 4 3 2 1	
Environmental Risk Management			
Ron Allums	5 4 3 2 1	5 4 3 2 1	
Environmental Benchmarking			
Paul Pizzi	5 4 3 2 1	5 4 3 2 1	
EPA Region VI Update			
Sam Coleman	5 4 3 2 1	5 4 3 2 1	
TNRCC Decisionmaking			
David Bolduc	5 4 3 2 1	5 4 3 2 1	

SPEAKER	ORAL PRESENTATION	COURSE MATERIALS	COMMENTS
Geographic Information Systems for Environmental Projects			
Lou Zachos	5 4 3 2 1	5 4 3 2 1	
Corporate Issues for Environmental Professionals			
Dean Hester	5 4 3 2 1	5 4 3 2 1	
Ethical Issues			
Leslie David Romo	5 4 3 2 1	5 4 3 2 1	
Open Mike			
Walter Bradley	5 4 3 2 1	N/A	
Beverly Hartstock	5 4 3 2 1	N/A	
Minor Hibbs	5 4 3 2 1	N/A	
John Riley	5 4 3 2 1	N/A	
Lydia Gonzales-Gromatzky	5 4 3 2 1	N/A	
Group	5 4 3 2 1	N/A	

Seventh Annual Texas Environmental Superconference

August 3-4, 1995

"Elvis on Environmental Law"



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Seventh Annual Texas Environmental Superconference



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MEMORANDUM

TO: Attendees

FROM: Planning Committee

DATE: August 3, 1995

On behalf of the Environmental and Natural Resources Section of the State Bar, the Air and Waste Management Association, Southwest Section, the Water Environment Association, and the Texas Hazardous Waste Management Society, welcome to the Seventh Annual Texas Environmental Superconference. As you know, the conference is an annual event established to create a dialogue among the attendees, who are drawn from the public and private sector and from the legal and technical professions. The conference provides excellent continental breakfasts, lunches, and snacks, and plenty of breaks to encourage participants to discuss environmental issues informally.

As always, there are evaluation forms for the program. We appreciate your taking the time to complete them. The organizers of this program take into account these forms in planning next year's conference. In addition, if you have an interest in having a particular topic presented, or in speaking on a particular topic, the evaluation form is the appropriate place to provide that information. Suggestions for themes for next year also are being solicited. Next year's conference is scheduled for August 1 and 2, 1996. Please mark your calendars.

If you have any questions or comments, please do not hesitate to contact any of the Planning Committee members at the conference, or, thereafter, Jeff Civins at the above listed number.

SEVENTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE
Thursday and Friday, August 3-4, 1995

"ELVIS ON ENVIRONMENTAL LAW"

Thursday, August 3, 1995

7:00 - 8:30 **Registration/Continental Breakfast**

8:30 - 8:45 **Welcoming Remarks**
Jeff Civins
Kelly, Hart & Hallman, P.C.

Phil Daly
Air and Waste Management
Association, Southwest Section

Moderator: Carol Batterton
TNRCC
Austin, Texas

8:45 - 9:15 **Legislative Update -- *"Heartbreak Hotel"***
Speaker: Gary Newton
Jenkens & Gilchrist, P.C.
Austin, Texas

9:15 - 9:45 **Key Issues in Administrative Law -- *"Don't Be Cruel"***
Speaker: Linda Secord
Texas Attorney General Office
Austin, Texas

9:45 - 10:15 **TNRCC Permit Processing and Enforcement Hearing Rules -- *"Funny How Time Slips Away"***
Speaker: *Jim Philips*
TNRCC
Austin, Texas

10:15 - 10:30 **Coffee Break**

10:30 - 11:30 **Key Issues in Air Quality (Panel Discussion) -- *"I Don't Care If The Sun Don't Shine"***

Speakers:	*Jerry Demo*	*David Duncan*
	Pollution Solutions	TNRCC
	Austin, Texas	Austin, Texas
	Karen Olson	*Jeff Saitas*
	TNRCC	TNRCC
	Austin, Texas	Austin, Texas

11:30 - 12:00 **TNRCC Policies -- *"A Whole Lotta Shakin' Goin' On"***
Speaker: Dan Pearson
TNRCC
Austin, Texas

12:00 - 1:30 **Lunch**

Moderator: Warren Davis
TNRCC
Austin, Texas

1:30 - 2:15 **RCRA/Superfund Update -- *"Blue Suede SWMU'S"***
Speaker: Keith Hopson
Brown McCarroll & Oaks Hartline, P.C.
Austin, Texas

2:15 - 2:45 **Waste Classification and Recycling -- *"Return To Sender"***
Speaker: Catriona Bartlett
TNRCC
Austin, Texas

2:45 - 3:15 **Key Issues In Water Quality -- *"Treat Me Nice"***
Speaker: Jim Davenport
TNRCC
Austin, Texas

3:15 - 3:30 **Cookie Bar Break**

3:30 - 4:00 **Spill Reporting -- *"It's Now or Never"***
Speakers: Marianne Baker
TNRCC
Austin, Texas

Robert Pressley
Kelly, Hart & Hallman, P.C.
Austin, Texas

4:00 - 4:30 **Risk Reduction Rules -- *"Clean Up Your Own Backyard"***
Speaker: Robert Hahn
RMT/Jones & Neuse
Nederland, Texas

4:30 - 5:00 **Natural Resource Damages -- *"I'll have a Blue Christmas Without You"***
Speaker: Ramon Dasch
TNRCC
Austin, Texas

5:00 - 6:00 **Cash Bar Reception**

Friday, August 4, 1995

8:00 - 8:40 **Registration/Continental Breakfast**

8:40 - **8:45** **Opening Remarks**
Jeff Civins
Kelly, Hart & Hallman, P.C.

Harless Benthel
Gilpin, Paxon & Bersch
Houston, Texas

Moderator: Albert R. Axe, Jr.
Jenkens & Gilchrist
Austin, Texas

8:45 - 9:15 **The Endangered Endangered Species Act -- *"Only the Strong Survive"***
Speaker: *Francesca Ortiz*
Baker & Botts, L.L.P.
Austin, Texas

9:15 - 9:45 **Toxic Tort -- *"You Ain't Nothin' But a Hound Dog"***
Speaker: *Michael Gibson*
Kleberg & Head, P.C.
Houston, Texas

9:45 - 10:15 **Criminal Enforcement -- *"Jail House Rock"***
Speakers: *Bill Ballard*
TNRCC
Austin, Texas

Harless Benthul
Gilpin, Paxson & Bersch
Houston, Texas

10:15 - 10:30 **Coffee Break**

10:30 - 10:50 **Environmental Risk Management -- *"Viva Las Vegas"***
Speaker: *Ron Allums*
CRC Environmental Risk Management
Fort Worth, Texas

10:50 - 11:30 **Environmental Benchmarking -- *"Shake Rattle and Roll"***
Speaker: *Paul Pizzi*
Pilko & Associates
Houston, Texas

11:30 - 12:00 **EPA Region VI Update -- *"All Shook Up"***
Speaker: *Sam Coleman*
EPA Region VI
Dallas, Texas

12:00 - 1:30 **Lunch**

Moderator: *Patricia Finn Braddock*
Fulbright & Jaworski, L.L.P.
Austin, Texas

1:30 - 2:00 **TNRCC Decision Making -- *"Love Me Tender"***
Speaker: *David Bolduc*
TNRCC
Austin, Texas

2:00 - 2:40 **Geographic Information Systems For Environmental Projects (A Demonstration) -- *"A World of Our Own"***

Speaker: *Louis Zachos*
Radian Corporation
Austin, Texas

2:40 - 3:10 **Corporate Issues for Environmental Professionals -- *"Suspicious Minds"***

Speaker: *Dean Hester*
Scott, Hulse, Marshall, Feuille, Finger & Thurmond
El Paso, Texas

3:10 - 3:30 **Ice Cream Bar Break**

3:30 - 3:50 **Ethical Issues -- *"You're the Devil in Disguise"***

Speaker: *Leslie David Romo*
Law Office of Leslie Romo
Austin, Texas

3:50 - 5:00 **Open Mike -- TNRCC Representatives -- *"Are You Lonesome Tonight"***

Speakers:

Walter Bradley	*Beverly Hartsock*
TNRCC	TNRCC
Austin, Texas	Austin, Texas
Minor Hibbs	*John Riley*
TNRCC	TNRCC
Austin, Texas	Austin, Texas

Lydia Gonzales-Grometzky
TNRCC
Austin, Texas

5:00 **Adjourn**

Texas Environmental Superconference
Co-sponsored by:

State Bar of Texas Environmental and Natural Resources Law Section
Texas Hazardous Waste Management Society
Water Environment Association of Texas
Air & Waste Management Association, Southwest Section

This course has been approved by the State Bar of Texas for **12.25 Hours in Continuing Legal Education Credits, including 1 Hour of Ethics**, and by the Texas Board of Legal Specialization for credit towards the continuing legal education requirements for certification in Real Estate and Administrative Law.

1995 Planning Committee

Al Axe, Jr. Brown McCarroll & Oaks Hartline Austin, TX	Carol Batterton TNRCC Austin, TX	Jeff Civins Kelly, Hart & Hallman, P.C. Austin, TX	Phillip Haag Hutcheson & Grundy, L.L.P. Austin, TX
Stephen Jenkins City of San Marcos San Marcos, TX	Dean Robbins TNRCC Austin, TX	Kathy Romans Chester LabNet Houston, TX	Margie Stokes US PCI Laidlaw San Antonio, TX

SEVENTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

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Linda Secord

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Jim Philips

D. **Key Issues in Air Quality (Panel Discussion) -- *"I Don't Care If The Sun Don't Shine"***

Jerry Demo
David Duncan
Karen Olson
Jeff Saitas

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Dan Pearson

F. **RCRA/Superfund Update -- *"Blue Suede SWMU'S"***

Keith Hopson

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Catriona Bartlett

H. **Key Issues In Water Quality -- *"Treat Me Nice"***

Jim Davenport

I. **Spill Reporting** -- ***"It's Now or Never"***

Marianne Baker
Robert Pressley

J. **Risk Reduction Rules** -- ***"Clean Up Your Own Backyard"***

Robert Hahn

K. **Natural Resource Damages** -- ***"I'll Have a Blue Christmas Without You"***

Ramon Dasch

L. **The Endangered Endangered Species Act** -- ***"Only the Strong Survive"***

Francesca Ortiz

M. **Toxic Tort** -- ***"You Ain't Nothin' But a Hound Dog"***

Michael Gibson

N. **Criminal Enforcement** -- ***"Jail House Rock"***

Bill Ballard

O. **Environmental Risk Management** -- ***"Viva Las Vegas"***

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Walter Bradley
Beverly Hartsock
Minor Hibbs
John Riley
Lydia Gonzalez Gromatzky

Legislative Update

"Heartbreak Hotel"

Gary Newton

GARY T. NEWTON

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PRACTICE AREA Environmental / Legislative

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Advises clients in the areas of environmental, legislative and administrative law. Spends a large portion of time lobbying on environmental issues on behalf of clients at the Texas Legislature. Practice also involves representation in rule making and permitting actions before the Texas Natural Resource Conservation Commission and other agencies. Represents clients in the manufacturing, mining, utility, energy, automobile, waste management and wildlife management industries.

CURRENT CLIENTS

American Automobile Manufacturers Association
Kraft Foods
Texas Disposal Systems
Texans for Wildlife Conservation
Maple Run Municipal Utility District
Cogema Mining, Inc.
Chuck Nash Chevrolet

EDUCATION

University of Houston Law Center, Houston, Texas, J.D. (1985)

Southwest Texas State University, San Marcos, Texas, B.B.A. in Accounting (1980)

A DIGEST OF ENVIRONMENTAL

LEGISLATION CONSIDERED BY

TEXAS IN 1995

74TH LEGISLATURE

REGULAR SESSION

BY

GARY T. NEWTON

JENKENS & GILCHRIST, P.C.

AUGUST 3, 1995

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OVERVIEW OF BUSINESS RELATED LEGISLATION

The Seventy-Fourth Session of the Texas Legislature convened in January with a new Governor and a new agenda. Issues that dominated past sessions - school finance, redistricting, criminal justice, taxes -- were not as high profile this session because of court rulings, the state's continued economic health and additional prison space. George W. Bush's fall victory also shifted the focus of legislative debate to the issues that were central to his campaign -- tort reform, welfare reform, juvenile justice reform and public education reform. And though items like gun rights, property rights and casino gambling received a lot of press attention, this session there were plenty of fights over business issues. The following is a brief summary of the business-related highlights of the Seventy-Fourth Session of the Texas Legislature.

BUDGET AND TAXES

Legislative leaders promised another tax-free budget, and they delivered. Texas' two-year state budget came in at just under $80 billion -- a $4.7 billion (6.2 percent) increase in spending over the previous budget. That increase will be funded by an increase in state and federal revenues.

For 1996-97, the budget's bottom line of $79.86 billion will be divided up among 245 state agencies. Public education continues to be the state's highest budget priority (41.9 percent of the total budget); over the next two years, $33.6 billion will go to educating Texas students, an increase of 7.3 percent. Some $300 million of that sum is scheduled to go to Texas teachers in the form of a pay raise. Other spending priorities include spending on health and human services ($26.4 billion), criminal justice ($6.9 billion) and economic development ($8.7 billion).

REGULATED INDUSTRIES

Telephone Deregulation

Lawmakers managed to reach consensus on a bill that will deregulate Texas' local phone service. The new law calls for the following changes:

- Competitors will be allowed to offer local phone service in Texas for the first time. Larger companies, including cable companies, will be required to build new networks instead of renting or reselling existing networks. Smaller competitors will be able to build their business on resale.

- Southwestern Bell and other local phone companies will be required to freeze their basic rate for four years. In return, they will be free to set prices on optional or new phone services. And overall, phone companies will have less regulation from the state.

- Phone companies will be required to contribute $150 million every year for the next ten years to a fund that would be used to improve telecommunication networks for hospitals and schools.

- Small companies would be freed from current regulations that require them to present cases at the Public Utility Commission in the same manner as large companies.

Electric Utilities Deregulation

This bill would deregulate the state's wholesale electric market and introduce moderate competition in the electric utility industry. Under the new law, big utilities would have to compete with smaller, independent power generators when they consider building new plants.

TORT REFORM

Governor Bush made tort reform one of the central planks of his winning campaign platform last fall. Lawmakers took heed and passed a series of bills that contain sweeping changes of Texas civil justice system.

Joint and Several Liability

The Legislature made a number of changes to the rules affecting a codefendant's responsibility for the damages awarded to a plaintiff. The following is a list of the most significant:

- Under the current law, a defendant can be held responsible for 100 percent of a plaintiff's damages as long as the defendant is at least 11 percent at fault and the codefendants are insolvent. The new law requires the defendant to be greater than 50 percent at fault before being held potentially responsible for up to 100 percent of the damages.

- As the law now stands, in cases involving tort liability for environmental emissions, a defendant can be held up to 100 percent responsible for damages if the codefendants are insolvent. The new law requires a defendant to be at least 15 percent at fault before they can be held responsible for 100 percent of the damages.

- Under the new law, if a construction contractor's employee is injured on a land owner's premises, the land owner would not be liable for failing to provide a safe workplace unless the land owner exercised control over the employee and had knowledge of the danger and failed to warn the employee.

- Under some circumstances, a contractor's employee could not recover both workers' compensation benefits and damages in a lawsuit for the same injury. At trial, the employee's judgment would be reduced by the amount of workers' compensation benefits he or she had received.

- A defendant would be allowed to include (join) as third parties other defendants in instances where the plaintiff could have sued these parties but did not. The jury will consider whether these third parties are responsible for all or part of the

plaintiff's damages and the plaintiff will have to collect from them. Presently, only the plaintiff can decide which defendants' fault will be compared with the plaintiff's when assigning responsibility.

Venue

The law, as it exists now, allows a plaintiff to sue a business or corporation in a particular county if one of three conditions are met:

(1) The principal office of the corporation is located in the county; or
(2) All or part of the cause of action arose in the county; or
(3) The plaintiff resided in the county and if the business had an agency or representative in that county. If there was no representative or agency in that county then the plaintiff could take the defendant into a county with the nearest representative or agency. (Courts have defined agency as someone with significant decision-making power.)

Under the new law, this third category is eliminated, meaning a plaintiff can only bring suit in a county in which all or a significant portion of the events giving rise to the claim took place or in the county in which the business' "principal office" is located. The legislation describes "principal office" as one where the business' decision makers conduct the daily affairs of the organization.

Plaintiffs in a multi-plaintiff suit will each have to prove that venue is proper as to them. Moreover, though plaintiffs will still be able to haul multiple defendants into any county where venue is valid with regard to one of the defendants, the new law gives the trial court the discretion to move the suit to another county because of injustice or undue expense.

Frivolous Lawsuits

This legislation prohibits parties from:

- Bringing a lawsuit that is frivolous, groundless in fact or in law, or is for the purpose of delay or harassment; or
- Defending a lawsuit if their defense is frivolous, groundless in fact or in law, or is for the purpose of delay or harassment; or
- Engaging in conduct which unnecessarily expands the lawsuit (e.g., discovery abuse); or
- Pursuing, in good faith, a claim or defense that established a new theory of law would not be considered a violation.

If the court finds that the claim or the defense is frivolous, the court may punish the offending party (including finding them in contempt) and/or require the party to pay the opponent's attorney's fees, out-of-pocket expenses and other damages. Before a party is punished, however, the court must conduct a hearing allowing the accused party to present their side.

Punitive Damages

Current law restricts punitive damages to four times actual damages or $200,000 whichever is greater. Once the new law takes effect, punitive damages would be the greater of $200,000 or an amount equal to two times economic damages plus no more than $750,000 in noneconomic damages, even in cases involving malice.

The legislation requires plaintiffs to prove fraud or malice and raises the standard of proof to win punitive damages from "preponderance of the evidence" to "clear and convincing."

Deceptive Trade Practices

Changes to the Deceptive Trade Practices Act (DTPA) will limit the Act's scope and impact. For instance, the DTPA will no longer apply to providers of professional services or to claims of personal injury. Claims for mental anguish will also be disallowed, unless the alleged act was committed knowingly, with actual awareness at the time of the alleged transgression of the falsity, deception or unfairness of the deceptive practice.

The revised DTPA allows consumers to waive application of the DTPA if the waiver is in bold writing and follows a proscribed format and the consumer is represented by legal counsel not chosen by the defendant. Moreover, application of the DTPA is not applicable to written contracts in excess of $100,000 (or $500,000 if all the contracts are for a single project) unless it is a consumer's residence.

Lawmakers also limited recovery to economic damages unless the act was committed knowingly, in which case punitive damages can be awarded. In addition, either party can compel mediation once the lawsuit is filed. Other provisions limit attorney's fees in certain situations and limit the venue of DTPA suits to counties where the transaction was solicited or the primary place of the defendant's business.

Governmental Immunity

Personal liability of insured public servants will be limited to $100,000, unless the public servant violated the United States Constitution or federal law. In that case, there will be no limit on personal liability. The law's definition of public servant includes: employees, volunteers and elected and appointed state and local officials. The definition does not include health care providers (although they would be covered by the medical malpractice legislation described below).

Medical Malpractice

New legislation requires plaintiffs who sue doctors or hospitals to put up a $5,000 bond for each defendant instead of the present $2,000 and file a report from a legally recognized expert attesting to the validity of the claim.

Lowering Liability Insurance Rates

Lawmakers attached a provision to the tort reform bills calling on the Insurance Commissioner to hold hearings on the impact of the lawsuit overhaul and rule by Nov. 1, 1995 on how much liability insurance rates should be reduced. If the commissioner fails to act by Jan. 1, 1996, the law mandates rate rollbacks of 10 to 30 percent.

ECONOMIC DEVELOPMENT

Tax Abatement Program

Lawmakers reauthorized the Property Redevelopment and Tax Abatement Act which will allow local governments to grant tax abatements for economic development.

Enterprise Zones

Reauthorizes the Department of Commerce to designate enterprise zones in order to receive state tax incentives.

GOVERNMENT

Abolishment of the State Treasury

Lawmakers gave their approval to a plan put forward by Treasurer Martha Whitehead to abolish her agency. Since the Treasury is a constitutionally-mandated office, voters must give their approval in a November referendum. If they do, the agency is scheduled to shut its doors September 1, 1996, with most major functions being transferred to the State Comptroller's office.

Workers' Compensation

A package of "sunset" bills was pushed through to continue what the business community has deemed a successful workers' comp program since its inception in 1989. Labor groups opposed the bill but were unsuccessful in making any drastic changes.

TRANSPORTATION

Trucking Deregulation

Texas trucking laws were overhauled to follow Congress' decision to deregulate interstate trucking and pre-empt states from regulating in-state trucking rates, routes and service. Lawmakers repealed a number of state laws to reflect that change, transferred remaining safety, registration and insurance oversight from the Railroad Commission to the Department of Public Safety and the Texas Transportation Commission.

SPECIAL LEGISLATIVE SESSION

There is no prospect of a special session in sight unless Congress cuts appropriations to Texas or unless a federal court orders a new redistricting plan for Congress.

APPROPRIATIONS

1. **HB 1/Junell - Appropriations Act. Effective 9/1/95.**
The Legislature appropriated $429 million for fiscal year 1996 and $436 million for fiscal year 1997 to the TNRCC. These amounts represent an increase over the 1995 appropriated amount of $350 million. Most of these increases are in the Petroleum Storage Tank and Waste Tire Recycling Programs. The appropriations bill allows 3,210 full-time equivalent employees in the TNRCC. The TNRCC was not appropriated their estimated fees. If their fee collections exceed the appropriated amount, the agency will not be able to spend that excess.

2. **HB 3050/Junell - Relating to exemption of certain funds from consolidation, re-creation of certain funds, preservation and creation of certain dedications of revenue, and exemption of certain unappropriated amounts from use for general government purposes. Effective 8/28/95 and 9/1/95 for some sections.**
The Comptroller is directed to provide a method to estimate revenue for each dedicated account in the General Revenue Fund. The Comptroller will then be able to reduce the dedicated account by the excess of the amount collected over the appropriated amount the fiscal year beginning September 1, 1997 and transfer that excess to the General Revenue Fund.

ADMINISTRATIVE PROCEDURE

1. **HB 433/Goodman - Relating to the parent-child relationship, suits affecting the parent-child relationship and the protection of children. Effective 9/1/95.**
This bill authorizes a court or the Attorney General's office to issue an order to suspend a permit for non-payment of child support.

2. **HB 1718/S. Turner - Relating to the revision of the Open Records Law. Effective 9/1/95.**
This bill makes many changes to the Open Records Act which could affect regulated entities. The changes include:

   - allowing Legislators to review confidential information;
   - requiring access to records stored in any manner such as electronic mail or computer records; and
   - requiring the Attorney General to determine within 60 days whether an agency's claim of an exception to the Act is valid.

3. **SB 12/Montford - Relating to administrative hearings for the TNRCC provided by the Office of Administrative Hearings. Effective 9/1/95.**
The contested case hearing on a contested permit application is moved from the TNRCC to SOAH. The TNRCC commissioners will still make the final administrative decision on whether to issue a contested permit based on the report of the hearing officer at SOAH. The SOAH hearing officer must apply TNRCC

rules in rendering a recommendation to the Commissioners. Proposed rules to implement this bill were published July 11, 1995.

4. **SB 14/Bivins - Relating to protecting real property rights from certain actions of this state or a political subdivision. Effective 9/1/95.**
Decried by environmental groups as the worst bill of the session, it allows a property owner to invalidate an action by a governmental entity that results in a loss of 25% of the property's value. The governmental entity may elect to pay damages to the property owners instead of invalidating its action. A private property owner may file a contested case with a state agency to determine whether a governmental action results in a taking subject to this chapter. However, this bill does not apply to government acts taken to protect public health and safety, or to implement federal law. When proposing a rule an agency must prepare a takings impact assessment which identifies the burdens on the private property owners and describe reasonable alternatives to carry out the rule.

5. **SB 424/Madla - Relating to the payment in periodic installments of certain penalties owed by certain businesses for violations of laws under the jurisdiction of the TNRCC. Effective 5/17/95.**
Allows small business to pay civil or administrative penalties over a period of time not to exceed 12 months as authorized by TNRCC rules.

6. **SB 741/Sims - Relating to the authority of the executive director of the TNRCC to issue an uncontested permit, license, certificate, or authorization. Effective 8/28/95.**
Gives the director of the TNRCC the authority to issue uncontested permits, licenses, certificates or authorization and validates any permit approvals made before and after the effective date of this bill. The TNRCC must be sure proper notice was made, the applicant consents, and the application is uncontested before taking such action. Proposed rules to implement this bill were published July 11, 1995.

7. **SB 1443/Brown - Relating to administrative licensing. Effective 9/1/95.**
The term of a permit is tolled during the period the permit is subject to judicial review. If the permittee engages in the activity for which the permit was issued while the permit is under review, then the duration of the permit is not tolled.

8. **SB 1546/Bivins - Relating to persons affected by matters in hearings before the TNRCC. Effective 9/1/95.**
Requires a person wanting to contest a permit application to have a personal justifiable interest affected by the ruling on a permit application. An interest common to members of the general public does not qualify as a personal justifiable interest. A hearing does not need to be held if the request for the hearing is not reasonable or supported by competent evidence. Proposed rules to implement this bill were published July 11, 1995.

9. **SB 1704/Shapiro - Relating to the review and approval of certain permits by the state, a municipality, or other local governmental agencies. Effective 8/28/95.**
This bill applies to permits issued by all state agencies. Requires that the regulations, ordinances and/or requirements that were in effect at the time the original application is filed to be the basis for the review and approval of a permit application. New regulations would not apply to the permit except for procedural changes that enhance or protect the project, including changes which lengthen the effective life of the permit. This bill does not apply to programs delegated to the state by the federal government. The TNRCC will adopt rules to implement.

ENFORCEMENT

1. **HB 2473/Chisum - Relating to audits to determine compliance with certain laws, rules, and regulations; providing penalties. Effective 5/23/95.**
The bill establishes a privilege for a self-audit report from being used against the facility as evidence in a civil, criminal, or administrative hearing. The bill also includes immunity to a facility operator from a civil, criminal bill or administrative penalty if the facility operator voluntarily discloses the violation promptly upon discovery and takes steps to immediately correct the violation. The immunity if a person intentionally, knowingly, or recklessly committed a violation.

2. **SB 1660/Ratliff - Relating to agreed orders of the TNRCC. Effective 9/1/95.**
Allows the TNRCC to enter into an agreed enforcement order without the alleged violator admitting to a violation which could be used as evidence of an act in a subsequent civil suit, unless the action is brought by the Attorney General's office.

AIR QUALITY

1. **SB 178/Whitmire - Relating to the vehicle emissions inspection and maintenance program. Effective 5/2/95.**
Repeals the centralized I/M 240 program and re-establishes the limited testing program that was in place before the centralized program. The bill authorizes the Governor to change the program after negotiations with EPA. While the Governor is negotiating a plan with EPA, the TNRCC must implement an interim I/M program beginning June 1, 1995.

2. **SB 200/Armbrister - Relating to the alternative fuels programs. Effective 9/1/95.**
This allows the use of reformulated gasoline and reformulated diesel as alternative fuels in fleet vehicles if they meet low emission vehicle standards. It also amends the compliance schedules for fleets, provides for emission-credit trading programs, and allows the TNRCC to grant waivers from the program.

3. **SB 290/Henderson - Relating to the delay of the ETR program. Effective 4/12/95.**
This bill suspends the state implementation of the Employer Trip Reduction program until October 20, 1995. It also allows the Governor to order additional, successive 45-day suspensions of the ETR program.

4. **SB 1125/Nixon - Relating to the renewal, amendment, or modification on certain emissions permits. Effective 5/19/95.**
Prohibits the TNRCC from holding a contested case hearing on a renewal, amendment, or modification of an air permit unless after the change there is an increase (instead of a decrease or no change) in emissions, or if the applicant has a compliance history full of recurring violations.

5. **SB 1126/Nixon - Relating to the modification of an existing facility under the Texas Clean Air Act. Effective 5/19/95.**
Allows a facility operator to make changes in the equipment or process without making application to the TNRCC if the change does not increase emissions or emit new air contaminants from a previously permitted facility.

WASTE

1. **HB 1644/Hirschi - Relating to the improper disposal of medical waste. Effective 9/1/95.**
This bill creates specific criminal penalties for generating, collecting, storing, processing, exporting or disposing of medical waste in Texas without all the required permits. The bill separates the specific penalties for large quantity generators, small quantity generators and transporters of medical waste for illegal disposal.

2. **HB 2296/Jackson - Relating to the creation of a voluntary clean-up program for solid and hazardous wastes. Effective 9/1/95.**
Authorizes the TNRCC to initiate a voluntary clean-up program using current standards for remediation while taking future land use into consideration. The applicant must pay a $1,000 fee and enter into an agreement with the TNRCC describing the work plans, reports, and schedule of oversight payments. The TNRCC must adopt rules to implement this bill.

3. **HB 2315/Saunders - Relating to the regulation of energy and material recovery and of gas recovery. Effective 9/1/95.**
Allows a MSW permit holder to install an energy, material, or gas recovery facility, or a transfer facility, at a permitted MSW facility by registration rather than a separate permit or a permit amendment. The bill allows a person to extract materials for energy and material recovery from closed or inactive landfills by registration rather than a new permit. The TNRCC must adopt rules to implement this bill.

4. **HB 2579/Howard - Relating to the abolition of the interagency coordination council. Effective 8/28/95.**
Abolished the Interagency Coordination Council, which consists of the Texas Department of Health, the TNRCC and the Railroad Commission. The purpose of the IAC was to coordinate overlapping solid waste regulatory and enforcement issues, but the need for a formal entity to perform this function has diminished with a consolidated environmental agency.

5. **HB 2587/Alexander - Relating to the regulation of certain aboveground and underground storage tanks and the regulation of underground storage tank installers. Effective 9/1/95.**
This bill doubles the amount of money from $60 million to $120 million per year that is available for tank owners to be reimbursed for remediation costs associated with leaking underground petroleum storage tanks. The bill requires all tank owners to register their tanks by December 31, 1995 in order to remain eligible for reimbursement. The bill sunsets the program after December 22, 1998 and requires tank owners to then put up financial responsibility for clean-up in the event of a leaking tank.

6. **HB 2944/Dukes - Relating to municipal solid waste disposal fees. Effective 9/1/95.**
This exempts waste generated from a natural man-made disaster or from the clean-up of structures used for drug trafficking or other crimes if the disposal service is donated. The bill also makes the statute clear that all solid waste is subject to the disposal fees except for Class I industrial solid waste and hazardous waste subject to management fees. The fee also does not apply to industrial solid waste disposed of on-site.

7. **HB 3072/Gallego - Relating to the use of solid waste fee revenue for local and regional activities. Effective 6/16/95.**
Allocates to the regional Councils of Governments half of the disposal fees for regional planning and assistance with the management of municipal solid waste. The bill also makes it clear the COGS cannot subsidize spending on facilities that compete with private industry.

8. **SB 776/Brown - Relating to an emergency appropriation from the waste tire recycling fund to the TNRCC for the fiscal year ending August 31, 1995. Effective 9/1/95.**
Completely revamps the tire shredding program to allow facilities which burn tires for energy recovery to be reimbursed 40 cents per tire from the waste tire recycling fund. The bill also allows the TNRCC to make grants for the construction of waste tire recycling facilities, including energy recovery facilities. Establishes a $1 recycling fee on the retail sale of a good used tire with a rim diameter of 12 inches to 17.5 inches; a $3.50 fee on the sale of a new tire with a rim diameter greater than 17.5 inches; and a $2 fee on a new motorcycle tire.

No fees are authorized on recapped or retreaded tires. The bill sunsets the program on December 31, 1997.

9. **SB 1371/Wentworth - Relating to the authority of a public agency to contract for solid waste services. Effective 6/12/95.**
Allows a public agency (including general law cities) to contract with another public agency or private contractor for solid waste services. The bill also validates contracts entered into before the effective date of this Act.

10. **SB 1619/Brown - Relating to certain powers of the TNRCC. Effective 8/28/95.**
Allows the TNRCC to enter or cross public or private property to investigate the release or threatened release of a substance if the responsible party is not available or there is an immediate danger to public health or the environment.

11. **SB 1683/Nixon - Relating to the collection, management, and recycling of used oil and used oil filters, providing criminal penalties. Effective September 1, 1995, except for fee decrease effective September 1, 1997.**
Requires the state used oil program to be no more stringent than federal rules. Cuts the fee that supports this program from 3 cents to 1 cent per quart or from 8 cents to 4 cents per gallon of automotive oil. The bill also prohibits used oil filters and/or used oil from being intentionally or knowingly placed in a landfill. The bill also allows grants to private entities for programs that promote recycling of household do-it-yourself used oil.

WATER QUALITY

1. **HB 1385/Saunders - Relating to the limitation and termination of annual cost recovery fees for regional water quality assessments. Effective 6/13/95.**
Limits the fee assessed on water and wastewater permits for nonpoint source pollution programs to a total of $5,000,000 to be apportioned among all permittees. The authority to assess this fee will end January 1, 1999.

2. **HB 1826/Jackson - Relating to the approval of treatment, sewer, or disposal system plans by the TNRCC. Effective 8/28/95.**
Allows the TNRCC to adopt standards for wastewater disposal systems and if plans for these systems are certified by a registered professional engineer as meeting those standards, then the TNRCC does not have to review or approve the plans independently.

3. **HB 1876/Stiles - Relating to the regulation, control, and authorization of sanitary sewer overflows.**
Forbids the TNRCC from adopting rules on sanitary sewer overflows that exceed the national policy on sewer overflows as adopted by the EPA.

4. **HB 1989/Rodriquez - Relating to the underground storage of appropriated water incidental to beneficial use. Effective 6/5/95.**
Allows the TNRCC to issue permits to store state water in aquifers unless groundwater quality will be significantly altered or unreasonable loss of state water will occur.

5. **HB 2015/Talton - Relating to the statutory changes to obtain delegation to Texas of the NPDES. Effective 6/5/95.**
Makes changes to the state NPDES program required by the EPA in order for the state to receive full delegation of this program. This means an applicant will not need a permit from the EPA. They will only need one permit from the state for their discharges. The changes prohibit persons from being appointed as a TNRCC commissioners if they own more than 10% or receive substantial income from a business permitted by the TNRCC. The bill also allows citizens to comment on TNRCC enforcement orders. The cap on permit fees goes up from $15,000 to $25,000 after delegation of the program.

6. **HB 2294/Yost - Relating to the regulation of groundwater. Effective 9/1/95.**
Allows the TNRCC to designate groundwater management areas and establish groundwater districts to prevent the waste of groundwater. This is an important regulatory tool in a growing state like Texas where groundwater is owned by the surface owner. The surface owner traditionally has the right of capture to use as much water as they want.

7. **HB 3226/Berlanga - Relating to the protection of coastal resources. Effective 6/8/95.**
Requires the TNRCC, if it issues a permit that may adversely affect a coastal natural resource area, to comply with the goals and policies of the Coastal Management Program as approved by the Coastal Coordination Council. The bill eliminates the CCC Authority to reverse and remand TNRCC actions.

8. **SB 1017/Wentworth - Relating to the designation of water qualtiy protection zones in certain areas. Effective 6/17/95.**
Allows the owners of tracts of land greater than 1,000 acres within a city's ETJ to designate a "Water Quality Protection Zone" in order to be exempt from the city's water quality ordinances. The owner must adopt a water quality plan to achieve water quality protection by either maintaining background levels of water quality in waterways or capturing and retaining the first 1.5 inches of rainfall from developed areas. This water quality plan is a covenant that goes with the land.

Notable Bills Which Failed to Pass

1. **HB 8/Yost - Relating to the administration, powers, duties, operations, financing and organization of solid waste management districts.**
   DIED in House Environmental Regulation Committee.

2. **HB 857/Yost - Relating to the cost-benefits analysis of an environmental rule or regulation proposed by a state agency or the legislature.**
   DIED in House State Affairs.

3. **HB 1059/Chisum - Relating to notice in county deed records of the existence of a buffer zone required as a condition of a permit issued by the TNRCC.**
   DIED in the Senate Natural Resources Committee.

4. **HB 1386/Saunders - Relating to legislative review of proposed state agency rules before notice of the proposed rulemaking is filed for publication in the Texas Register.**
   DIED in House State Affairs subcommittee.

5. **HB 1515/Cuellar - Relating to the creation of the Environmental Equity Fund consisting of penalties from the enforcement of pollution prevention laws.**
   DIED in House Appropriations Committee.

6. **HB 2213/Turner - Relating to restriction on high-impact siting of solid waste management facilities.**
   DIED in House Environmental Regulation Committee.

7. **HB 2349/Kuempel - Relating to the regulation of sanitary landfills.**
   DIED due to filibuster in the Senate.

8. **HB 2441/Hilbert - Relating to the amendment, extension, or renewal of a permit for a solid waste facility.**
   DIED after being tagged in the Senate Natural Resources Committee.

9. **HB 2491/Yost - Relating to the environmental permitting procedures of the TNRCC.**
   DIED on the Senate Intent Calendar while awaiting a floor vote. Would have modeled the TNRCC hearing process after the EPA process which would have redefined "affected person" as someone who would be directly impacted by the permit.

10. **HB 2843/Lewis - Relating to the adoption of rules by the TNRCC.**
    DIED while awaiting approval of the conference committee report. Would have prohibited the TNRCC from adopting or amending a rule which is more stringent than a federal regulation unless the federal regulation is not enough necessary to

protect health and safety or if it is necessary to address a condition unique to this state. There were several other amendments put on this bill regarding composting and clean water, but the whole bill was killed due to Barrientos' filibuster.

11. **SB 298/Ratliff - Relating to water quality standards.**
Was amended onto HB 2843 (above) and died along with the bill.

12. **SB 426/Madla - Relating to the identification of origin of municipal, industrial, or hazardous waste accepted.**
DIED in Senate Natural Resources Committee.

13. **SB 432/Truan - Relating to the validation of acts and proceedings of certain counties regarding solid waste disposal.**
DIED on last House Daily Calendar.

14. **SB 742/Sims - Relating to the duties of the office of public interest counsel of the TNRCC.**
DIED on the Senate Intent Calendar.

15. **SB 966/Madla - Relating to the disposal, reuse, or recycling of cardboard.**
DIED in Senate Natural Resources Committee.

Key Issues in Administrative Law

"Don't Be Cruel"

Linda Secord

Linda Secord

Linda Secord is an Assistant Attorney General in the Natural Resources Division of the Office of the Attorney General. She is a 1982 graduate of the University of Texas Law School. Immediately after law school, she was a briefing attorney for the Austin Court of Appeals before joining the Environmental Protection Division, the predecessor of NRD. She is board certified in administrative law and a frequent speaker at legal seminars.

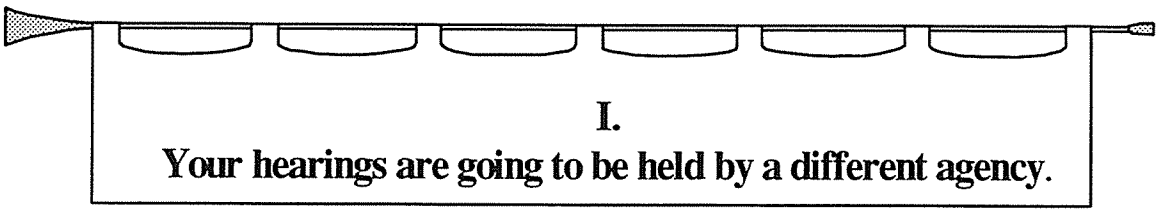
UPDATE ON ENVIRONMENTAL HEARINGS: TNRCC HEARINGS MOVE TO STATE OFFICE OF ADMINISTRATIVE HEARINGS

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State of Texas

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CAVEAT: The views and opinions expressed herein are those of the author and do not necessarily reflect those of the Office of the Attorney General. The author does not have the authority to offer an opinion on behalf of the Office of the Attorney General.

This update is not intended to serve as a formal paper, but as the start of a research file for busy practitioners who may need a quick reference when called upon to assist their clients in hearings on environmental matters.

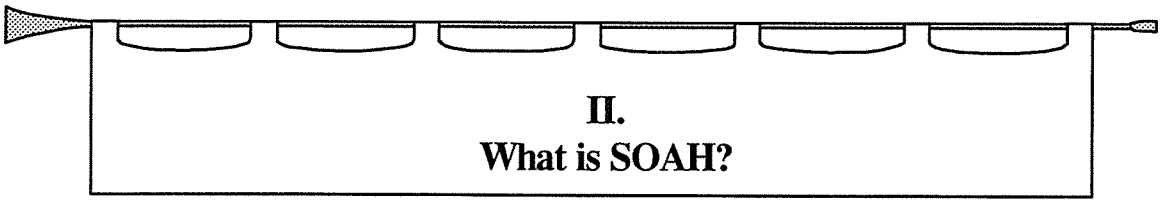


I.
Your hearings are going to be held by a different agency.

As most of you are probably aware by now, the state's largest environmental agency, the Texas Natural Resource Conservation Commission, will no longer hold contested case hearings in-house after September 1, 1995. The hearing function for this important state agency is being transferred to the State Office of Administrative Hearings.

This paper introduces some of the acronyms we will all have to learn and sets out the significant components of S.B. 12, the Senate Bill that transfers responsibility and authority for TNRCC contested case hearings to the State Office of Administrative Hearings. The key acronyms and name changes you will need to know are: Office of Hearings Examiners, or OHE, was the old name at the TNRCC, the **new name** will be **State Office of Administrative Hearings**, or **SOAH** and it is an office separate from the TNRCC; at the TNRCC the person before whom you had your hearing was a "hearings examiner", now the person before whom you have your hearing will be an **administrative law judge**, or **ALJ**.

For your convenience, I have attached copies of: (1) the bill effectuating this transfer; (2) Chapter 2003 of the Texas Government Code, the enabling statute that creates the State Office of Administrative Hearings; and (3) § 2001.058 of the Government Code, the provision of the Administrative Procedure Act (**APA**) specifically applying to hearings before SOAH, as well as some other relevant materials discussed below to these written remarks.



II.
What is SOAH?

The State Office of Administrative Hearings was created in 1991 to provide Texas with an independent, objective, and economically efficient administrative judiciary. Attorney General Opinion DM-231. (See Attachment 4.) The administrative law judges of SOAH are not employees of any other state agency: they are not hired, fired or supervised by any agency

director or commissioner. The SOAH Chief Administrative Law Judge is appointed by the Governor and confirmed by the legislature. The agency's budget is derived from interagency contracts between SOAH and the administrative agencies whose hearings are conducted at SOAH.

On a substantive level, the aspect of SOAH decisions that has probably attracted the greatest interest from the bar is found at § 2001.058 of the Administrative Procedure Act:

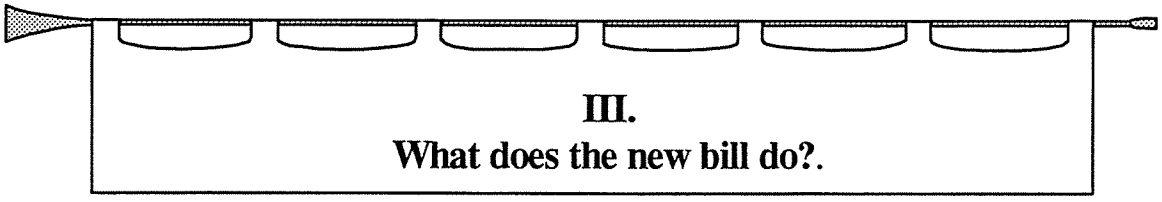
> (e) A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only for reasons of *policy*. The agency shall state in writing the reason and legal basis for a change made under this subsection. [emphasis added]

To date there has been only one attorney general opinion, DM-231, and one reported appellate opinion *Bavarian Properties, Inc. v. Texas Alcoholic Beverage Com'n*, 870 S.W.2d 686 (Tex.App. — Fort Worth 1994, writ denied) regarding this section. Copies are attached at (5) for your convenience.

In DM-231, the Attorney General analysed the legislative history of the bill creating SOAH and concluded that the independence of the ALJ was of central concern to the legislature at the time of enactment. Therefore, a state agency required to use SOAH for its hearings may not make its own findings and conclusions but must await the proposal for decision (PFD) of the ALJ. The agency may alter the PFD only in accordance with 2001.058(e).

In *Bavarian Properties* the SOAH administrative law judge had recommended that a set of permit applications be granted. The agency disagreed, citing public safety concerns. The dissatisfied applicant appealed and claimed that the agency had gone beyond its statutory

authority in changing the administrative law judge's findings of fact and conclusions of law. Although the opinion does not give much detail, it would seem that the agency order contained language echoing the "public safety" statutory criteria for denial of an application but did not specifically cite the statute. The appellate court held that the agency had sufficiently stated its policy reason in writing. The court then went on to examine the agency record for substantial evidence to support the agency's decision and affirmed.



III.
What does the new bill do?.

S.B. 12 is attachment (1) to this outline. Here are its highlights as I see them.

✓ 1. Section 8, which took effect immediately upon the bill's passage earlier this summer, instructs the two agencies to work on the transition. The staff of both SOAH and TNRCC have been very busy and tangible fruits of their efforts are found in the rules published in the Texas Register on July 11, 1995 and found at attachment (6) to this outline ("proposed rules").

✓ 2. Section 9 of the bill provides that the equipment, data, and facilities of the TNRCC Office of Hearings Examiners are automatically transferred on September 1, 1995. The examiners themselves do not automatically transfer, although their applications to be employed at SOAH are to be considered first before those of other applicants. The examiners of the new environmental

division at SOAH are to have the expertise necessary to conduct the technical, specialized subjects that come before the TNRCC.

✓ 3. Once the new Natural Resource Conservation Division of SOAH is staffed, the ALJs will office on the 5th floor of the Clements State Office Building, located on the northwest corner of the intersection of Lavaca and 15th Street. The division's hearings will be held in the Stephen F. Austin building in space that is being renovated into hearings rooms. January 1996 is the target date for completion of the renovations for office and hearings space. For the time being, the ALJ will remain physically in the Park 35 complex.

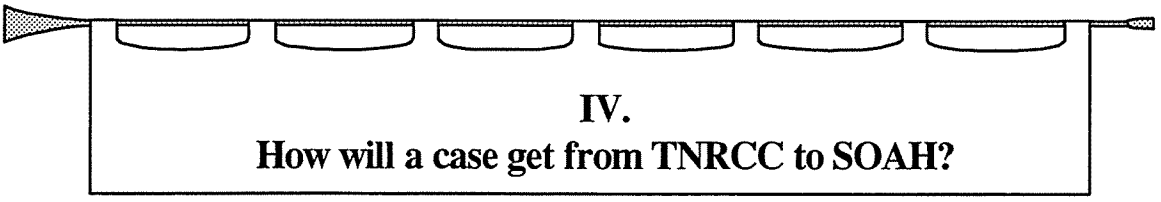
✓ 4. Applications for permits will still be filed with the TNRCC. That agency will determine the necessity for an adjudictive hearing and refer the matter to SOAH. Even after the referral, the TNRCC Chief Clerk will be the keeper of the official file and the parties should provide the SOAH ALJ a copy of everything filed.

✓ 5. The TNRCC will provide the SOAH ALJ with the relevant TNRCC substantive rules to be applied as well as areas and issues to be addressed. Although these may be added to "at any time" the financial arrangements between the two agencies will probably encourage efficiency and limit the number of revisions to the rules and issues.

✓ 6. The division of labor is not absolute: the TNRCC will still hold hearings required under Tex. Water Code § 26.0191(b) [pertaining to temporary or emergency orders] and the

SOAH ALJ may perform some non-hearing functions under delegation from the TNRCC. Also, the bill requires the two agencies to adopt rules creating a process for the certification of questions from SOAH to TNRCC.

✓ 7. If the examiner for a pending hearing accepts a job at SOAH, the pending case is to be assigned to the same examiner. Section 9(b) of S.B. 12.

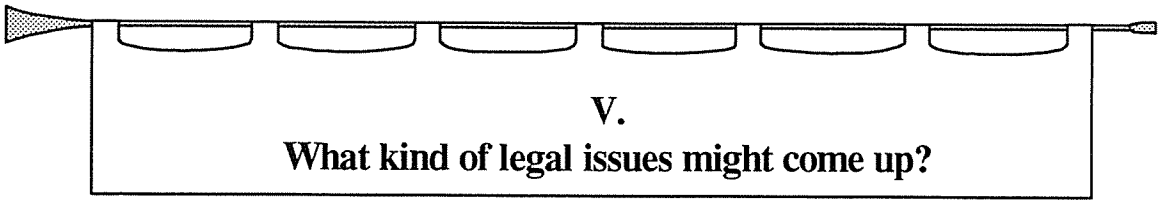


IV.
How will a case get from TNRCC to SOAH?

The proposed rules, attachment (6) to this update, set out the nuts and bolts of the process. Just as in the past, TNRCC will send out notice of an application and interested persons can contact the commission. Once a protest or request for hearing is filed, the general counsel will evaluate it to see if it is sufficient to invoke a right to an adjudicative hearing. The person making the request must have a "personal justiciable interest," not just be an interested member of the general public. Section 263.25 of the proposed rules. Groups making the request must meet 3 criteria: (1) at least one member of the group must be able to make the request on his own, (2) the group's organizational purpose must fit with the interest it seeks to protect, and (3) there must be nothing in the claim or the requested relief in the case which would require the participation of individual members. Proposed rule § 263.27.

If the General Counsel determines the protest / request is sufficient, the Executive Director will prepare a list of issues or areas that must be addressed. The TNRCC chief clerk will then file this list with SOAH. Sections 263.23 and 263.28 of the proposed rules. If the TNRCC General Counsel determines that the request is not sufficient to invoke hearing procedures, the matter goes to the commission. If the commission agrees with the General Counsel, the commission may take action to approve or deny the application. Section 263.23 of the proposed rules.

Note: When no protest or request for hearing is filed, the Executive Director can give final approval. Once a protest/request is filed, the Executive Director cannot give final approval even though the commission may decide the protest/request isn't sufficient. Section 263.2 of the proposed rules.



V.
What kind of legal issues might come up?

The commission is the ultimate decision maker, but TNRCC is limited in its ability to overturn the findings and conclusions made by the ALJ in the proposal for decision. Three statutes pertain to this question and their interrelationship will no doubt be the subject of much thought in the coming year or so. The basic statutory scheme for an agency's ability to change the PFD is Tex. Gov't Code § 2001.058(e), mentioned above. However, Section 1 of S.B. 12 contains a new section to the SOAH enabling statute, § 2003.047(i)(2), which provides that any amendment of the PFD shall be based solely on the record made before the ALJ. There is no mention of "policy," although § 2003.047(I)(3) establishes that "[t]he provisions of Chapter 2001,

A more difficult question is raised by the opening phrase of § 2003.047(I)(2): "Except as provided in Section 361.0832, Texas Health and Safety Code, the commission shall consider the proposal for decision prepared by the administrative law judge, the exceptions of the parties, and the brief and argument of the parties." Attachment (7) is a copy of § 361.0832. This statute has more detail about the terms under which the commission can alter findings and conclusions and it has not yet been construed by the appellate courts. There are competing views about whether it is more or less confining for the commission than the APA provision at § 2001.058(e). In fact, there are competing views as to whether it applies only to hazardous waste matters or to all permit applications covered by the Solid Waste Disposal Act.

For professionals practicing in the area of environmental law, be they lawyers, engineers, or other types of consultants, this change from the TNRCC to SOAH will require increased attention to both procedural and substantive detail. Good Luck.

Attachments

(1) S.B. 12, 74th Legislative Session

(2) Chapter 2003 of the Texas Government Code

(3) Section 2001.058 of the Texas Government Code

(4) Attorney General Opinion DM-231

(5) *Bavarian Properties, Inc. v. Texas Alcoholic Beverage Com'n*

(6) 20 Tex. Reg. 5013

(7) Section 361.0832 of the Texas Health and Safety Code

AN ACT

relating to administrative hearings for the Texas Natural Resource Conservation Commission provided by the State Office of Administrative Hearings.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter C, Chapter 2003, Government Code, is amended by adding Sections 2003.047 and 2003.048 to read as follows:

Sec. 2003.047. NATURAL RESOURCE CONSERVATION DIVISION. (a) The office shall establish a natural resource conservation division to perform the contested case hearings for the Texas Natural Resource Conservation Commission.

(b) The division shall conduct hearings relating to contested cases before the commission, other than a hearing conducted by one or more commissioners. The commission by rule may delegate to the division the responsibility to hear any other matter before the commission if consistent with the responsibilities of the division.

(c) Only an administrative law judge in the division may conduct a hearing on behalf of the commission. An administrative law judge in the division may conduct hearings for other state agencies as time allows. The office may transfer an administrative law judge to the division on a permanent or temporary basis and may contract with qualified individuals to serve as temporary

administrative law judges as necessary.

(d) To be eligible to preside at a hearing on behalf of the commission, an administrative law judge, regardless of temporary or permanent status, must be licensed to practice law in this state and have the expertise necessary to conduct hearings regarding technical or other specialized subjects that may come before the commission.

(e) When the office receives jurisdiction of a proceeding, the commission shall provide to the administrative law judge a list of issues or areas that must be addressed. In addition, the commission may identify and provide to the administrative law judge at any time additional issues or areas that must be addressed.

(f) The office and the commission jointly shall adopt rules providing for certification to the commission of an issue that involves an ultimate finding of compliance with or satisfaction of a statutory standard the determination of which is committed to the discretion or judgment of the commission by law. The rules must address, at a minimum, the issues that are appropriate for certification and the procedure to be used in certifying the issue. Each agency shall publish the jointly adopted rules.

(g) An administrative law judge hearing a case on behalf of the commission, on the judge's own motion or on motion of a party and after notice and an opportunity for a hearing, may impose appropriate sanctions as provided by Subsection (h) against a party or its representative for:

(1) filing a motion or pleading that is groundless and brought:

(A) in bad faith;

(B) for the purpose of harassment; or

(C) for any other improper purpose, such as to cause unnecessary delay or needless increase in the cost of the proceeding;

(2) abuse of the discovery process in seeking, making, or resisting discovery; or

(3) failure to obey an order of the administrative law judge or the commission.

(h) A sanction imposed under Subsection (g) may include, as appropriate and justified, issuance of an order:

(1) disallowing further discovery of any kind or of a particular kind by the offending party;

(2) charging all or any part of the expenses of discovery against the offending party or its representatives;

(3) holding that designated facts be considered admitted for purposes of the proceeding;

(4) refusing to allow the offending party to support or oppose a designated claim or defense or prohibiting the party from introducing designated matters in evidence;

(5) disallowing in whole or in part requests for relief by the offending party and excluding evidence in support of those requests; and

(6) striking pleadings or testimony, or both, in whole or in part.

(i)(1) After hearing evidence and receiving legal argument, an administrative law judge shall make findings of fact, conclusions of law, and any ultimate findings required by statute, all of which shall be separately stated. The administrative law judge shall make a proposal for decision to the commission and shall serve the proposal for decision on all parties. An opportunity shall be given to each party to file exceptions to the proposal for decision and briefs related to the issues addressed in the proposal for decision. The commission shall consider and act on the proposal for decision.

(2) Except as provided in Section 361.0832, Health and Safety Code, the commission shall consider the proposal for decision prepared by the administrative law judge, the exceptions of the parties, and the briefs and argument of the parties. The commission may amend the proposal for decision, including any finding of fact, but any such amendment thereto and order shall be based solely on the record made before the administrative law judge. Any such amendment by the commission shall be accompanied by an explanation of the basis of the amendment. The commission may also refer the matter back to the administrative law judge to reconsider any findings and conclusions set forth in the proposal for decision or take additional evidence or to make additional findings of fact or conclusions of law. The commission shall serve

a copy of the commission's order, including its finding of facts and conclusions of law, on each party.

(3) The provisions of Chapter 2001, shall apply to contested case hearings for the commission to the extent not inconsistent with this section.

Sec. 2003.048. NATURAL RESOURCE CONSERVATION COMMISSION HEARINGS FEE. The office shall charge the Texas Natural Resource Conservation Commission a fixed annual fee rather than an hourly rate for services rendered by the office to the commission. The office and the Texas Natural Resource Conservation Commission shall negotiate the amount of the fixed fee biennially, subject to the approval of the governor, to coincide with the commission's legislative appropriations request.

SECTION 2. Subchapter H, Chapter 5, Water Code, is amended to read as follows:

SUBCHAPTER H. DELEGATION OF HEARINGS

~~[OFFICE OF HEARING EXAMINERS]~~

Sec. 5.311. ~~[CREATION--OF-OFFICE.--(a)--The commission shall create an office of hearing examiners to assist the commission in carrying out its powers and duties under this code.~~

~~[(b)--The office of hearing examiners is independent of the executive director and the divisions of the commission and is under the exclusive control of the commission.~~

~~[Sec. 5.312.--ORGANIZATION OF OFFICE OF HEARING EXAMINERS. (a)--The office of hearing examiners shall be under the direction~~

~~of the chief hearing examiner.~~

[~~(b) The chief hearing examiner and all assistant hearing examiners employed in the office of hearing examiners shall be attorneys licensed to practice law in this state and shall be employed by the commission.~~

[~~Sec. 5.313.~~] DELEGATION OF RESPONSIBILITY. (a) The commission may delegate to an administrative law judge of the State Office of Administrative Hearings [~~a hearing examiner~~] the responsibility to hear any matter before the commission.

(b) The administrative law judge [~~A hearing examiner shall prepare for and hold any hearing as directed by the commission and~~] shall report to the commission on the hearing in the manner provided by law.

Sec. 5.312 [~~5.314~~]. TIME LIMIT FOR ISSUANCE OR DENIAL OF PERMITS. (a) Except as provided in Subsection (b), all permit decisions shall be made within 180 days of the receipt of the permit application or application amendment or the determination of administrative completeness, whichever is later.

(b) This section does not apply to permits issued under federally delegated or approved programs unless allowed under that program.

Sec. 5.313. HEARING EXAMINERS REFERENCED IN LAW. Any reference in law to a hearing examiner who has a duty related to a case pending before the commission means an administrative law judge of the State Office of Administrative Hearings.

SECTION 3. Subsections (a), (b), and (c), Section 26.021, Water Code, are amended to read as follows:

(a) Except for those hearings required to be held before the commission under Section 26.0191(b) of this code, the commission may authorize the chief administrative law judge of the State Office of Administrative Hearings [~~hearing-examiner~~] to call and hold hearings on any subject on which the commission may hold a hearing.

(b) The commission may also authorize the chief administrative law judge [~~hearing-examiner~~] to delegate to one or more administrative law judges [~~hearing-examiners~~] the authority to hold any hearing the chief administrative law judge calls [~~called by him~~].

(c) At any hearing called under this section, the chief administrative law judge or the administrative law judge to whom a hearing is delegated may [~~by the chief hearing examiner, he or the person delegated the authority by him to hold the hearing is empowered to~~] administer oaths and receive evidence.

SECTION 4. Subsections (a), (b), and (c), Section 28.029, Water Code, are amended to read as follows:

(a) The commission may authorize the chief administrative law judge of the State Office of Administrative Hearings [~~hearing examiner~~] to call and hold hearings on any subject on which the commission may hold a hearing.

(b) The commission may also authorize the chief

administrative law judge [~~hearing-examiner~~] to delegate to one or more administrative law judges [~~hearing-examiners~~] the authority to hold any hearing the chief administrative law judge calls [~~called by him~~].

(c) At any hearing called under this section, the chief administrative law judge or the administrative law judge to whom a hearing is delegated may [~~by the chief hearing examiner, he or the person delegated the authority by him to hold the hearing is empowered to~~] administer oaths and receive evidence.

SECTION 5. Subsections (a), (b), and (c), Section 31.009, Water Code, are amended to read as follows:

(a) The commission may authorize the chief administrative law judge of the State Office of Administrative Hearings [~~hearing examiner~~] to call and hold hearings on any subject on which the commission may hold a hearing.

(b) The commission may also authorize the chief administrative law judge [~~hearing-examiner~~] to delegate to one or more administrative law judges [~~hearing-examiners~~] the authority to hold a hearing the chief administrative law judge calls [~~called by the chief hearing examiner~~].

(c) At a hearing called under this section, the chief administrative law judge or the administrative law judge to whom a hearing is delegated [~~by the chief hearing examiner, the chief hearing examiner or the person delegated the authority by him to hold the hearing~~] may administer oaths and receive evidence.

SECTION 6. Subsections (a) and (b), Section 361.0831, Health and Safety Code, are amended to read as follows:

(a) Unless required for the disposition of ex parte matters authorized by law, or unless permitted by Section 2001.061, Government Code [~~17, Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes)~~], a hearings examiner [~~of the commission~~] may not communicate, directly or indirectly, with any employee of the commission [~~who is not an employee of the office of hearings examiners~~], any commissioner, or any party to a hearing conducted by the commission in connection with any issue of fact or law pertaining to a contested case in which the commission or party is involved.

(b) Except for communications allowed under Subsection (a), an employee of the commission, a commissioner, or a party to a hearing conducted by the commission may not attempt to influence the finding of facts or the application of law or rules by a hearings examiner [~~of the commission~~] except by proper evidence, pleadings, and legal argument with notice and opportunity for all parties to participate.

SECTION 7. Section 361.0832, Health and Safety Code, is amended by amending Subsection (a) and by adding Subsection (g) to read as follows:

(a) After hearing evidence and receiving legal arguments, a hearings examiner [~~of the commission~~] shall make findings of fact, conclusions of law, and any ultimate findings required by statute,

all of which shall be separately stated. The hearings examiner shall make a proposal for decision to the commission and shall serve the proposal for decision on all parties. The commission shall consider and act on the proposal for decision.

(g) To the extent of a conflict between this section and Section 2001.058(e), Government Code, this section controls.

SECTION 8. As soon as practicable, the chief administrative law judge of the State Office of Administrative Hearings shall consult with the chief administrative hearing examiner of the Texas Natural Resource Conservation Commission to assist the judge in:

(1) determining the number of and requirements for administrative law judges needed to conduct Texas Natural Resource Conservation Commission hearings effectively; and

(2) making necessary administrative changes in the State Office of Administrative Hearings.

SECTION 9. (a) On September 1, 1995, all equipment, data, facilities, and other items of the office of hearing examiners of the Texas Natural Resource Conservation Commission are transferred to the State Office of Administrative Hearings.

(b) If a hearing examiner or administrative law judge employed by the office of hearing examiners of the Texas Natural Resource Conservation Commission is hearing a case pending before the commission as of the effective date of this Act and that individual is offered and accepts a position as an administrative law judge of the State Office of Administrative Hearings, the chief

administrative law judge of the office shall assign the case to that individual to render a proposal for decision.

(c) In filling any administrative law judge position that is created in the natural resource conservation division of the State Office of Administrative Hearings under this Act, the chief administrative law judge of the State Office of Administrative Hearings shall consider the application of each applicant who, immediately before this Act takes effect, is employed as a hearings examiner of the Texas Natural Resource Conservation Commission before considering any other application for the position.

SECTION 10. (a) Except as provided in Subsection (b) of this section, this Act takes effect September 1, 1995.

(b) Section 8 of this Act takes effect immediately.

SECTION 11. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 12 passed the Senate on April 4, 1995, by the following vote: Yeas 30, Nays 0; and that the Senate concurred in House amendments on May 4, 1995, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

I hereby certify that S.B. No. 12 passed the House, with amendments, on May 2, 1995, by the following vote: Yeas 147, Nays 0, one present not voting.

Chief Clerk of the House

Approved:

Date

Governor

Historical and Statutory Notes

Prior Laws:

Acts 1977, 65th Leg., p.1703, ch. 678.
Vernon's Ann.Civ.St. art. 6252–13b, § 5.

§ 2002.056. Confidentiality of Data Base

(a) The data base for the administrative code is confidential and is exempt from disclosure under Chapter 552.

(b) In this section, "data base" means the machine-readable form of the material prepared for and used in the publication of the administrative code and includes:

(1) indexes;

(2) annotations;

(3) tables of contents;

(4) tables of authority;

(5) cross-references;

(6) compiled rules; and

(7) other unique material.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:

Acts 1981, 67th Leg., p. 169, ch. 76, § 3.
Vernon's Ann.Civ.St. art. 6252–13b, § 5A.

CHAPTER 2003. STATE OFFICE OF ADMINISTRATIVE HEARINGS

SUBCHAPTER A. GENERAL PROVISIONS

Section

2003.001. Definitions.
[Sections 2003.002 to 2003.020 reserved for expansion]

SUBCHAPTER B. STATE OFFICE OF ADMINISTRATIVE HEARINGS

2003.021. Office.
2003.022. Chief Administrative Law Judge.
[Sections 2003.023 to 2003.040 reserved for expansion]

SUBCHAPTER C. STAFF AND ADMINISTRATION

2003.041. Employment of Administrative Law Judges.
2003.042. Powers of Administrative Law Judge.
2003.043. Temporary Administrative Law Judge.
2003.044. Staff.
2003.045. Administrative Division.
2003.046. Central Hearings Panel.

SUBCHAPTER A. GENERAL PROVISIONS

§ 2003.001. Definitions

In this chapter:

(1) "Administrative law judge" means an individual who presides at an administrative hearing held under Chapter 2001.

(2) "Office" means the State Office of Administrative Hearings.

(3) "State agency" means a state board, commission, department, or other agency that is subject to Chapter 2001.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:
Acts 1991, 72nd Leg., ch. 591, § 1.
Vernon's Ann.Civ.St. art. 6252–13f, § 1.

[Sections 2003.002 to 2003.020 reserved for expansion]

SUBCHAPTER B. STATE OFFICE OF ADMINISTRATIVE HEARINGS

§ 2003.021. Office

(a) The State Office of Administrative Hearings is a state agency.

(b) The office shall conduct all administrative hearings in contested cases under Chapter 2001 that are before a state agency that does not employ an individual whose only duty is to preside as a hearings officer over matters related to contested cases before the agency.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:
Acts 1991, 72nd Leg., ch. 591, § 2.
Vernon's Ann.Civ.St. art. 6252–13f, § 2.

§ 2003.022. Chief Administrative Law Judge

(a) The office is under the direction of a chief administrative law judge appointed by the governor for a two-year term.

(b) To be eligible for appointment as chief administrative law judge, an individual must:

(1) be licensed to practice law in this state;

(2) be board-certified in administrative law; and

(3) have at least five years' experience in conducting administrative hearings under Chapter 2001.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:

Acts 1991, 72nd Leg., ch. 591, § 2.
Vernon's Ann.Civ.St. art. 6252–13f, § 2.

[Sections 2003.023 to 2003.040 reserved for expansion]

SUBCHAPTER C. STAFF AND ADMINISTRATION

§ 2003.041. Employment of Administrative Law Judges

(a) The chief administrative law judge shall employ administrative law judges to conduct hearings for state agencies subject to this chapter.

(b) To be eligible for employment with the office as an administrative law judge, an individual must be licensed to practice law in this state and meet other requirements prescribed by the chief administrative law judge.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:

Acts 1991, 72nd Leg., ch. 591, § 3.

Vernon's Ann.Civ.St. art. 6252–13f, § 3(a), (b).

§ 2003.042. Powers of Administrative Law Judge

An administrative law judge may:

(1) administer an oath;

(2) take testimony;

(3) rule on a question of evidence;

(4) subject to review by the state agency before which the contested case is brought, issue an order relating to discovery or another hearing or prehearing matter, including an order imposing a sanction that the agency may impose; and

(5) issue a proposal for decision that includes findings of fact and conclusions of law.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:

Acts 1991, 72nd Leg., ch. 591, § 3.
Vernon's Ann.Civ.St. art. 6252–13f, § 3(b).

Notes of Decisions

Authority of administrative law judge 1

1. Authority of administrative law judge

A board may not promulgate a rule giving it the authority to make its own findings of fact and conclusions of law. Op.Atty.Gen.1993, No. DM-231.

§ 2003.043. Temporary Administrative Law Judge

(a) The chief administrative law judge may contract with a qualified individual to serve as a temporary administrative law judge if an administrative law judge employed by the office is not available to hear a case within a reasonable time.

(b) The chief administrative law judge shall adopt rules relating to the qualifications of a temporary judge.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:

Acts 1991, 72nd Leg., ch. 591, § 3.
Vernon's Ann.Civ.St. art. 6252-13f, § 3(c).

§ 2003.044. Staff

The chief administrative law judge may hire staff as required to perform the powers and duties of the office.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:

Acts 1991, 72nd Leg., ch. 591, § 3.
Vernon's Ann.Civ.St. art. 6252-13f, § 3(d).

§ 2003.045. Administrative Division

An administrative division in the office oversees the training, evaluation, discipline, and promotion of all administrative law judges employed by the office.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:

Acts 1991, 72nd Leg., ch. 591, § 4.
Vernon's Ann.Civ.St. art. 6252-13f, § 4.

§ 2003.046. Central Hearings Panel

(a) A central hearings panel in the office is composed of six senior administrative law judges appointed by the chief administrative law judge.

(b) Under the direction of the chief administrative law judge, the central panel shall coordinate and supervise the operation of administrative hearings conducted by the office.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:
Acts 1991, 72nd Leg., ch. 591, § 4.
Vernon's Ann.Civ.St. art. 6252–13f, § 4.

CHAPTER 2004. REPRESENTATION BEFORE STATE AGENCIES

Section
2004.001. Definitions.
2004.002. Registration.
2004.003. Exemptions From Registration.
2004.004. Reporting and Filing of Registrations.
2004.005. Penalty.

§ 2004.001. Definitions

In this chapter:

(1) "Individual" includes a member of the legislature, any other state officer, and a state employee.

(2) "State agency" means an office, department, commission, or board of the executive branch of state government.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:
Acts 1957, 55th Leg., 1st C.S., p. 30, ch. 12.
Vernon's Ann.P.C. art. 183–2.
Acts 1973, 63rd Leg., p. 995, ch. 399, § 5.
Vernon's Ann.Civ.St. art. 6252–23, § 1.

§ 2004.002. Registration

(a) An individual who appears before a state agency or contacts in person an officer or employee of a state agency on behalf of an individual, firm, partnership, corporation, or association about a matter before that agency shall register with the state agency:

(1) the name and address of the registrant;

(2) the name and address of the person on whose behalf the appearance or contact is made; and

Historical and Statutory Notes

Prior Laws:

Acts 1983, 68th Leg., p. 3189, ch. 547, § 1.
Vernon's Ann.Civ.St. art. 6252–13a, § 13(i).

Notes of Decisions

Right to continuance 1

1. Right to continuance

Member of state legislature, who contested company's application to Water Commission for permit to build solid waste facility, was not entitled to continuance while legislature was in session; statute providing for continuance applied to judicial proceeding in court, and Commission was not "court" despite requirement of Administrative Procedure Act that it make certain decisions in a manner much like a court. Smith v. Houston Chemical Services, Inc. (App. 3 Dist. 1994) 872 S.W.2d 252, rehearing overruled, application for writ of error filed.

§ 2001.058. Hearing Conducted by State Office of Administrative Hearings

(a) This section applies only to an administrative law judge employed by the State Office of Administrative Hearings.

(b) An administrative law judge who conducts a contested case hearing shall consider applicable agency rules or policies in conducting the hearing, but the state agency deciding the case may not supervise the administrative law judge.

(c) A state agency shall provide the administrative law judge with a written statement of applicable rules or policies.

(d) A state agency may not attempt to influence the finding of facts or the administrative law judge's application of the law in a contested case except by proper evidence and legal argument.

(e) A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only for reasons of policy. The agency shall state in writing the reason and legal basis for a change made under this subsection.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:

Acts 1991, 72nd Leg., ch. 591, § 5.
Vernon's Ann.Civ.St. art. 6252–13a, § 13(j).

Notes of Decisions

Authority of office of administrative hearings 2
Reasons of policy, generally 1

1. Reasons of policy, generally

Alcoholic Beverage Commission (ABC) did not exceed its statutory authority when it altered administrative law judge's findings and conclusions recommending that mixed beverage permit, mixed beverage late hours permit, and beverage cartage permit be granted applicant; ABC stated in writing that its policy reason for denial of permit was public safety of citizens given that there was only one entrance into and one exit out of parking area of applicant's club and that exit was directly onto a frontage road as it intersected with exit ramp of state highway. Bavarian Properties, Inc. v. Texas Alcoholic Beverage Com'n (App. 2 Dist. 1994) 870 S.W.2d 686, rehearing denied, application for writ of error filed.

Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 24, 1993

Mr. Fred S. Brinkley, Jr., R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
8505 Cross Park Drive, Suite 110
Austin, Texas 78754-4594

Opinion No. DM-231

Re: Whether a quorum of a licensing board attending a licensee disciplinary hearing conducted by the State Office of Administrative Hearings may make findings of fact, conclusions of law, and vote on discipline without receiving from the State Office of Administrative Hearings a proposal for decision (RQ-408)

Dear Mr. Brinkley:

On behalf of the Texas State Board of Pharmacy (the "board"), you have asked our opinion regarding the functions of the State Office of Administrative Hearings (the "SOAH"). Specifically, you ask whether, if a majority of the board attends a licensee disciplinary hearing over which an administrative law judge from the SOAH presides, the board members at that time may make findings of fact, conclusions of law, and vote on a disciplinary sanction, without receiving a proposal for decision from the administrative law judge. We conclude that the board may not.[1]

The legislature created the SOAH in 1991 by enacting Senate Bill 884. *See* Acts 1991, 72d Leg., ch. 591, at 2127-28 (codified V.T.C.S. article 6252-13f). The legislature designed the SOAH to conduct all administrative hearings in contested cases under the Administrative Procedure and Texas Register Act ("APTRA"), V.T.C.S. article 6252-13a, that are before an agency that does not employ a person whose sole duty is to preside as a hearings officer over matters related to contested cases before the agency.[2] V.T.C.S. art. 6525-13f, § 2(b). The legislature hoped that the implementation of Senate Bill 884 would accomplish at least two purposes. First, the legislature hoped to increase economic efficiency by pooling the resources of smaller agencies that are unable to employ full-time

[1]We do not decide in this opinion whether a majority of the board, solely for the purpose of listening or observing, may attend a licensee disciplinary hearing over which an administrative law judge from the SOAH presides.

[2]For purposes of this opinion, we assume that the board is one of the agencies Senate Bill 884 requires to use the services of the SOAH.

administrative law judges. Second, the legislature hoped to create an administrative judiciary independent of the agency that could hear objectively administrative disputes. Hearings on Senate Bill 884 Before the Senate Comm. on State Affairs (Apr. 8, 1991) (testimony of Senator Montford, author) (tape available from Senate Staff Services).

Among other things, Senate Bill 884 added article 6252-13f to the Revised Civil Statutes. *See* Acts 1991, 72d Leg., ch. 591, §§ 1 - 4 at 2127-28. Section 3(b) of article 6252-13f authorizes an administrative law judge to perform the following functions:

> (1) administer oaths;
>
> (2) take testimony;
>
> (3) rule on questions of evidence;
>
> (4) issue orders relating to discovery and other hearing or prehearing matters, including orders imposing sanctions that the agency that the contested case is before may impose, subject to review by the agency; and
>
> (5) issue proposals for decision that include findings of fact and conclusions of law.

See also State Office of Administrative Hearings, 17 Tex. Reg. 6442-43 (1992) (to be codified at 1 T.A.C. §§ 155.15(b), 155.51). You believe that this provision merely authorizes, but does not require, an administrative law judge for the SOAH to issue a proposal for decision and therefore supports your contention that the board may make its own findings of fact and conclusions of law after attending a hearing on a disciplinary matter before the SOAH. However, the plain language of other sections of Senate Bill 884, as well as the bill's legislative history, indicates that the legislature intended the SOAH to make findings of fact and conclusions of law on matters before it. The agency may modify the administrative law judge's findings and conclusions, but only in compliance with the requirements stated in Senate Bill 884.

APTRA, as well as the rules of practice and procedure before the board, governs any disciplinary action the board takes under section 26 of the Texas Pharmacy Act, V.T.C.S. article 4542a-1. V.T.C.S. art. 4542a-1, § 27. Senate Bill 884 added to APTRA section 13(j), which provides as follows:

> This subsection applies only to an administrative law judge employed by the State Office of Administrative Hearings. The administrative law judge who conducts the hearing shall consider any applicable agency rules or policies in conducting the hearing, *but may not be supervised by the agency that the contested case is before.* The agency shall provide the administrative law judge with a written statement of applicable rules or policies. *An agency may not attempt*

> *to influence the finding of facts or the administrative law judge's application of the law in any contested case other than by proper evidence and legal argument. An agency may change a finding of fact or conclusion of law made by the administrative law judge only for reasons of policy and must state in writing the reason and legal basis for the change.* [Emphasis added.]

On its face, section 13(j) of APTRA confers upon an agency only a limited role in the administrative hearing process: the agency must provide the administrative law judge with a written statement of rules or policies it believes are relevant to the contested case (*see also* State Office of Administrative Hearings, 17 Tex. Reg. 6441 (1992) (to be codified at 1 T.A.C. § 155.5(c)); the agency may present evidence and legal argument to the administrative law judge; and the agency may modify the administrative law judge's proposal for decision only for policy reasons and only in writing. Moreover, section 13(j) expressly prohibits the agency from supervising the administrative law judge during the hearing and from attempting to influence the administrative law judge's findings of fact and conclusions of law, unless the agency does so by presenting evidence and legal argument. In our opinion, the plain language of section 13(j) of APTRA precludes a board from preempting the administrative law judge's proposal for decision by making its own findings of fact, conclusions of law, and determination of the proper disciplinary sanction. We note, of course, that an agency always retains the right to enter into an agreed final order (which disposes of all issues and may contain finding of fact and conclusions of law and which may require a board vote) with a party regarding a disciplinary matter, even if the matter is pending before the SOAH. *See* State Office of Administrative Hearings, 17 Tex. Reg. 6442 (1992) (to be codified at 1 T.A.C. § 155.29(c)).

The legislative history of Senate Bill 884 supports our determination. A member of the committee that drafted Senate Bill 884 testified before the House Committee on State Affairs that the committee had tried to strike a balance between the powers of the agency and the SOAH. Hearings on S.B. 884 Before the House Comm. on State Affairs (May 6, 1991) (testimony of Reggie James, representing Consumers Union) (tape available from House Committee Coordinator). Section 5(b) of the bill, which added section 13(j) to APTRA, articulates the balance the committee struck: the SOAH is responsible for recommending to the agency findings of fact and conclusions of law, but the agency has the ultimate authority to approve the proposal for decision. *See id.* Furthermore, the committee drafted the bill to restrict an agency's power to overturn arbitrarily an administrative law judge's decision by permitting the agency to change a finding of fact or a conclusion of law only for policy reasons and only in writing. *See id.*

In our opinion, the legislature wanted to ensure that agencies that were required to use the services of the SOAH would not interfere with the administrative law judge's decision. *See id.* (testimony of Judith Sokolow, representing Advocacy, Inc.) (testifying about need for impartial administrative hearings conducted by judiciary independent of agency); *id.* (testimony of Mary Jo Magruden, representing Texas Planning Council for

Developmental Disabilities) (same). Until, therefore, an agency has received a proposal for decision from the administrative law judge, the agency can participate in the administrative hearing only by presenting evidence and making legal argument at the hearing. *See* V.T.C.S. art. 6252-13a, § 13(j); Hearing on Senate Bill 884 Before the House Comm. on State Affairs (May 6, 1991) (testimony of Linda Secord, representing Office of the Attorney General) (tape available from House Committee Coordinator).

We do not believe that article 6252-13f, section 3(b), V.T.C.S., contradicts this conclusion because it states that an administrative law judge "may," instead of "shall," issue a proposal for decision. In this provision, "may" means "to have authority to" or "to be permitted to." *See* B. GARNER, MODERN LEGAL USAGE 98, 354 (1987). Section 3(b) lists several tasks an administrative law judge "may" perform. The bill analysis for Senate Bill 884 describes the list in section 3(b) as "prerogatives" of administrative law judges. A "prerogative" is "an exclusive or special right, power, or privilege: as . . . one belonging to an officer or an official body." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 930 (1990). We believe that the characterization of section 3(b) as a list of prerogatives is consistent with the legislative intent: the legislature intended that, *vis a vis* those agencies required to utilize the services of the SOAH, the SOAH, and only the SOAH, is authorized to conduct an administrative hearing and issue the proposal for decision. The agency is authorized to modify the proposal, but only in accordance with section 13(j) of APTRA.

You argue that section 15 of APTRA authorizes the board to forego receiving a proposal for decision from the SOAH if a majority of the board members have heard the case or read the record. Section 15 provides in pertinent part as follows:

> If in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, may not be made until a proposal for decision is served on the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs to the officials who are to render the decision.

Section 15 does not authorize an agency to forego receiving a proposal for decision from the SOAH in any circumstance. For those agencies that are subject to APTRA and that must use the services of the SOAH, section 13(j) of APTRA, together with article 6252-13f, section 3(b), V.T.C.S., requires the SOAH administrative law judge to conduct a hearing and prepare a proposal for decision for the agency's approval. If the administrative law judge proposes a decision that will be adverse to a party to the proceeding other than the agency, section 15 provides that the agency cannot render its final decision until it has satisfied the requirements articulated in section 15.

You also suggest that because many contested cases before the board involve a pharmacist accused of illegally diverting controlled substances the board should be able to revoke the accused pharmacist's license on an imminent peril basis. You contend that requiring such a case to go before an administrative law judge of the SOAH will delay such an order, creating a "serious threat to the public health and welfare." We note, however, that article 6252-13f, section 3(c), V.T.C.S., requires the SOAH to hear a case within a reasonable time. *See also* State Office of Administrative Hearings, 17 Tex. Reg. 2565, 6442, 6443 (1992) (to be codified at 1 T.A.C. §§ 155.15(a)(2), 157.1(a)). Additionally, section 19A of APTRA authorizes an agency, including the board, to request the attorney general to bring an action in a district court with jurisdiction over the matter to compel compliance with an agency rule. *See* 28 T.A.C. § 281.24(a)(3), (4), (5) (listing among grounds for discipline diversion, acquisition, and distribution of drugs in violation of Controlled Substances Act and Dangerous Drug Act). Section 17(k) of the Texas Pharmacy Act, V.T.C.S. article 4542a-1, also authorizes the board to sue in district court to restrain or enjoin a person from violating article 4542a-1. *See* V.T.C.S. art. 4542a-1, § 26(a)(9) (providing that board may discipline pharmacist who violates any provision of the Controlled Substances Act or Dangerous Drug Act). In our opinion, therefore, the board has alternatives by which it may seek to restrain or enjoin a pharmacist from illegally diverting controlled substances.

Finally, you ask whether our opinion would change if the board promulgated a rule specifically allowing it to take action before receiving a proposal for decision from the SOAH's administrative law judge. When the legislature acts with respect to a particular matter, an administrative agency may not promulgate a rule that will, in effect, nullify the legislature's action. *See State v. Jackson*, 376 S.W.2d 341, 344-45 (Tex. 1964). In Senate Bill 884, the legislature explicitly has stated that the SOAH must hear and prepare a proposal for decision for all contested cases before the board. A rule such as the one you propose would, in effect, nullify the SOAH's role in objectively preparing a proposal for decision that the board may modify only for policy reasons and only in writing. The board may not, therefore, promulgate such a rule.[3]

[3]To the extent that any existing board rules are inconsistent with the provisions of Senate Bill 884, they are invalid. *See* 2 TEX. JUR. 3D *Administrative Law* § 17, at 210-11 (1979).

SUMMARY

Absent reaching an agreed final disposition of a matter, a licensing board that is required to use the services of the State Office of Administrative Hearings may not make its own findings of fact, conclusions of law, or vote on discipline. Instead, the board must receive from the SOAH a proposal for decision, which the board may modify only in compliance with section 13(j) of the Administrative Procedures and Texas Register Act, V.T.C.S. article 6252-13a. Furthermore, a board may not promulgate a rule giving it the authority to make its own findings of fact and conclusions of law.

Very truly yours,

Dan Morales

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY KELLER
Deputy Attorney General for Litigation

RENEA HICKS
State Solicitor

MADELEINE B. JOHNSON
Chair, Opinion Committee

Prepared by Kymberly K. Oltrogge
Assistant Attorney General

RECEIVED
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ENVIRONMENTAL PROTECTION
DIVISION

BAVARIAN PROPERTIES, INC., d/b/a Club Legends, Appellant,

v.

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Chris Harris, Toby Goodman, and Richard Greene, Appellees.

No. 2-93-109-CV.

Court of Appeals of Texas, Fort Worth.

Feb. 16, 1994.

Rehearing Overruled March 22, 1994.

Applicant for mixed beverage permit, mixed beverage late hours permit, and beverage cartage permit appealed from Alcoholic Beverage Commission's (ABC) denial of its application. The 141st District Court, Tarrant County, Catherine A. Gant, J., found there was substantial evidence to support denial of application. Applicant appealed. The Court of Appeals, Day, J., held that: (1) ABC did not exceed its statutory authority when it altered administrative law judge's findings and conclusions, and (2) there was substantial evidence supporting denial of permits.

Affirmed.

1. **Intoxicating Liquors** ⇐59(1)

Alcoholic Beverage Commission (ABC) did not exceed its statutory authority when it altered administrative law judge's findings and conclusions recommending that mixed beverage permit, mixed beverage late hours permit, and beverage cartage permit be granted applicant; ABC stated in writing that its policy reason for denial of permit was public safety of citizens given that there was only one entrance into and one exit out of parking area of applicant's club and that exit was directly onto a frontage road as it intersected with exit ramp of state highway. V.T.C.A., Government Code § 2001.058(e); V.T.C.A. Alcoholic Beverage Code §§ 1.03, 11.46(a)(8).

2. **Intoxicating Liquors** ⇐71

There was substantial evidence of unusual situation that justified Alcoholic Beverage Commission's (ABC) refusal to issue mixed beverage permit, mixed beverage late hours permit, and beverage cartage permit; applicant's establishment was the only establishment serving alcoholic beverages whose patrons were forced to travel through unusually busy merge zone given that exit from applicant's parking area was directly onto frontage road which intersected with exit ramp of state highway.

3. **Administrative Law and Procedure** ⇐683, 791

Intoxicating Liquors ⇐75(7)

In reviewing Alcoholic Beverage Commission's (ABC) ruling, both trial court and Court of Appeals are to apply substantial evidence test.

4. **Administrative Law and Procedure** ⇐791

"Substantial evidence test" for reviewing agency decision is whether evidence as a whole is such that reasonable minds could have reached conclusion that agency must have reached in order to justify its action.

See publication Words and Phrases for other judicial constructions and definitions.

5. **Administrative Law and Procedure** ⇐791

Issue under substantial evidence test is not whether trial court's ruling on agency action was correct but whether it was reasonable.

6. **Administrative Law and Procedure** ⇐791

Although substantial evidence required to support agency decision on appeal is more than a mere scintilla, evidence in record may actually preponderate against agency's decision and still amount to substantial evidence.

7. **Administrative Law and Procedure** ⇐749, 750

Agency's findings, inferences, conclusions, and decisions are presumed to be supported by substantial evidence, and burden is

on complaining party to demonstrate otherwise.

Steven H. Swander, Fort Worth, for appellant.

Don E. Walden, Austin, for appellee.

Cribbs & McFarland, P.C., and Paul F. Wieneskie, James A. Cribbs, Paul T. Francis, Arlington, for appellees/intervenors Chris Harris, Toby Goodman and Richard Greene.

Before FARRIS, LATTIMORE and DAY, JJ.

OPINION

DAY, Justice.

Bavarian Properties, Inc., d/b/a Club Legends (Legends), appeals from the trial court's finding that there was substantial evidence to support the Texas Alcoholic Beverage Commission's (TABC's) denial of Legends' application for a mixed beverage permit, a mixed beverage late hours permit, and a beverage cartage permit (the permits).

We affirm.

Because this case has a rather complicated procedural history, we set it out below:

January 25, 1993: An administrative law judge recommended that the permits be granted.

February 12, 1993: State Senator Chris Harris, State Representative Toby Goodman, and Arlington Mayor Richard Greene filed their exceptions to the administrative law judge's recommendation.

March 10, 1993: After a hearing, TABC denied Legends' application for the permits. TABC found that the sale of alcoholic beverages, coupled with the fact that the only exit from Legends is directly onto the frontage road as it merges with an exit ramp, created a significant risk to public safety.

March 30, 1993: Legends filed a motion for rehearing.

April 9, 1993: TABC overruled the motion for rehearing.

April 30, 1993: Legends filed its original petition in the trial court.

May 7, 1993: The trial on Legends' petition was held.

May 24, 1993: The trial court rendered judgment *nunc pro tunc*, affirming TABC's order.

In two points of error, Legends complains the trial court improperly affirmed TABC's order denying the permits because: (1) TABC exceeded its statutory authority by altering the administrative law judge's findings of fact and conclusions of law; and (2) there is not substantial evidence Legends' location creates a risk different from and more dangerous than other licensed establishments serving alcoholic beverages in the immediate vicinity.

[1] TEX.GOV'T CODE ANN. § 2001.058(e) (Vernon Pamph. 1994) provides:

> A state agency may change a finding of fact or conclusion of law made by the administrative law judge ... only for reasons of policy. The agency shall state in writing the reason and legal basis for a change made under this subsection.

Id. Legends contends TABC exceeded its statutory authority when it altered the administrative law judge's findings and conclusions because TABC did not state any policy reason for the changes.

We find, however, that TABC stated its policy reason in writing, as section 2001.058(e) requires.[1] In this case, the policy at issue is the protection of public safety. This policy is set forth in TEX.ALCO.BEV.CODE ANN. §§ 1.03 & 11.46(a)(8) (Vernon 1978 & Supp. 1994). Section 1.03 provides:

> This code is an exercise of the police power of the state for the protection of the welfare, health, peace, temperance, *and safety*[2] of the people of the state. It shall

1. Legends does not complain that TABC failed to state the legal basis for its decision. Accordingly, we do not address whether the language in TABC's order satisfies the legal basis requirement of section 2001.058(e).

2. Unless otherwise noted, all emphasis is supplied by the author.

be liberally construed to accomplish this purpose.

Id.

Section 11.46(a) provides:

(a) The commission or administrator may refuse to issue an original or renewal permit with or without a hearing if it has reasonable grounds to believe and finds that any of the following circumstances exists:

. . . .

(8) the place or manner in which the applicant may conduct his business warrants the refusal of a permit based on the general welfare, health, peace, morals, *and safety* of the people and on the public sense of decency[.]

Id.

In its order, TABC stated:

[M]ost of the testimony in the case revolved around the *public safety issue* of the club. It is an important issue that there is only one entrance into and one exit out of the parking area of Club Legends. The only exit is directly onto the frontage road as it intersects with the exit ramp of State Highway 360. *A public safety issue is created* by the fact that there is only one exit.

TABC also made the following finding of fact in its order:

38. The sale of alcoholic beverages, coupled with the fact that the only exit from Club Legends is directly onto the frontage road as it merges with the exit ramp, *creates a significant risk to public safety* by permitting the sale and service of alcoholic beverages at Club Legends.

The public safety of Texas citizens is a legitimate public policy basis for TABC's ruling, as evidenced by sections 1.03 and 11.46(a)(8). The record shows TABC stated this policy reason in writing. We overrule Legends' first point of error.

[2] In point two, Legends complains the trial court improperly affirmed TABC's order denying the permits because there is not substantial evidence Legends' location creates a risk different from and more dangerous than other licensed establishments serving alcoholic beverages in the immediate vicinity.

[3–5] In reviewing TABC's ruling, both the trial court and this court are to apply the substantial evidence test. The substantial evidence test is whether the evidence as a whole is such that reasonable minds *could* have reached the conclusion that the agency must have reached in order to justify its action. *Texas Alcoholic Beverage Comm'n v. Sierra*, 784 S.W.2d 359, 360 (Tex.1990) (emphasis added). *See also* TEX.ALCO.BEV.CODE ANN. §§ 11.67(b), 61.34 (Vernon 1978 & Supp. 1994). The issue under this test is not whether the trial court's ruling was correct but whether it was reasonable. *Sierra*, 784 S.W.2d at 361.

[6, 7] Although substantial evidence is more than a mere scintilla, the evidence in the record may actually preponderate against the agency's decision and still amount to substantial evidence. *Texas Health Facilities Comm'n v. Charter Medical–Dallas*, 665 S.W.2d 446, 452 (Tex.1984). The agency's findings, inferences, conclusions, and decisions are presumed to be supported by substantial evidence, and the burden is on the complaining party to demonstrate otherwise. *Texas State Bd. of Dental Examiners v. Sizemore*, 759 S.W.2d 114, 116 (Tex.1988), *cert. denied*, 490 U.S. 1080, 109 S.Ct. 2100, 104 L.Ed.2d 662 (1989); *Texas Health*, 665 S.W.2d at 453.

Legends argues, however, that TABC cannot deny a permit to a fully qualified applicant who proposes to operate a lawful business in a wet area and in compliance with city zoning ordinances, absent some unusual condition or situation that justifies such a refusal. *See Texas Alcoholic Beverage Comm'n v. Mikulenka*, 510 S.W.2d 616, 619 (Tex.Civ.App.—San Antonio 1974, no writ).

The evidence in this case shows: Traffic exits off State Highway 360, via a two-lane exit ramp, onto Watson Road, the service road that runs in front of Legends. *See* Exhibit A attached hereto. Watson Road is a one-way road. It consists of two lanes before the merge area and four lanes after it. The sole exit from the Legends parking lot is a driveway located near the beginning of the

"gore area"[3] between the exit ramp and Watson Road. Although the gore area is intended to separate cars using the exit ramp and the frontage road, photographs introduced into evidence show vehicles frequently cross this area illegally. Thus, cars freely move from the exit ramp across the gore area to Watson road, and vice versa. Legends' patrons are therefore forced to turn right onto Watson Road very near this complex merge area.

Several things make this particular exit ramp and merge area unusual:

1. As we have previously noted, the exit ramp has two lanes. Dr. Joseph D. Blaschke, TABC's expert, estimated that only ten to fifteen percent of the exit ramps in Texas have two lanes.

2. The volume of traffic exiting from Highway 360 onto the exit ramp is extremely high, when compared with other Texas exit ramps. Blaschke estimated the volume on the ramp to be in the upper ten percent in Texas.

3. There is an unusually short distance—600 feet—between where the exit ramp merges with Watson Road and the nearest intersection.

4. A high number of vehicles exiting from State Highway 360 onto Watson Road turn right at the next intersection, which is Six Flags Drive. Based on his personal observations, Blaschke testified that about fifty percent of the vehicles exiting at this point moved to the right or outside lanes of the frontage road. In order to make a right-hand turn onto Six Flags Drive, vehicles exiting onto Watson Road must cross between one and three lanes in the 600 feet between the exit ramp and the intersection. *See* Exhibit A.

5. Vehicles using the exit ramp and Watson Road travel at relatively high speeds. Eighty-five percent of the drivers travel down the exit ramp at fifty-one miles per hour, and eighty-five percent of the vehicles on Watson Road travel at forty-one miles per hour.

Blaschke testified that the merge area does not present a congestion problem. Rather, drivers negotiating that area must engage in a "complex decision-making driving task" because of the high volume of traffic, the high rate of speed, the shortness of the merge area, and the number of drivers making a right-hand turn at Six Flags Drive.

Legends' location is also unique when compared with others in the vicinity, in that Legends' patrons exiting the club premises *must* turn right onto Watson Road near the beginning of the gore area and travel through the 600–foot merge section. It is undisputed that, in this area, Legends is the only establishment serving alcoholic beverages whose patrons are forced to travel through the unusually busy merge zone.

Legends makes much of the fact that the volume of traffic in the merge area was estimated at 8,760,000 cars, and only eight motor vehicle accidents occurred during the year that served as the testing period. Blaschke testified without contradiction, however, that allowing the sale of alcoholic beverages at Legends would increase the risk of an accident to all drivers on this stretch of road. Blaschke opined that, due to the complexity of the driving task at this particular merge area, alcohol-impaired individuals leaving Legends would create a greater potential for accidents than usual. On the other hand, Frank Yu, Legends' traffic engineering expert, testified repeatedly that he did not factor into his conclusions the effect of alcohol on drivers. Rather, Yu's opinions on traffic patterns and driver behavior were premised upon his assumption that all drivers would behave "normally." Yu also assumed all drivers would obey all the traffic laws—including not illegally crossing the gore area—despite unchallenged photographic evidence to the contrary.

We find there is substantial evidence of an unusual situation that justifies TABC's refusal to issue the permits to Legends. *See Sierra*, 784 S.W.2d at 360 (upholding TABC's denial of wine and beer permit because location of proposed establishment, on a dangerous curve, created a potential traffic safety

3. The gore area is the triangular section between a freeway exit ramp and the service road that is striped with white paint. It is designed to keep cars from moving off the exit ramp too soon, or from moving too quickly from the service road into the exit lanes.

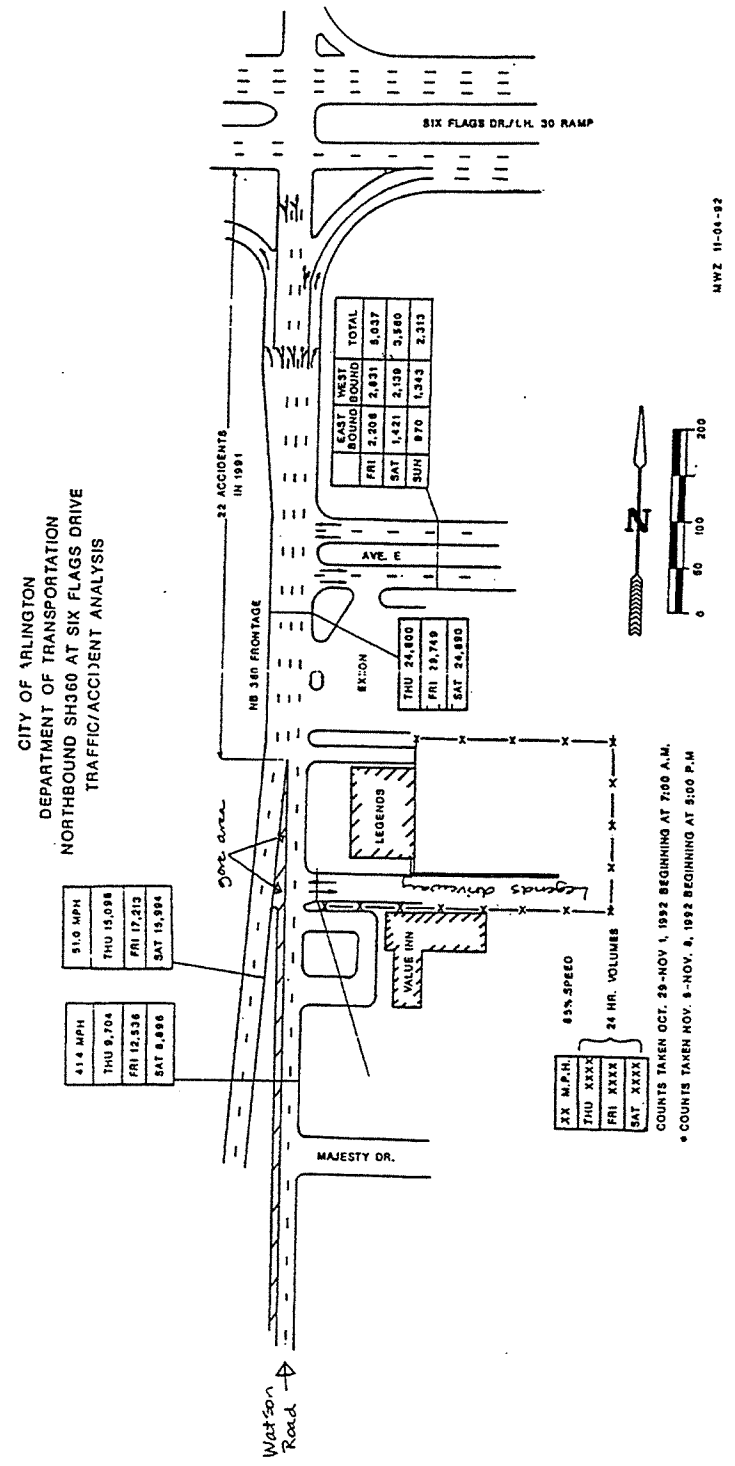
hazard). Legends bore the burden of showing that no substantial evidence existed to support TABC's ruling, and it has failed to carry that burden.

We overrule point of error two.

The trial court's judgment is affirmed.

EXHIBIT A

PLAINTIFF'S EXHIBIT P-3 11-19-92 KB



for denial.

(d)-(f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on June 28, 1995.

TRD-9507997 James O. Mathis, Ed.D.
Chair
Texas State Board of Examiners of Professional Counselors

Earliest possible date of adoption: August 11, 1995

For further information, please call: (512) 458-7236

♦ ♦ ♦

Subchapter K. Continuing Education Requirements

• 22 TAC §681.178

The amendment is proposed under the Licensed Professional Counselor Act, Texas Civil Statutes, Article 4512g, §6, which provide the Texas State Board of Examiners of Professional Counselors with the authority to adopt and revise rules that are necessary to administer the Licensed Professional Counselor Act; §14(p) relating to rules concerning temporary licenses; and §19(b) relating to rules on fees.

The amendment affects the Licensed Professional Counselor Act, Texas Civil Statutes, Article 4512g.

§681.178. Reporting of Continuing Education. The requirements for reporting continuing education shall be as follows.

(1) -(2) (No change.)

(3) Each report must be accompanied by appropriate documentation of the continuing education claimed on the report as follows:

(A)-(B) (No change.)

(C) for completion of academic work from accredited schools, an official graduate transcript showing course credit with at least a "B" or pass grade sent **directly to the board from the school(s) where the coursework was obtained**; or

(D) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on June 28, 1995.

TRD-9507998 James O. Mathis, Ed.D.
Chair
Texas State Board of Examiners of Professional Counselors

Earliest possible date of adoption: August 11, 1995

For further information, please call: (512) 458-7236

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Subchapter M. Formal Hearings

• 22 TAC §681.220

The amendment is proposed under the Licensed Professional Counselor Act, Texas Civil Statutes, Article 4512g, §6, which provide the Texas State Board of Examiners of Professional Counselors with the authority to adopt and revise rules that are necessary to administer the Licensed Professional Counselor Act; §14(p) relating to rules concerning temporary licenses; and §19(b) relating to rules on fees.

The amendment affects the Licensed Professional Counselor Act, Texas Civil Statutes, Article 4512g.

§681.220. Action After the Hearing.

(a)-(c) (No change.)

(d) Final orders or decisions.

(1) (No change.)

(2) To protect the public interest and to ensure that appropriate principles govern the decisions of the board, it is the policy of the board to change a finding of fact or conclusion of law or to modify the proposed order of an administrative law judge when the board determines that the proposed order is:

(A) erroneous;

(B) against the weight of the evidence;

(C) based on misapplication or misinterpretation of laws, rules, or standards;

(D) based on insufficient review of the evidence;

(E) not sufficient to protect the public interest; or

(F) not appropriate recognition of whether or not rehabilitation of the licensee or applicant has occurred.

(3)[(2)] All final orders or decisions shall be in writing and shall set forth the findings of fact and conclusions required by law.

(4)[(3)] All final orders shall be signed by the chairperson of the board; however, interim orders may be issued by the ALJ.

(5)[(4)] A copy of all final orders and decisions shall be timely provided to all parties as required by law.

(e)-(f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on June 28, 1995.

TRD-9507999 James O. Mathis, Ed.D.
Chair
Texas State Board of Examiners of Professional Counselors

Earliest possible date of adoption: August 11, 1995

For further information, please call: (512) 458-7236

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 101. General Rules

• 30 TAC §101.29

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes an amendment to §101.29, concerning Emissions Banking. The Emissions Banking rule, effective March 15, 1993, provides a mechanism for certifying and recording ownership of emission reduction credits (ERCs) which can be used for offsets and other regulatory requirements for volatile organic compounds and nitrogen oxides emissions in the state's ozone nonattainment areas. Separate banks are maintained for ERCs of each pollutant in a given ozone nonattainment area.

The proposed rule amendment consists of three main revisions to §101.29. The first revision involves deletion of the 3.0% per year depreciation factor for banked ERCs. Under the current rule, 3.0% of the initial value of a banked ERC is deducted annually on the anniversary of the date the reduction occurred, as a demonstration of reasonable further progress toward ozone attainment. However, since it is possible to conduct external offset transactions without using the bank and incurring the 3.0% depreciation, industries find it difficult to justify using the bank.

The second revision would extend the life of banked ERCs from five years from the date of the emission reduction (current rule) to ten years from the date of the emission reduction. Current TNRCC Air Permitting Division New Source Review policy gives unlimited life to emissions reductions, used for netting purposes, for sources greater than 250 tons per year. However, if these same reductions were used as offsets, they would have a life of only five years. Extending ERC life to ten years

would help improve marketability of these ERCs. The five-year life of emissions reductions used for netting, currently applicable to sources with the potential to emit less than 250 tons per year, is not affected by the proposed rule changes.

The repeal of the 3.0% per year depreciation factor and the extension of the useful life of an emission reduction credit from five years to ten years applies to all eligible emission reductions, including previously certified credits which have not been used or which may have expired prior to the effective date of this rule.

The third revision would give the Executive Director the discretionary authority to suspend the certification process if the Air Permitting Division workload requires it, compared to the current rule which suspends the certification process when 1,000 tons of credits have been certified for a given bank. The rule's original intent, to help maintain a balanced agency workload in the certification of ERC applications, is preserved in the proposed revision without unnecessarily restricting the amount of ERCs present in the bank at any given time.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the proposed section is in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Minick also has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be progress towards attainment of the ozone standard as a result of emissions reductions and more flexible, cost-effective regulation of emissions sources. Adoption of the section as proposed is anticipated to result in a reduction of costs for affected businesses. The positive fiscal implications that would result from removing the 3.0% annual depreciation of emission reduction credits and the extension of the life of the credits to ten years will vary with each specific company potentially affected and have not been estimated. There are no significant direct implications anticipated for small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

A public hearing on the proposal will be held August 8, 1995, at 10:00 a.m. in Room 254S of TNRCC Building E, located at 12118 North IH-35, Park 35 Technology Center, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC central office in Austin. The deadline for submission of written comments will be 30 days after the date of publication in the *Texas Register*. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail written comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log #95118-101-AI. Please fax written comments to (512) 239-5687. Copies of the proposed rule are available at the central office of the TNRCC, Air Policy and Regulations Division, located at 12118 North IH-35, Park 35 Technology Center, Building E, Austin, and at all TNRCC regional offices. For further information, contact Mike Magee at (512) 239-1511.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

The amendment is proposed under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the TNRCC with the authority to adopt rules consistent with the policy and purposes of the TCAA.

The proposed amendment implements the Health and Safety Code, §382.017.

§101.29. Emissions Banking.

(a)-(c) (No change.)

(d) Length of time available. A certified Emissions Reduction Credit (ERC), generated by a stationary source, is available for use [to fulfill an offset requirement] during the ten-year [five-year] period after the reduction was actually achieved. The banking applicant shall identify the date the reduction was actually achieved. The ERC certificate shall indicate the expiration date for the certified reduction. If an ERC is withdrawn from the bank prior to the ten-year [five-year] expiration and submitted with a complete permit application for use as an offset, the ERC remains usable for the lifetime of the new facility or modification proposed for offset. The length of time a certified Mobile Source Emission Reduction Credit (MERC) is available for use is a function of the remaining vehicle miles of the mobile source, as determined in the Accelerated Vehicle Retirement program and Alternative Fuel Requirements for Motor Vehicle Fleets. The Bank expiration date and useful life of the credit is calculated from the date the MERCs are certified.

(e) ERC and MERC certification or registration.

(1)-(2) (No change.)

(3) **The Executive Director shall have the discretion to temporarily suspend the certification of applications for emission reduction credits if necessary to efficiently manage workloads in accordance with agency priorities. Registered credits need not be certified in order to be transferable.** [When each Bank has a minimum balance of 1,000 tpy of certified ERCs of a given pollutant in a given nonattainment area, the remaining emissions reductions applications will be registered, but not certified. Whenever any Bank balance drops below 700 tpy, registered emissions reductions will be certified in the order they were received, with consideration to the priority provided in paragraph (1) of this subsection, to return the Bank balance to a minimum of 1,000 tpy. This limitation does not apply to MERCs.]

(4) Emission reduction amounts shall be determined and certified based on actual monitoring results, when available, or otherwise calculated using good engineering practices. The MERCs will be determined and certified using the methodologies provided in the Accelerated Vehicle Retirement program and Alternative Fuel Requirements for Motor Vehicle Fleets. An ERC certificate will be issued by the Executive Director which indicates the amount of certified emissions reduction which is available for use [as offsets] and the length of time the reduction is eligible for use. A MERC certificate will be issued by the Executive Director which indicates the total amount of certified emission reduction credits, the quantity available on an annual basis, and the date upon which the last annualized emission reduction expires.

(f)-(i) (No change.)

(j) Depreciation. The Executive Director is prohibited from depreciating any ERC or MERC, except under the following circumstances:

[(1) an ERC, not a MERC, will incur an annual 3.0% depreciation on the anniversary of the date the reduction occurred based on the initial ERC value as a demonstration of reasonable further progress toward ozone attainment;]

(1)[(2)] the ERC or MERC certificate has expired; or

(2)[(3)] regulatory changes were promulgated after the ERC or MERC certificate has been issued, which would have required reductions from the source that created the qualifying reduction. The credit shall be reduced by the amount affected by the regulatory change.

(k) The ERC and MERC use. The use of ERCs and MERCs will be accomplished either through transfers or withdrawals.

(1) (No change.)

(2) Withdrawal. Only the owner of the certificate is eligible to withdraw deposits from the Bank. Once a certificate

has been issued, the ERC or MERC shall be valid for the time period indicated on the certificate, unless the certificate has been depreciated in accordance with subsection (j) of this section. Certified emission reduction credits may be withdrawn from the Bank by the original applicant at any time prior to the expiration of the credit and may be held by the original applicant to be used for netting purposes. The ERCs held by the original applicant may not be used for offsets after the expiration of the **ten-year** [five-year] period following the date of the emission reduction, but may continue to be used for netting **to the extent allowed** under applicable state and federal regulations. The ERCs will be depreciated under subsection (j)(2) of this section **if applicable** [during the time they are in the Bank].

(l)-(m) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on June 29, 1995.

TRD-9508117 Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: November 1, 1995

For further information, please call: (512) 239-1966

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Chapter 261. Introductory Provisions

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes the repeal of §§261.1-261.13 and proposes new §§261.1-261.19 and 261.30, concerning the TNRCC procedural rules. The proposed changes to the commission's procedural rules would implement recent legislation in Senate Bills (SB) 12, 741, and 1546. SB 12 directs the State Office of Administrative Hearings (SOAH) to conduct contested case hearings for the commission (other than hearings before one or more commissioners). SB 741 authorizes the commission to delegate to the executive director the authority to act on uncontested applications. SB 1546 requires the commission to adopt rules concerning whether a person is an "affected person" and is entitled to standing in a contested case hearing. The commission limited the scope of this review of the procedural rules so that the new rules may be finally adopted by September 1, 1995, which is the effective date of SB 12 and 1546.

In proposing this rule package, the TNRCC is attempting to limit any rule changes to those necessitated by recent legislation. Additionally, an attempt has been made to recodify the current TNRCC practices and reorganize the procedural rules into a more logical format. No substantive change is intended by this recodification. Comment is specifically solicited on any changes in the recodification that appear to be substantive in nature. Comment is also solicited upon those sections that enact recent legislative changes in the agency's authority, and how these rules comport with the new legislation.

The TNRCC is continuing to review the procedural rules of the agency, with an eye towards providing efficient and understandable application review procedures. Additional changes to streamline and improve upon these rules are contemplated that current time limits do not allow to be incorporated into this rule package. Therefore, another review of these rules will begin after the final promulgation of this package (TNRCC Rule Log Number 95124-263-AD). The second review will focus upon general agency procedures and will allow broad discussion of all agency procedures and application processes. To provide a firm time frame for the next review, the current rule package, as proposed, will expire on May 31, 1996.

Before publication, the TNRCC sought informal comment on the proposed rules from approximately 60 people representing agency advisory groups, various interest groups, and regular practitioners before the agency. Due to the complexities of transferring contested cases to the purview of another state agency and the short time prior to the effective date of the legislation, the TNRCC sought this early, informal review of the proposed rules to ensure that no large issues or problems were overlooked or created. Many thorough and detailed comments were received. These comments helped the staff clarify some rules and correct many errors that crept into the first draft. The TNRCC would like to thank those who reviewed this draft package and submitted the many helpful comments. Comments received, but not addressed in this proposal, will be considered either in the response to comments in this rulemaking, or in the subsequent rule package.

The only significant change made in response to the early comments involved redrafting Chapter 263, Subchapter A, regarding delegation of uncontested applications and approvals to the executive director. The TNRCC had attempted to draft a delegation section that codified existing TNRCC practice, which distinguishes between media. This approach necessitated maintaining procedural differences between actions on air permit applications, and all other types of actions. Due to the informal comments received, the TNRCC became convinced that there was a need to clarify the delegation of actions on air permit applications, as well as a need to create additional procedural similarity between the actions on air applications and actions on applications in other media. These changes are incorporated into this proposal.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections. The transfer of responsibilities from the commission to SOAH is not anticipated to significantly affect the costs of the transferred hearing functions; therefore, no net impact to state government will result.

Mr. Minick also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be improvement in the hearings process for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. There will be no effect on small businesses. There is no anticipated economic cost for persons who are required to comply with the sections as proposed.

A public hearing on the proposal will be held August 10, 1995, at 10:00 a.m. in Room 254S of TNRCC Building E, located at 12118 North IH-35, Park 35 Technology Center, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC central office in Austin through August 11, 1995. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on August 11, 1995, will be considered by the commission prior to any final action on the proposal. Please mail written comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log #95124-263-AD. Please fax comments to (512) 239-5687. Copies of the proposed rules are available at the central office of the TNRCC, Air Policy and Regulations Division, located at 12118 North IH-35, Park 35 Technology Center, Building E, Austin, and at all TNRCC regional offices. For further information, contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

Subchapter A. General Provisions

- 30 TAC §§261.1-261.13

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361. 024, and 382.017, which authorizes the TNRCC to adopt any

rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The repeals implement the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382. 017.

§261.1. Purpose of Rules.

§261.2. Construction of Rules.

§261.3. Business Office and Mailing Address of the Commission.

§261.4. Seal of Commission.

§261.5. Commission Meetings.

§261.6. Minutes of Commission Meetings.

§261.7. Designation of Executive Director.

§261.8. Official Records are Public.

§261.9. Classified Data and Confidential Information.

§261.10. Copies and Certificates.

§261.11. Lost Records and Papers.

§261.12. Definitions.

§261.13. Inscriptions on TNRCC Vehicles.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508166 Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: August 30, 1995

For further information, please call: (512) 239-1966

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• 30 TAC §§261.1-261.19

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new sections implement the Texas Water Code, §§5.103, 5.105, and 26. 011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017.

§261.1. Definitions. The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

Applicant or petitioner–A party seeking a license, permit, order, or rule from the commission.

Chief clerk–The chief clerk of the Texas Natural Resource Conservation Commission or any authorized individual designated by the executive director to act in his or her place.

Commission–The Texas Natural Resource Conservation Commission.

Commissioners' meeting–A public meeting or hearing at which a quorum of the commissioners consider matters scheduled for deliberation, such as rulemaking proceedings, applications, or judges' proposals for decision.

Executive director–The executive director of the commission, or any authorized individual designated by the executive director to act in his or her place.

General counsel–The general counsel of the commission, or any authorized individual designated by the general counsel to act in his or her place.

Judge–An administrative law judge employed by SOAH.

Party–Each person or agency named or admitted as a party to a proceeding.

Person–An individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity.

Protestant–Any party opposing, in whole or in part, an application or petition filed with the commission.

SOAH–State Office of Administrative Hearings.

§261.2. Purposes of Rules. The purposes of these sections are to implement the powers and duties assigned to the commission under the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017, and other laws of this state, to establish the general policies of the commission, and to set forth the procedures to be followed in commission proceedings. To further these ends, these sections are adopted to simplify procedure, avoid delay, save expense, and facilitate the administration and enforcement of state law by the commission. These sections shall be given a fair and impartial construction to achieve their intended purposes.

§261.3. Construction of Rules. Unless otherwise expressly provided for in these rules, the past, present, and future tense shall each include the other; the masculine, feminine, and neutral gender shall each include the other; and the singular and plural number shall each include the other.

§261.4. Business Office and Mailing Address of the Commission.

(a) Commission offices. The commission's offices are located at Park 35, 12015 North Interstate 35, Austin. The commission's mailing address is P.O. Box 13087, Austin, Texas 78711-3087.

(b) Chief clerk's address. The chief clerk's mailing address is: Office of Chief Clerk, Texas Natural Resource Conservation Commission, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087. The Chief clerk's office is located in Austin, Texas, Park 35, Building F, 12015 North Interstate 35.

§261.5. Seal of the Commission. The seal of the commission will bear the words "Texas Natural Resource Conservation Commission" encircling the oak and olive branches common to other official state seals.

§261.6. Commissioners' Meetings.

(a) The commissioners shall meet as necessary for the conduct of the commission's business, at times specified by the commissioners and entered in the minutes, including special meetings at times and places in the state necessary for the performance of the commission's duties. The commission is subject to the Open Meetings Act, Texas Government Code, Chapter 551, and the Texas Water Code, §5.058, including any existing or future exceptions that may be provided by law.

(b) The chairman of the commission, or in his absence, the acting chairman, shall preside at all meetings and hearings of the commissioners.

§261.7. Minutes of Commissioners' Meetings. The minutes of commissioners' meetings are kept by the chief clerk of the commission in a form and manner as the commissioners may prescribe from time to time in accordance with existing laws. They shall be signed by the chairman and attested to by the chief clerk.

§261.8. Designation of Executive Director. All functions, duties, and responsibilities of the commission arising from the appointment or designation of the Texas Water Rights Commission, the Texas Water Quality Board, the Texas Water Development Board, or the Texas Water Commission by the Governor prior to September 1,

1985, relating to any federal program shall be performed by the executive director, subject to the provisions of the Texas Water Code and the right of the commissioners to require prior commission approval of any action relating thereto to be taken by the executive director.

§261.9. Official Records are Public. Subject to the limitations provided in the acts administered by the commission and the Open Records Act, Texas Government Code, Chapter 552, information collected, assembled, or maintained by the commission is public record open to inspection and copying during regular business hours.

§261.10. Classified Data and Confidential Information.

(a) Neither the commission nor any applicant by virtue of his application to or transaction with the commission may be required to disclose any classified data of the federal government or any confidential information relating to trade secrets, secret processes, or economics of operation; provided, however, that the composition of any defined waste subject to the jurisdiction of the commission may not be regarded as confidential information. Further, the commission may not be required to disclose to any person any information that, if released as requested, would give any advantage to competitors or bidders.

(b) In accordance with subsection (a) of this section, a person submitting data or information may request that the data or information be designated as classified or confidential. If the commission or executive director agrees with the designation, the data or information is not open for public inspection, shall be kept in confidence by the agency, and may, upon request, be returned to the person submitting the data or information after it has served the purpose for which it was submitted.

§261.11. Copies and Certificates.

(a) Except as provided in the Copyright Revision Act of 1976, Title 17, United States Code, §261.10 of this title (relating to Designation of Executive Director) and the Open Records Act, Texas Government Code, Chapter 552, upon the application of any person, accompanied by appropriate fees, the commission will furnish copies, certified or otherwise, as requested, of any of its proceedings or other official acts of record or of any map, paper, or document filed with the commission, or other official record, or of any information collected, assembled, or maintained by the commission in its files. Certified copies will be made as appropriate, under the hand of one of the following officials: the chairman of the commission, the executive director, or the chief clerk of the commission. Certified copies will be affixed with the seal of the commission as appropriate.

(b) The commission may furnish copies at the rates published in its operating procedures, or will contract for the copies to be made at the expense of the person requesting them. In no event shall such fees for copies exceed those permitted by Texas Revised Civil Statutes, Article 3913.

§261.12. Lost Records and Papers. When any papers or records in the custody and control of the commission are lost or destroyed, the parties, with the approval of the commission, may agree in writing on a brief statement of the matters contained therein or any person may at any time supply such lost records or papers as follows.

(1) Any person may make a written sworn motion before the commission stating the loss or destruction of such record or papers, accompanied by certified copies of the originals, if obtainable, or by substantial copies thereof.

(2) If, upon hearing, the commission is satisfied that they are substantial copies of the original, an order will be entered substituting such copies for the missing originals.

(3) Such substituted copies will be filed with and constitute a part of the record and have the force and effect of the originals.

§261.13. Inscriptions on Commission Vehicles. Vehicles assigned to or used by the Special Investigations Unit of the Enforcement Policy Division of the commission are exempt from bearing the inscription required in Texas Civil Statutes, Article 6701m-1. These vehicles are to be used primarily in the detection and investigation of criminal violations of state and federal environmental laws. The purpose of exempting these vehicles from the inscription requirements of Article 6701m-1 is to increase the effectiveness of commission investigators in detecting and investigating criminal violations of state and federal environmental laws, thereby allowing investigative personnel to accomplish their tasks undetected and to provide a greater degree of safety for these investigators, the state property being used in the investigation, and a greater degree of case integrity.

§261.14. Conduct and Decorum in Commissioners' Meetings.

(a) Participants shall not approach the commissioners bench without first obtaining leave from the chairman, and must never lean on or go behind the bench.

(b) Participants should anticipate any need to set up or move furniture, appliances, or easels, and shall make advance arrangements with the chief clerk.

(c) Participants should remain seated except to address the commissioners or to appropriately handle documents, exhibits, or physical evidence.

(d) Participants, except commission personnel, shall address the commissioners from the podium.

(e) Participants shall not ask argumentative questions, but may ask questions for informational or clarification purposes only.

§261.15. Rulings in Commission Evidentiary Hearings. In evidentiary hearings before the commission, the presiding officer or his designee shall make all procedural and evidentiary rulings.

§261.16. Docket System. The chief clerk shall assign a docket number to each matter scheduled for consideration during a commissioners' meeting or SOAH proceeding.

§261.17. Document Filing Procedures.

(a) All documents to be considered in a commissioners' meeting or by judges in contested cases shall be filed with the chief clerk. Hearing requests and responses shall also be filed with the chief clerk.

(b) If a docket number has been assigned, it should appear on the first page of all filed documents.

(c) Documents shall be filed by mail, facsimile, or hand delivery. If a person files a document by facsimile, he or she must file with the chief clerk the appropriate number of copies by mail or hand delivery within two days.

(d) The original or one copy of a document shall be filed, except for documents to be considered at a commissioners' meeting. For documents to be considered at a commissioners' meeting, 11 copies shall be filed.

(e) The time of filing is upon receipt by the chief clerk.

(f) The chief clerk shall accept all documents presented for filing. The chief clerk's acceptance is not a determination that the document meets filing deadlines or other requirements.

(g) If the requirements of this section are not followed, the commissioners may choose not to consider the documents. In the absence of a waiver under subsection (h) of this section, the commissioners may choose not to consider documents filed within two days of a commissioners' meeting.

(h) The judge may waive one or more of the requirements of this section, or impose additional filing requirements in the SOAH proceedings. The commissioners or general counsel may waive one or more of the requirements of this section, or impose additional filing requirements for commissioners' meetings.

(i) This section does not apply to offers of evidence during a hearing.

§261.18. Service on Judge, Parties, and Interested Persons.

(a) For responses to requests for hearing, copies of all documents filed with the chief clerk shall be served on the same day to the executive director, the public interest counsel, the applicant, and any persons filing hearing requests.

(b) For contested case hearings, copies of all documents filed with the chief clerk shall be served on the same day to the judge and all parties.

(c) All documents filed and served under this section shall include a certificate of service, certifying compliance with this section, and signed by the person or attorney filing the document. Failure to timely furnish copies may be grounds for withholding consideration of the document.

(d) Service by mail is complete upon deposit in the mail, properly addressed, with postage prepaid. Service by facsimile is complete when sent to the recipient's current facsimile number. Service by facsimile after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Judges may impose different service requirements for SOAH proceedings.

§261.19. Computation of Time. In computing any period of time prescribed or allowed by regulations of the commission, by order of the commission, or by any applicable statute, the period shall begin on the day after the act, event, or default in question and it shall conclude on the last day of that designated period, unless it is a Saturday, Sunday, or legal holiday on which the Office of the Chief Clerk is closed, in which event the period runs until the end of the next day that is neither a Saturday, Sunday, nor a legal holiday.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508167 Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: August 30, 1995

For further information, please call: (512) 239-1966

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Subchapter B. Expiration

• 30 TAC §261.30

The new section is proposed under the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361. 024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new section implements the Texas Water Code, §§5.103, 5.105, and 26. 011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017.

§261.30. Expiration. This chapter will expire on May 31, 1996.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508168 Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: August 30, 1995

For further information, please call: (512) 239-1966

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Chapter 263. General Rules

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes the repeal of §§263.1-263.37 and proposes new §§263.1-263.12, 263. 21-263.28, and 263.40, concerning the TNRCC procedural rules. The proposed changes to the commission's procedural rules would implement recent legislation in Senate Bills (SB) 12, 741, and 1546. SB 12 directs the State Office of Administrative Hearings (SOAH) to conduct contested case hearings for the commission (other than hearings before one or more commissioners). SB 741 authorizes the commission to delegate to the executive director the authority to act on uncontested applications. SB 1546 requires the commission to adopt rules concerning whether a person is an "affected person" and is entitled to standing in a contested case hearing. The commission limited the scope of this review of the procedural rules so that the new rules may be finally adopted by September 1, 1995, which is the effective date of SB 12 and 1546.

In proposing this rule package, the TNRCC is attempting to limit any rule changes to those necessitated by recent legislation. Additionally, an attempt has been made to recodify the current TNRCC practices and reorganize the procedural rules into a more logical format. No substantive change is intended by this recodification. Comment is specifically solicited on any changes in the recodification that appear to be substantive in nature. Comment is also solicited upon those sections that enact recent legislative changes in the agency's authority, and how these rules comport with the new legislation.

The TNRCC is continuing to review the procedural rules of the agency, with an eye towards providing efficient and understandable application review procedures. Additional changes to streamline and improve upon these rules are contemplated that current time limits do not allow to be incorporated into this rule package. Therefore, another review of these rules will begin after the final promulgation of this package (TNRCC Rule Log Number 95124-263-AD). The second review will focus upon general agency procedures and will allow broad discussion of all agency procedures and application processes. To provide a firm time frame for the next review, the current rule package, as proposed, will expire on May 31, 1996.

Before publication, the TNRCC sought informal comment on the proposed rules from approximately 60 people representing agency advisory groups, various interest groups, and regular practitioners before the agency. Due to the complexities of transferring contested cases to the purview of another state agency and the short time prior to the effective date of the legislation, the TNRCC sought this early, informal review of the proposed rules to ensure that no large issues or problems were overlooked or created. Many thorough and detailed comments were received. These comments helped the staff clarify some rules and correct many errors that crept into the first draft. The TNRCC would like to thank those who reviewed this draft package and submitted the many helpful comments. Comments received, but not addressed in this proposal, will be considered either in the response to comments in this rulemaking, or in the subsequent rule package.

The only significant change made in response to the early comments involved redrafting this chapter, Subchapter A, regarding delegation of uncontested applications and approvals to the executive director. The TNRCC had attempted to draft a delegation section that codified existing TNRCC practice, which distinguishes between media. This approach necessitated maintaining procedural differences between actions on air permit applications, and all other types of actions. Due to the informal comments received, the TNRCC became convinced that there was a need to clarify the delegation of actions on air permit applications, as well as a need to create additional procedural similarity between the actions on air applications and actions on applications in other media. These changes are incorporated into this proposal.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a

result of enforcing or administering the sections. The transfer of responsibilities from the commission to SOAH is not anticipated to significantly affect the costs of the transferred hearing functions; therefore, no net impact to state government will result.

Mr. Minick also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be improvement in the hearings process for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. There will be no effect on small businesses. There is no anticipated economic cost for persons who are required to comply with the sections as proposed.

A public hearing on the proposal will be held August 10, 1995, at 10:00 a.m. in Room 254S of TNRCC Building E, located at 12118 North IH-35, Park 35 Technology Center, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC central office in Austin through August 11, 1995. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on August 11, 1995, will be considered by the commission prior to any final action on the proposal. Please mail written comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log #95124-263-AD. Please fax comments to (512) 239-5687. Copies of the proposed rules are available at the central office of the TNRCC, Air Policy and Regulations Division, located at 12118 North IH-35, Park 35 Technology Center, Building E, Austin, and at all TNRCC regional offices. For further information, contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

• 30 TAC §§263.1-263.37

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361. 024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The repeals implement the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382. 017.

§263.1. Examiners.

§263.2. Powers of the Examiner.

§263.3. Substitution of Examiners.

§263.4. Oath.

§263.5. Appearance.

§263.6. Failure to Appear.

§263.7. Affidavit by Representative.

§263.8. Attorney of Record.

§263.9. Number of Counsel Heard.

§263.10. Conduct and Decorum Generally.

§263.11. Conduct of Counsel.

§263.12. Conduct and Decorum in Commission Meetings and Hearings.

§263.13. Disorderly Conduct.

§263.14. Computation of Time.

§263.15. Filing of Documents.

§263.16. Extensions for Filing of Documents.

§263.17. Amended and Supplemental Pleadings.

§263.18. Motions.

§263.19. Service by Mail or by Telephonic Document Transfer.

§263.20. Consolidated Hearing.

§263.21. Severance.

§263.22. No Ex Parte Communications.

§263.23. Utilizing Special Skills of the Commission.

§263.24. Official Hearings Reporter.

§263.25. Requests for Hearings Reporter Services.

§263.26. Cancellation of Hearings Reporter Services.

§263.27. Assessment of Reporting and Transcription Costs.

§263.28. Payment of Reporting or Transcription Assessment.

§263.29. Transcript Correction.

§263.30. Sale of Transcript Copies.

§263.31. Audio Recording of Proceedings.

§263.32. Informal Proceedings.

§263.33. Burden of Proof.

§263.34. Witness Fees.

§263.35. Withdrawing the Application.

§263.36. Appeal of Air Quality Permits.

§263.37. Factors for Consideration in Calling Air Quality Hearings Prior to Issuance of Permit.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

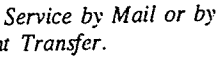
Issued in Austin, Texas, on July 5, 1995.

TRD-9508169

Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: August 30, 1995

For further information, please call: (512) 239-1966



Chapter 263. Processing of Application, Evaluation of Request for Contested Case Hearing

Subchapter A. Final Approval by Executive Director

- **30 TAC §§263.1-263.12**

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new sections implement the Texas Water Code, §§5.103, 5.105, and 26. 011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017.

§263.1. Applicability.

(a) Sections 263.1-263.7 of this title (relating to Applicability; Executive Director Shall Review Application; Notice that Executive Director Will Issue Final Approval; Executive Director's Final Approval; Remand for Consideration by Executive Director; Motion for Reconsideration; and Eligibility of Executive Director) applies to applications for permits or other approvals listed in subsection (b) of this section, including applications for a new permit, or to renew, modify, amend, or transfer a permit. The subchapter also applies to applications which seek an order that has the effect of issuing, renewing, modifying, amending, or transferring a permit.

(b) The following applications shall be included:

(1) water rights permits or certificates of adjudication;

(2) wastewater discharge permits;

(3) municipal solid waste and industrial and hazardous waste permits;

(4) on-site waste water disposal system permits;

(5) underground injection control permits;

(6) radioactive waste or radioactive material permits or licenses;

(7) weather modification measures permits;

(8) certificates of convenience and necessity;

(9) requests for extensions of time to commence or complete construction of a dam;

(10) water and wastewater utility rate matters under Texas Water Code, Chapters 12 or 13; and

(11) the creation of a district, or the issuance of bonds by a district, under the Texas Water Code, Chapters 50-63.

(c) Sections 263.1-263.7 of this title (relating to Applicability; Executive Director Shall Review Application; Notice that Executive Director will Issue Final Approval; Executive Director's Final Approval; Remand for Consideration by Executive Director; Motion for Reconsideration; and Eligibility of Executive Director) do apply to:

(1) applications for emergency or temporary orders;

(2) applications for temporary permits;

(3) applications that are part of a consolidated proceeding covering additional matters to which this subchapter does not apply; or

(4) air quality permits.

§263.2. Executive Director Shall Review Application.

(a) The executive director shall review an application that is subject to §§263.1-263.7 of this title (relating to Applicability; Executive Director Shall Review Application; Notice that Executive Director Will Issue Final Approval; Executive Director's Final Approval; Remand for Consideration by Executive Director; Motion for Reconsideration; and Eligibility of Executive Director) and determine whether it meets the following requirements:

(1) public notice of the application has been issued as required by law and commission rules, and the notice explained that the executive director will issue final approval of the application unless there is a protest or request for hearing filed with the chief clerk;

(2) the application meets all relevant statutory and administrative criteria;

(3) the application does not raise new issues that require the interpretation of commission policy;

(4) the commission staff and public interest counsel do not raise objections; and

(5) no timely protests or requests for hearing are filed with the chief clerk, or the application has become uncontested because the applicant and the persons who filed the protests or requests have agreed in writing to the action to be taken by the executive director. If parties have been named for a hearing, only the written agreement of the parties is needed.

(b) The executive director shall not issue final approval of an application if a timely protest or request for hearing is filed even though the commission has denied the protest or request under the procedure set forth in Subchapter B of this chapter. The executive director shall refer the application to the commission for final action. The executive director may issue final approval if the applicant and all persons who filed the protests or requests have agreed in writing to the action to be taken by the executive director.

§263.3. Notice that Executive Director Will Issue Final Approval. The chief clerk shall publish notice in the *Texas Register* that, under §§263.1-263.7 of this title (relating to Applicability; Executive Director Shall Review Application; Notice that Executive Director Will Issue Final Approval; Executive Director's Final Approval; Remand for Consideration by Executive Director; Motion for Reconsideration; and Eligibility of Executive Director), the executive director will issue final approval of the permit or other approval. The notice shall describe the deadline to file a motion for reconsideration. The notice may be published at the same time as other public notice required by law or commission rules.

§263.4. Executive Director's Final Approval.

(a) The executive director may issue final approval of an application if it meets the requirements of §263.2 and §263.3 of this title (relating to Executive Director Shall Review Application and Notice that Executive Director Will Issue Final Approval).

(b) The permit or other approval shall be effective when signed by the executive director.

§263.5. Remand for Consideration by Executive Director. At any time during the processing of an application, if all protests, objections, and requests for hearing concerning the application are withdrawn, the commissioners, or the judge if SOAH holds jurisdiction over the application, may remand the application for the executive director's consideration under §§263.1-263.7 of this title (relating to Applicability; Executive Director Shall Review Application; Notice that Executive Director Will Issue Final Approval; Executive Director's Final Approval; Remand for Consideration by Executive Director; Motion for Reconsideration; and Eligibility of Executive Director).

§263.6. Motion for Reconsideration.

(a) The applicant, public interest counsel, or other person may file with the

chief clerk a motion for reconsideration of the executive director's final approval of an application.

(b) A motion for reconsideration must be filed with the chief clerk not later than the 20th day after the date on which the chief clerk mailed to the applicant the signed permit or other approval. In addition to a specific motion for reconsideration, the commissioners shall consider as a motion for reconsideration any objection, protest, or request for hearing filed with the chief clerk not later than the 20th day.

(c) If the applicant is the only person who files a motion for reconsideration, the executive director shall evaluate the motion and may revise and reissue the permit or other approval. Before reissuance, the executive director must republish notice in the *Texas Register* under §263.3 of this title (relating to Notice that Executive Director Will Issue Final Approval), with a description of the revisions to the permit.

(d) If a motion for reconsideration is not acted on by the commissioners within 45 days after the permit or approval is signed, the motion shall be deemed overruled.

§263.7. Eligibility of Executive Director. Effective upon National Pollutant Discharge Elimination System (NPDES) delegation, the executive director may issue NPDES permits or other approvals under §§263. 1-263.7 of this title (relating to Applicability; Executive Director Shall Review Application; Notice that Executive Director Will Issue Final Approval; Executive Director's Final Approval; Remand for Consideration by Executive Director; Motion for Reconsideration; and Eligibility of Executive Director) only if he or she complies with the eligibility requirements in 33 United States Code, §§1251-1387, as amended.

§263.8. Air Quality Permits.

(a) This section and §§263.9-263.12 of this title (relating to Air Quality Permits-Executive Director Shall Review Application; Permits-Executive Director's Final Approval; Air Quality Permits-Remand for Consideration by Executive Director; and Air Quality Permits-Motion for Reconsideration) apply to applications for air quality permits or other approvals under the Texas Health and Safety Code, §§382.051-382.055, including applications for a new permit, or to renew, modify, amend, or transfer a permit. This subchapter also applies to applications which seek an order which has the effect of issuing, renewing, modifying, amending, or transferring a permit.

(b) This section and §§263.8-263.12 of this title (relating to Air Quality Permits; Air Quality Permits-Executive Director Shall Review Application; Permits-Executive Director's Final Approval; Air Quality Permits-Remand for Consideration by Executive Director; and Air Quality Permits-Motion for Reconsideration) do not apply to:

(1) applications for emergency orders;

(2) applications that are part of a consolidated proceeding covering additional matters and to which this subchapter does not apply;

(3) registrations for standard exemptions under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification).

§263.9. Air Quality Permits-Executive Director Shall Review Application.

(a) The executive director shall review an application which is subject to §§263.8-263.12 of this title (relating to Air Quality Permits; Air Quality Permits-Executive Director Shall Review Application; Permits-Executive Director's Final Approval; Air Quality Permits-Remand for Consideration by Executive Director; and Air Quality Permits-Motion for Reconsideration) and determine whether it meets the following requirements:

(1) public notice of the application has been issued as required by law and commission rules;

(2) the application meets all relevant statutory and administrative criteria;

(3) the commission staff does not raise objections;

(4) no timely requests for hearing are filed with the chief clerk, or the application has become uncontested because the applicant and the persons who filed the requests have agreed in writing to the action to be taken by the executive director.

(b) The executive director shall not issue final approval of an application if a timely request for hearing is filed even though the commission has denied the request pursuant to the procedures set forth in Subchapter B of this chapter (relating to Evaluation of Request for Contested Case Hearing, Referral of Application to State Office of Administration Hearings). The executive director shall refer the application to the commission for final action. The executive director may issue final approval if the applicant and all persons who filed the requests have agreed in writing to the action to be taken by the executive director.

§263.10. Air Quality Permits-Executive Director's Final Approval.

(a) The executive director may issue final approval of an application if it meets the requirements of §263.8 and §263.9 of this title (relating to Air Quality Permits and Air Quality Permits-Executive Director Shall Review Application).

(b) The permit or other approval is effective when signed by the executive director.

§263.11. Air Quality Permits-Remand for Consideration by Executive Director. At any time during the processing of an application, if all protests, objections, and requests for hearing concerning the application are withdrawn, the commission, or the judge if SOAH holds jurisdiction over the application, may remand the application for the executive director's consideration under §§263.8-263.12 of this title (relating to Air Quality Permits; Air Quality Permits-Executive Director Shall Review Application; Air Quality Permits-Executive Director's Final Approval; Air Quality Permits-Remand for Consideration by Executive Director; and Air Quality Permits-Motion for Reconsideration).

§263.12. Air Quality Permits-Motion for Reconsideration.

(a) An applicant or a person affected by a decision of the executive director, with the exception of a decision regarding a federal operating permit, may file with the chief clerk a motion for reconsideration of the executive director's final approval of an application. Any person filing a motion for reconsideration under this section must identify with specificity the issues that form the basis of the appeal.

(b) A motion for reconsideration must be filed with the chief clerk not later than the 30th day after the date the chief clerk mailed the signed permit or other approval to the applicant.

(c) If the applicant is the only person who files a motion for reconsideration, the executive director shall evaluate the motion and may revise and reissue the permit or other approval.

(d) If a motion for reconsideration is not acted on by the commission within 45 days after the permit or approval is signed, the motion shall be deemed overruled.

(e) A decision made by the executive director, including a permit issued by the executive director, is not affected by the filing of a motion for rehearing under this section unless expressly so ordered by the commissioners. A final order by the commission reversing or modifying the executive director's decision takes effect when it becomes final and appealable.

(f) Notwithstanding the provisions of this section, a person affected by a decision of the executive director regarding a federal operating permit under the Texas Clean Air Act, Health and Safety Code, §§382.051-382.055, may not appeal the decision to the commission. The person may:

(1) petition the administrator of the United States Environmental Protection Agency in accordance with rules adopted under the Health and Safety Code, §382.0563; or

(2) file a petition for judicial review under the Health and Safety Code, §382.032.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508170 Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: August 30, 1995

For further information, please call: (512) 239-1966

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Subchapter B. Evaluation of Request for Contested Case Hearing, Referral of Application to State Office of Administrative Hearings

• 30 TAC §§263.21-263.28

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new sections implement the Texas Water Code, §§5.103, 5.105, and 26. 011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017.

§263.21. Contested Case Hearing Required. If the executive director, a commissioner, the applicant, or, in the case of an air permit hearing, any of those persons or a state legislator, requests a contested case hearing concerning an application, the person making the request shall make the request to the chief clerk, who shall take the appropriate actions contemplated in §265.28 of this title (relating to Request for SOAH to Acquire Jurisdiction Over Case).

§263.22. Request for Hearing by Affected Person.

(a) When authorized by law, affected persons may request that a contested case hearing be held concerning an application.

(b) A request for hearing must be in writing and filed with the chief clerk. The request must:

(1) give the name, address, and telephone number of the person who files the request;

(2) identify the person's personal justiciable interest affected by the application;

(3) state a clear and unambiguous request for a contested case hearing; and

(4) provide other information required by the public notice of application.

(c) The deadline to file a request for a hearing will be specified in the public notice of the application.

(d) The chief clerk shall respond in writing to a request for hearing, protest, or other response to the notice of application to explain how the person may submit public comment to the executive director and how the person may seek alternative dispute resolution under commission rules.

§263.23. Review of Request for Hearing.

(a) The general counsel shall determine whether a request for a contested case hearing on an application meets the requirements of this subchapter.

(b) The chief clerk shall deliver to the general counsel a copy of all documents filed with the chief clerk in response to public notice of an application. The chief clerk shall also deliver or mail copies of the documents to the executive director, the public interest counsel, and the applicant.

(c) The executive director, the public interest counsel, and the applicant may submit a written response to the request for hearing by a deadline set by the general counsel. Any response shall be filed with the chief clerk, and served on the executive director, the public interest counsel, the applicant, and the person who filed the request. If the facts alleged in the request are challenged, the general counsel may require the person who filed the request to submit an affidavit or other competent evidence. The general counsel may also hold a meeting, in person or by telephone conference, at which he or she may discuss the request with representatives of the executive director, the public interest counsel, the applicant, and the persons who filed the requests.

(d) The general counsel shall evaluate whether a request for hearing meets the requirements of this subchapter and, if so, whether the application should be processed under the requirements of Chapter 265, Subchapter F of this title (relating to Special Procedures for Freezing the Process). Upon determining a request for hearing is valid, the general counsel shall direct the chief clerk concerning the notice of hearing, including a proper description of whether the requirements of Chapter 265, Subchapter F of this title apply. When evaluating whether the provisions of that subchapter should apply, the general counsel shall consider at a minimum: the number and sophistication of the parties or potential parties; the expected length of the hearing; and the complexity of the issues. The general counsel may allow the parties to present evidence and argument regarding this determination.

(e) If the general counsel determines that the request for a contested case hearing does not meet the requirements of this subchapter, the general counsel shall schedule the request and application for the commission's consideration during a commissioners' meeting. The commission shall determine whether the request for hearing meets the requirements of this subchapter. If the commission determines the request(s) for hearing do not meet the requirements of this subchapter, the commission may take action to approve or deny the application.

(f) If the general counsel or the commission determines that a request for a contested case hearing meets the requirements of this subchapter, the general counsel shall direct the chief clerk to refer the case for hearing under §263.28 of this title (relating to Request for SOAH to Acquire Jurisdiction Over Case).

§263.24. Substantive Requirements. A request for a contested case hearing must meet the following requirements:

(1) the request is made by an affected person; and

(2) the request is reasonable.

§263.25. Determination of Affected Person.

(a) Concerning any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

(b) All relevant factors shall be considered, including the following:

(1) whether the interest claimed is one protected by the law under which the application will be considered;

(2) distance restrictions or other limitations imposed by law on the affected interest;

(3) whether a reasonable nexus exists between the interest claimed and the activity regulated;

(4) the health, safety, and use of property of the affected person; and

(5) use of the impacted natural resource by the affected person.

§263.26. Determination of Reasonableness of Request for Hearing. The determination of the reasonableness of a request for a hearing shall be based on the following:

(1) whether the request for a hearing is based solely on something other than concerns within the jurisdiction of the commission; and

(2) for air quality permits requests that are considered unreasonable, include a request concerning an amendment, modification, or renewal that would not result in an increase in allowable emissions and will not result in the emission of an air contaminant not previously emitted. The following shall also be considered:

(A) whether the project is an emissions reduction project including:

(i) whether there are no increases in emissions of any contaminants and the reduction project is not driven by a non-compliance situation; and

(ii) whether the project will have both emission reductions and incidental increases where the net effect is an emission reduction;

(B) whether the project is mandated by commission rule;

(C) the location of the proposed project;

(D) whether the applicant requests authority to substitute an equivalent or more efficient control device;

(E) whether the request for a contested case hearing is based solely on something other than concerns about air pollution;

(F) the extent to which the person requesting a hearing is likely to be impacted by the emissions; and

(G) the applicant's compliance history.

§263.27. Request for Contested Case Hearing by Group or Association. A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

(1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;

(2) the interests the group or association seeks to protect are germane to the organization's purpose; and

(3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

§263.28. Request for SOAH to Acquire Jurisdiction Over Case. If the chief clerk receives authorization pursuant to this subchapter to refer an application to SOAH, the chief clerk shall take the following actions:

(1) file a Request for Setting of Hearing form, or Request for Assignment of Administrative Law Judge form, whichever is appropriate. The executive director shall prepare a list of issues or areas that must be addressed, which the chief clerk shall file with SOAH;

(2) deliver or mail notice of the referral of the application to the general counsel, the executive director, the public interest counsel, the applicant, the person or persons who requested a contested case hearing, and any other person who has filed with the chief clerk a written request that they be given notice of hearings. The notice shall contain instructions on the proper procedure to file documents in a case referred to SOAH; and

(3) issue public notice of the hearing as required by law, and in coordination with the policies and procedures of SOAH.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508171 Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: August 30, 1995

For further information, please call: (512) 239-1966

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Subchapter C. Expiration

• 30 TAC §263.40

The new section is proposed under the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361. 024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new section implements the Texas Water Code, §§5.103, 5.105, and 26. 011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017.

§263.40. Expiration. This chapter will expire on May 31, 1996.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508172 Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: August 30, 1995

For further information, please call: (512) 239-1966

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Chapter 264. Alternative Dispute Resolution

• 30 TAC §§264.2, 264.3, 264.5-264.8, 264.10, 264.20

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes amendments to §§264.2, 264.3, 264.5-264.8, and 264.10, and new §264.20, concerning the TNRCC procedural rules. The proposed changes to the commission's procedural rules would implement recent legislation in Senate Bills (SB) 12, 741, and 1546. SB 12 directs the State Office of Administrative Hearings (SOAH) to conduct contested case hearings for the commission (other than hearings before one or more commissioners). SB 741 authorizes the commission to delegate to the executive director the authority to act on uncontested applications. SB 1546 requires the commission to adopt rules concerning whether a person is an "affected person" and is entitled to standing in a contested case hearing. The commission limited the scope of this review of the procedural rules so that the new rules may be finally adopted by September 1, 1995, which is the effective date of SB 12 and 1546.

In proposing this rule package, the TNRCC is attempting to limit any rule changes to those necessitated by recent legislation. Additionally, an attempt has been made to recodify the current TNRCC practices and reorganize the procedural rules into a more logical format. No substantive change is intended by

this recodification. Comment is specifically solicited on any changes in the recodification that appear to be substantive in nature. Comment is also solicited upon those sections that enact recent legislative changes in the agency's authority, and how these rules comport with the new legislation.

The TNRCC is continuing to review the procedural rules of the agency, with an eye towards providing efficient and understandable application review procedures. Additional changes to streamline and improve upon these rules are contemplated that current time limits do not allow to be incorporated into this rule package. Therefore, another review of these rules will begin after the final promulgation of this package (TNRCC Rule Log Number 95124-263-AD). The second review will focus upon general agency procedures and will allow broad discussion of all agency procedures and application processes. To provide a firm time frame for the next review, the current rule package, as proposed, will expire on May 31, 1996.

Before publication, the TNRCC sought informal comment on the proposed rules from approximately 60 people representing agency advisory groups, various interest groups, and regular practitioners before the agency. Due to the complexities of transferring contested cases to the purview of another state agency and the short time prior to the effective date of the legislation, the TNRCC sought this early, informal review of the proposed rules to ensure that no large issues or problems were overlooked or created. Many thorough and detailed comments were received. These comments helped the staff clarify some rules and correct many errors that crept into the first draft. The TNRCC would like to thank those who reviewed this draft package and submitted the many helpful comments. Comments received, but not addressed in this proposal, will be considered either in the response to comments in this rulemaking, or in the subsequent rule package.

The only significant change made in response to the early comments involved redrafting Chapter 263, Subchapter A, regarding delegation of uncontested applications and approvals to the executive director. The TNRCC had attempted to draft a delegation section that codified existing TNRCC practice, which distinguishes between media. This approach necessitated maintaining procedural differences between actions on air permit applications, and all other types of actions. Due to the informal comments received, the TNRCC became convinced that there was a need to clarify the delegation of actions on air permit applications, as well as a need to create additional procedural similarity between the actions on air applications and actions on applications in other media. These changes are incorporated into this proposal.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections. The transfer of responsibilities from the commission to SOAH is not anticipated to significantly affect the costs of the transferred hearing functions; therefore, no net impact to state government will result.

Mr. Minick also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be improvement in the hearings process for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. There will be no effect on small businesses. There is no anticipated economic cost for persons who are required to comply with the sections as proposed.

A public hearing on the proposal will be held August 10, 1995, at 10:00 a.m. in Room 254S of TNRCC Building E, located at 12118 North IH-35, Park 35 Technology Center, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC central office in Austin through August 11, 1995. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on August 11, 1995, will be considered by the commission prior to any final action on the proposal. Please mail written comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log #95124-263-AD. Please fax comments to (512) 239-5687. Copies of the proposed rules are available at the central office of the TNRCC, Air Policy and Regulations Division, located at 12118 North IH-35, Park 35 Technology Center, Building E, Austin, and at all TNRCC regional offices. For further information, contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

The amendments are proposed under the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361. 024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The amendments implement the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382. 017.

§264.2. Definitions. The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

Commission–The **Texas Natural Resource Conservation Commission** [Texas Water Commission]. When used in connection with a hearing, the word "commission" includes any **judge** [examiner] assigned to the proceeding.

Judge [Examiner]–An administrative law judge [or hearing examiner] employed by **SOAH** [commission in the Office of Hearing Examiners].

Protested [Contested] matter–A request for a license, permit, order, or other formal authorization from the commission which is opposed by an affected person.

SOAH–State Office of Administrative Hearings.

§264.3. Informal Disposition of Protested/Contested Matters. Unless precluded by law, informal disposition may be made of any **protested** or contested matter by stipulation, consent order, agreed settlement, mediation, or default. [However, this chapter does not apply to enforcement cases.]

§264.5. Appointment of Mediator.

(a) For each [contested] matter which has been referred for resolution through alternative dispute resolution procedures, the alternative dispute resolution director shall assign a mediator, from the pool of mediators employed by the commission, to facilitate the informal disposition of such contested matter. The alternative dispute resolution director may assign a substitute or additional mediator to a proceeding without the necessity of duplicating any duty or function performed by the previous mediator.

(b) A mediator who is not a commission or **SOAH** employee may be used for the alternative dispute resolution procedures provided that:

(1)-(2) (No change.)

[(3) the alternative dispute resolution director agrees to the substitution and selection; and]

(3)[(4)] the outside mediator agrees to be subject to the direction of the commission's alternative dispute resolution director and also subject to all time limits imposed by the director, the **judge** [examiner], statute, or regulation.

(c) Whenever an outside mediator is used, the following shall apply.

(1) Any governmental subdivision or entity that is a statutory party to the hearing, such as the commission's executive director and public interest counsel[, or the Texas Air Control Board], is prohibited from paying for the outside mediator.

(2)-(3) (No change.)

§264.6. Mediator Pool: Qualifications.

(a) The commission shall establish a pool of mediators to resolve contested matters through alternative dispute resolution procedures.

(1)-(2) (No change.)

(b) If the mediator is [an administrative law] a judge or a hearing examiner of the commission, that person will not also sit as the **judge** [presiding examiner] for the case.

§264.7. Time Period.

(a) (No change.)

(b) Formal alternative dispute resolution. In contested matters concerning applications filed pursuant to the Texas Water Code, Chapters 26 and 27, and the Texas Health and Safety Code, Chapter 361, formal alternative dispute resolution procedures shall not be employed until the executive director has completed processing the subject application or petition and has issued a draft permit or determined that a draft permit should not be issued. [The provisions of this subsection shall apply to complex hearings as defined in §274.2 of this title (relating to Definitions).] Upon unanimous motion of the parties and at the discretion of the **judge** [examiner], the provisions of this subsection may apply to contested hearings concerning applications filed pursuant to the Texas Water Code, Chapters 26 and 27, and the Texas Health and Safety Code, Chapter 361[, but which are not subject to the provisions of Chapter 274 of this title (relating to Expediting the Complex Hearings)]. In such cases, it is within the discretion of the **judge** [examiner] to continue the hearing to allow the use of formal alternative dispute resolution procedures.

(1)-(3) (No change.)

(4) It is within the discretion of the **judge** [examiner], upon a unanimous motion of the parties, to continue the hearing for a reasonable period of time not to exceed 14 days, to allow alternative dispute resolution procedures to continue towards a settlement or towards agreeing to contested issues.

§264.8. Stipulations. When alternative dispute resolution procedures do not result in the full settlement of a contested matter, the parties, in conjunction with the assigned mediator, shall limit the contested issues through the entry of written stipulations. Such stipulations shall be forwarded or formally presented to the **judge** [examiner] assigned to conduct the hearing on the merits for inclusion in the hearing record.

§264.10. Confidentiality of Communications in Alternative Dispute Resolution Procedures.

(a)-(c) (No change.)

(d) If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the **judge** [examiner] to determine, in camera, whether the facts, circumstances, and the context of the communications or materials sought to be disclosed warrant a protective order of the **judge** [examiner] or whether the communications or materials are subject to disclosure.

(e) The mediator may not communicate with the **judge** [presiding examiner] or any commissioner, directly or indirectly, on any aspect of Alternative Dispute Resolution negotiations which are deemed confidential by this section.

§264.20. Expiration. This chapter will expire on May 31, 1996.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508174 Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: August 30, 1995

For further information, please call: (512) 239-1966

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Chapter 265. Procedures Before Public Hearings

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes the repeal of §§265.1-265.9, 265.10-265.20-265.24, 265.26-265.51, 265.53-265.55 and proposes new §§265.1, 265.2, 265.21-265.30, 265.41-265.48, 265.61-265.73, 265.81-265.88, 265.101-265.104, 265.106-265.113, 265.121-265. 134, 265.141-265.145, 265.151-265.166, and 265.170, concerning the TNRCC procedural rules. The proposed changes to the commission's procedural rules would implement recent legislation in Senate Bills (SB) 12, 741, and 1546. SB 12 directs the State Office of Administrative Hearings (SOAH) to conduct contested case hearings for the commission (other than hearings before one or more commissioners). SB 741 authorizes the commission to delegate to the executive director the authority to act on uncontested applications. SB 1546 requires the commission to adopt rules concerning whether a person is an "affected person" and is entitled to standing in a contested case hearing. The commission limited the scope of this review of the procedural rules so that the new rules may be finally adopted by September 1, 1995, which is the effective date of SB 12 and 1546.

In proposing this rule package, the TNRCC is attempting to limit any rule changes to those necessitated by recent legislation. Additionally, an attempt has been made to recodify the current TNRCC practices and reorganize the procedural rules into a more logical format. No substantive change is intended by this recodification. Comment is specifically solicited on any changes in the recodification that appear to be substantive in nature. Comment is also solicited upon those sections that enact recent legislative changes in the agency's authority, and how these rules comport with the new legislation.

The TNRCC is continuing to review the procedural rules of the agency, with an eye towards providing efficient and understandable application review procedures. Additional changes to streamline and improve upon these rules are contemplated that current time limits do not allow to be incorporated into this rule package. Therefore, another review of these rules will begin after the final promulgation of this package (TNRCC Rule Log Number 95124-263-AD). The second review will focus upon general agency procedures and will allow broad discussion of all agency procedures and application processes. To provide a firm time frame for the next review, the current rule package, as proposed, will expire on May 31, 1996.

Before publication, the TNRCC sought informal comment on the proposed rules from approximately 60 people representing agency advisory groups, various interest groups, and regular practitioners before the agency. Due to the complexities of transferring contested cases to the purview of another state agency and the short time prior to the effective date of the legislation, the TNRCC sought this early, informal review of the proposed rules to ensure that no large issues or problems were overlooked or created. Many thorough and detailed comments were received. These comments helped the staff clarify some rules and correct many errors that crept into the first draft. The TNRCC would like to thank those who reviewed this draft package and submitted the many helpful comments. Comments received, but not addressed in this proposal, will be considered either in the response to comments in this rulemaking, or in the subsequent rule package.

The only significant change made in response to the early comments involved redrafting Chapter 263, Subchapter A, regarding delegation of uncontested applications and approvals to the executive director. The TNRCC had attempted to draft a delegation section that codified existing TNRCC practice, which distinguishes between media. This approach necessitated maintaining procedural differences between actions on air permit applications, and all other types of actions. Due to the informal comments received, the TNRCC became convinced that there was a need to clarify the delegation of actions on air permit applications, as well as a need to create additional procedural similarity between the actions on air applications

and actions on applications in other media. These changes are incorporated into this proposal.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections. The transfer of responsibilities from the commission to SOAH is not anticipated to significantly affect the costs of the transferred hearing functions; therefore, no net impact to state government will result.

Mr. Minick also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be improvement in the hearings process for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. There will be no effect on small businesses. There is no anticipated economic cost for persons who are required to comply with the sections as proposed.

A public hearing on the proposal will be held August 10, 1995, at 10:00 a.m. in Room 254S of TNRCC Building E, located at 12118 North IH-35, Park 35 Technology Center, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC central office in Austin through August 11, 1995. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on August 11, 1995, will be considered by the commission prior to any final action on the proposal. Please mail written comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log #95124-263-AD. Please fax comments to (512) 239-5687. Copies of the proposed rules are available at the central office of the TNRCC, Air Policy and Regulations Division, located at 12118 North IH-35, Park 35 Technology Center, Building E, Austin, and at all TNRCC regional offices. For further information, contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

• 30 TAC §§265.1-265.9

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361. 024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The repeals implement the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382. 017.

§265.1. Initial Pleadings.

§265.2. Executive Director Forwards Initial Pleadings to the Commission.

§265.3. Acceptance for Filing.

§265.4. Affidavit of Publication.

§265.5. Effect of Failure to Furnish Affidavit.

§265.6. Conference Before Hearing.

§265.7. Recordation of Conference Action.

§265.8. Prefiled Testimony and Exhibits.

§265.9. Written Protest.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508175 Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: August 30, 1995

For further information, please call: (512) 239-1966

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Chapter 265. Contested Case Hearings

Subchapter A. Definitions

• 30 TAC §265.1, §265.2

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new sections implement the Texas Water Code, §§5.103, 5.105, and 26. 011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017.

§265.1. Definitions. The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

APA–the Administrative Procedure Act (Government Code, Chapter 2001).

Applicant or petitioner–A party seeking a license, permit, order, or rule from the commission.

Chief clerk–The chief clerk of the commission or any authorized individual designated by the chief clerk to act in his or her place.

Commission–The Texas Natural Resource Conservation Commission. When used in connection with a hearing which may be conducted by SOAH, the word commission includes any judge assigned to the proceeding.

Complainant–Any party who has filed a signed, written complaint with the commission against any party subject to the jurisdiction of the commission.

Executive director–The executive director of the commission, or any authorized individual designated by the executive director to act in his or her place.

General counsel–The general counsel of the commission, or any authorized individual designated by the general counsel to act in his or her place.

Judge–An administrative law judge employed by SOAH.

Intervenor–Any party otherwise not defined.

License–The whole or part of any commission permit, certificate, approval, registration, or similar form of permission required by law.

Licensing–The commission process respecting the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

Party–Each person or agency named or admitted as a party.

Person–Any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency.

Petitioner–See Applicant.

Pleadings–Written allegations filed by parties concerning their respective claims, such as applications, protests, complaints, claims, and other similar documents, including those submitted by the executive director and the public interest counsel.

Presiding officer–The chairman or acting chairman of the commission. When used in connection with a proceeding conducted by a judge, "presiding officer"

means the judge, or if more than one judge is conducting a proceeding, the judge so designated.

Protestant–Any party opposing, in whole or in part, an application or petition filed with the commission.

Register–The Texas Register.

Respondent–Any party against whom any complaint has been filed.

SOAH–State Office of Administrative Hearings.

§265.2. Evidentiary Hearing Held by Commissioners. When an evidentiary hearing is held before one or more commissioners, the rules of this chapter will apply. "Judge" shall mean the commissioner presiding over the hearing.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

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TRD-9508180 Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

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For further information, please call: (512) 239-1966

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Subchapter B. General Discovery Rules

- **30 TAC §§265.10-265.20**

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361. 024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The repeals implement the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382. 017.

§265.10. Discovery.

§265.11. Forms of Discovery.

§265.12. Scope of Discovery.

§265.13. Exceptions.

§265.14. Protective Orders.

§265.15. Duty to Supplement.

§265.16. Discovery of Documents and Things.

§265.17. Interrogatories to Parties.

§265.18. Admission of Facts and Genuineness of Document.

§265.19. Requests for Information.

§265.20. Sanctions for Failure to Comply with Discovery Ruling.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

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Subchapter C. Special Procedures for Freezing the Process

- **30 TAC §§265.21-265.24, 265.26-265.35**

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361. 024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The repeals implement the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382. 017.

§265.21. Applicability.

§265.22. Procedures Applicable to the Executive Director and Public Interest Council.

§265.23. First Preliminary Hearing.

§265.24. Discovery Schedule and Freezing the Process for Hearings Conducted Pursuant to this Subchapter.

§265.26. Identification of Witnesses.

§265.27. Limiting the Number of Witnesses.

§265.28. Rebuttal.

§265.29. Prefiled Testimony.

§265.30. Supplementing Prefiled Testimony and Objections.

§265.31. Subpoena of Witnesses and for the Production of Documentary Evidence.

§265.32. Form of Subpoena.

§265.33. Witness Shall Attend Hearing.

§265.34. Evidence.

§265.35. Additional Testimony.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

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Chapter 265. Contested Case Hearings

Subchapter B. General Rules

- **30 TAC §§265.21-265.30**

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new sections implement the Texas Water Code, §§5.103, 5.105, and 26. 011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017.

§265.21. Administrative Law Judges.

(a) The commission delegates to judges employed by the Natural Resource Conservation Division of SOAH the authority to preside at public hearings designated by the commission and to report to the commission on such hearings in the manner provided by law. Proceedings referred by the commission to SOAH will be assigned to judges by the chief administrative law judge. When the chief administrative law judge assigns more than one judge to hear a particular proceeding, one of the judges will be designated as the presiding judge and shall resolve all procedural and evidentiary questions.

(b) The presiding judge shall have authority to do the following:

(1) set hearing dates;

(2) convene the hearing at the time and place specified in the notice for the public hearing;

(3) establish the jurisdiction of the commission concerning the subject matter under consideration;

(4) rule on motions and on the admissibility of evidence and amendments to pleadings;

(5) designate and align parties and establish the order for presentation of evidence;

(6) administer oaths to all persons presenting testimony in a manner calculated to impress the witness with the importance and solemnity of the promise to adhere to the truth;

(7) examine witnesses;

(8) issue subpoenas when required to compel the attendance of witnesses, or the production of papers and documents related to the hearing;

(9) commission and require the taking of depositions, to compel other forms of discovery in accordance with these sections, and to issue sanctions under these sections for noncompliance with discovery rulings;

(10) set prehearing conferences and require prehearing orders;

(11) ensure that information and testimony are introduced as conveniently and expeditiously as possible, including limiting the time of presentation without prejudicing any rights of parties to the proceeding;

(12) limit testimony to matters under the commission's jurisdiction;

(13) recess any hearing from time to time and from place to place;

(14) reopen the record of a hearing, prior to issuance of a proposal for decision, for additional evidence where necessary to make the record more complete; and

(15) exercise any other appropriate powers necessary or convenient to carry out his or her responsibilities.

§265.22. Substitution of Judges. The chief administrative law judge may, for good cause, assign a substitute or additional judge to a proceeding without the necessity of duplicating any duty or function performed by the previous judge.

§265.23. Representation at Hearings.

(a) Attorney of record. An attorney of record is one who has appeared in a proceeding or whose name is subscribed to any application or other pleading or to some agreement of the parties filed in the proceedings. The attorney shall be considered to have continued as attorney of record to the end of the proceeding with the commission unless there is a statement to the contrary appearing in the record.

(b) Number of counsel heard. Not more than one counsel or representative for each party or aligned group of parties shall be heard on any question or in the hearing except upon special leave of the judge.

(c) Conduct of counsel.

(1) Counsel shall observe the letter and spirit of all canons of ethics, including those concerning improper ex parte communications with the commissioners and judges.

(2) Counsel shall advise their clients and witnesses of applicable requirements of conduct and decorum.

(3) All objections, arguments, and other comments by counsel shall be directed to the judge and not to other participants.

§265.24. Conduct and Decorum.

(a) Generally.

(1) All persons, parties, representatives, witnesses, and other participants in a commission proceeding shall conduct themselves with proper dignity, courtesy, and respect for the commission, judge, parties, witnesses, and all other participants. No participant shall engage in any activity that interferes with commissioners' meetings or proceedings.

(2) All participants in commission proceedings shall refer to and address other participants respectfully by using appropriate titles and surnames.

(3) All participants shall enter the meeting or hearing room before the scheduled time for each session. When the judge calls the meeting or hearing to order, complete order shall be observed.

(4) All participants shall, and observers may, register their presence by completing a registration form and submitting it to the judge.

(5) At the discretion of the judge, there shall be no smoking in commissioners' meetings or proceedings.

(6) All participants shall dress appropriately for a commission proceeding. Attorneys shall dress the same as for an appearance in a district court of this state.

(b) Disorderly conduct. No person may conduct himself in a commission proceeding in any manner which interferes with the orderly and dignified conduct of commission business. In a hearing before a judge, the judge shall first warn a person violating this section to refrain from the specific conduct in violation. Upon further violation of this section by the same person, the judge may exclude that person from the proceeding for such time and under such conditions as are necessary to correct the situation. Violation of this section shall also be sufficient cause for the Judge to recess the hearing. Subject to the provisions of §265.71 of this title (relating to Interlocutory Appeals and Certified Questions), no objections to any action taken by the examiner under this section will be considered by the commission until it considers the proposal for decision.

§265.25. Consolidation and Severance.

(a) Consolidation. Consistent with notices required by law, the judge may consolidate related matters if the consolidation will not injure any party and may save time and expense or otherwise benefit the public interest and welfare. The commission may, when it refers matters to SOAH, direct that the matters be consolidated for hearing.

(b) Severance. The judge may sever issues in a proceeding or hold special hearings on separate issues if doing so will not injure any party and may save time and expense or benefit the public interest and welfare.

§265.26. Ex Parte Communications.

(a) No ex parte communications. During the pendency of a contested case either at the State Office of Administrative Hearings or before the commission, no party, person, or their representatives shall communicate directly or indirectly with any commissioner or the judge concerning any issue of fact or law relative to the pending case, except on notice and opportunity for all parties to participate.

(b) Utilizing special skills of the commission. The judge may seek the special skills or knowledge of commission staff in evaluating the evidence in a contested case. The judge shall follow the following procedure.

(1) The judge shall issue an order, copied to all parties, asking the executive director to assign a staff person with expertise who has not participated in the proceeding or in the processing of the matter being considered for potential consultation.

(2) All communications between the designated staff expert and the judge shall be either recorded or in writing, and all such communications submitted to or considered by the judge shall be made available as public records when the proposal for decision is issued.

§265.27. Burden of Proof. In any proceeding other than a proceeding involving a proposed change of rates, the burden of proof is on the moving party. The burden of proof in a proceeding involving a proposed change of rates is governed by §291.12 of this title (relating to Burden of Proof).

§265.28. Audio Recording of Proceedings. The judge shall cause each proceeding to be recorded on audio cassette tape. Any person may obtain a copy of the tape recording from the judge or, after conclusion of the hearing, may submit a request to the chief clerk accompanied by payment of all reproduction costs.

§265.29. Witness Fees.

(a) A person who is not a party and who is subpoenaed or otherwise compelled to attend any hearing or proceeding to testify, to give a deposition, or to produce books, records, papers, or other objects that may be necessary and proper for the purpose of the proceeding pursuant to this section is entitled to receive: mileage reimbursement, at the current rate of mileage reimbursement for state employees as established by the legislature, for going to, and returning from the place of the hearing or the place where the deposition is taken, if the place is more than 25 miles from the person's place of residence; and a minimum fee of $70 or the amount equal to state employees' current maximum travel reimbursement for overnight lodging plus meals as established by the legislature, whichever is greater, for each day or part of a day the person is necessarily present as a witness or deponent. This fee shall be paid to the witness or deponent even if overnight lodging is not used, and the fee shall not be prorated for parts of days.

(b) Mileage and fees to which a witness is entitled under this section shall be paid by the party at whose request the witness appears or the deposition is taken, on presentation of proper vouchers sworn by the witness and approved by the commission.

§265.30. Transcriptions of Hearings.

(a) Official hearings reporter. Consistent with its court reporting services agreement, the commission will provide a certified shorthand hearings reporter to make a verbatim record and transcript of any commissioners' meeting, hearing, or other proceeding upon the timely request of any person. The hearings reporter provided by the commission shall be the official reporter for commission proceedings. If the commission does not provide a hearings reporter a party may, at his own expense, furnish a certified shorthand hearings reporter who the commission may designate as the official reporter for the proceeding.

(b) Requests for hearings reporter services.

(1) A request for a verbatim record or transcript of a proceeding may be submitted at any time, but shall be submitted in writing to the chief clerk of the commission or the judge and shall specify the name, mailing address, and daytime telephone number of the requester; the name and date of the commission proceeding; and a statement of whether a transcript is requested. A request for a transcript of a proceeding already reported may be made directly to the hearings reporter.

(2) A person requesting a verbatim record without a transcript of a proceeding shall pay the applicable reporting fees in the commission's court reporting services agreement.

(3) A person requesting a transcript of a proceeding shall pay for at least an original and two copies of the transcript in addition to any applicable reporting fees in accordance with the commission's court reporting services agreement. The hearings reporter shall provide the commission the original and one copy of the transcript free of charge.

(4) Upon his or her own motion, the judge may request a verbatim record and an original and two copies of a transcript of a proceeding.

(5) In hearings expected to last three days or more, the applicant may be required to pay for the transcript up front, by the judge, subject to reimbursement from other parties upon assessment of costs.

(c) Cancellation of hearings reporter services. A person who causes the judge to cancel a hearing or meeting for which a verbatim record or transcript has been requested is responsible for paying the hearings reporter, upon demand, the full daily reporting fee in the commission's court reporting services agreement unless the cancellation occurs more than 24 hours prior to the scheduled beginning of the hearing or meeting.

(d) Assessment of reporting and transcription costs.

(1) Upon the timely filed motion of a party or upon its own motion, the commission may assess reporting and transcription costs to one or more of the parties participating in the proceeding. The commission shall consider the following factors in assessing reporting and transcription costs:

(A) the party who requested the transcript;

(B) the financial ability of the party to pay the costs;

(C) the extent to which the party participated in the hearing;

(D) the relative benefits to the various parties of having a transcript;

(E) the budgetary constraints of a state or federal administrative agency participating in the proceeding;

(F) in rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and

(G) any other factor which is relevant to a just and reasonable assessment of costs.

(2) The commission will not assess reporting or transcription costs to statutory parties who are precluded by law from appealing any ruling, decision, or other act of the commission.

(3) In any proceeding where the assessment of reporting or transcription costs is an issue, the judge shall provide the parties an opportunity to present evidence and argument on the issue. A judge shall include in the proposal for decision a recommendation for the assessment of costs.

(4) The parties may agree upon the division or assessment of reporting and transcription costs. The terms of such an agreement shall be made part of the record of the proceeding.

(e) Payment of reporting or transcription assessment.

(1) Each party assessed a reporting or transcription cost in a commission proceeding shall pay the assessment in full within ten days after the commission's order is final, as provided by the APA. The assessment shall be paid by check payable to the order of the hearings reporter firm that reports or transcribes the proceeding, or as otherwise ordered by the commission. Payment shall be remitted to the chief clerk of the commission or as otherwise ordered by the commission.

(2) If a party fails to pay the assessment in accordance with subsection (a) of this section the commission may forward the matter to the attorney general of Texas for prosecution and collection.

(3) Upon a party's filing its sworn motion showing good cause for failure to pay its assessment in accordance with subsection (a) of this section, accompanied by tender of payment of the party's assessment in full, the commission may grant an exception to the time within which payment must have been made under subsection (a) of this section, accept the payment, and otherwise enforce its assessment.

(f) Sale of transcript copies. The hearings reporter may sell copies of a transcript of a commission proceeding in accordance with the commission's court reporting services agreement, but the commission shall not be precluded from complying with the Open Records Act, Texas Government Code, Chapter 552.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

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TRD-9508181 Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

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For further information, please call: (512) 239-1966

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Chapter 265. Procedures Before Public Hearings

Subchapter D. Discovery

• 30 TAC §§265.36-265.49

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361. 024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The repeals implement the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382. 017.

§265.36. Discovery in Hearings Held under Subchapter C.

§265.37. Forms and Scope of Discovery; Protective Orders; Supplementation of Responses.

§265.38. Stipulations Regarding Discovery Procedure.

§265.39. Discovery and Production of Documents and Things for Inspection, Copying, or Photography.

§265.40. Interrogatories to Parties.

§265.41. Requests for Admissions.

§265.42. Depositions.

§265.43. Issuance of Commission to Take Deposition.

§265.44. Witness Shall Comply with Discovery.

§265.45. Non-stenographic Recording; Deposition by Telephone.

§265.46. Failure of Party or Witness to Attend or to Serve Subpoena; Expenses.

§265.47. Deposition Examination, Cross-examination, and Objections.

§265.48. Submission to Witness; Changes; Signing.

§265.49. Use of Deposition Transcripts in Commission Proceedings.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

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Texas Natural Resource Conservation Commission

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Chapter 265. Contested Case Hearings

Subchapter C. General Procedures

• 30 TAC §§265.41-265.48

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new sections implement the Texas Water Code, §§5.103, 5.105, and 26. 011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017.

§265.41. Informal Proceeding/Remand to Executive Director.

(a) A commission proceeding may be conducted as an informal proceeding when in the judgment of the judge the conduct of a proceeding under informal procedures will:

(1) result in savings of time or costs to all parties;

(2) lead to a negotiated or agreed settlement of facts or issues in controversy; and

(3) not prejudice the rights of any party.

(b) If, during an informal proceeding, all parties reach a negotiated or agreed settlement which in the judgment of the judge settles all facts or issues in controversy, the proceeding shall not be a contested case under the APA and no proposal for decision nor detailed findings of fact and conclusions of law will be made.

(c) If the parties do not reach a negotiated or agreed settlement of all facts and issues in controversy, the judge may adjourn the informal proceeding and convene a contested case hearing under standard hearing procedures as otherwise provided for in commission regulations.

§265.42. Withdrawing the Application.

(a) Absent commission authorization or agreement of the parties, an applicant may not withdraw his application without prejudice once the judge has taken jurisdiction over the application. The judge will forward the request to withdraw the application and his recommendation to the commission.

(b) In addition to commission authorization or agreement of the parties, the

application may also be withdrawn without prejudice if the applicant reimburses the other parties all costs the other parties have incurred in the permitting process for the subject application.

§265.43. Procedure Before Preliminary Hearing.

(a) Conference before preliminary hearing.

(1) At the discretion of the judge, a conference before hearing may be held at a time and place stated in the notice. If notice of the conference is not given in the notice of public hearing, notice of the conference shall be mailed at least ten days prior to the conference or the conference may be held at the public hearing date, time, and place stated in the notice of public hearing. If notice of public hearing is required to be published, notice of a conference to be held prior to the initial public hearing date shall be published at least ten days prior to the conference.

(2) A conference may be held to consider the following:

(A) the formulation and simplification of issues;

(B) the necessity or desirability of amending pleadings;

(C) the possibility of making admissions or stipulations;

(D) the procedure at the hearing;

(E) the identification of and specification of the number of witnesses;

(F) the filing and exchange of prepared testimony and exhibits;

(G) the designation of parties;

(H) the scheduling of discovery; and

(I) any other matters which may expedite the hearing or otherwise facilitate the hearing process.

(3) At the discretion of the judge, additional conferences before the hearing may be scheduled and held without the necessity of publication.

(b) Recordation of conference action. As determined by the judge, action taken at the conference shall be reduced to writing and made a part of the record or a statement thereof shall be made on the record at the close of the conference or at the hearing. After a prehearing conference, the judge may make appropriate rulings concerning matters discussed at the conference.

§265.44. Initial Pleadings. Applications, petitions, complaints, and other pleadings which initiate new proceedings before the commission should be delivered to the executive director, together with all related materials, for initial processing and review in accordance with the rules of the commission.

§265.45. Executive Director Forwards Initial Pleadings to the Commission. After an application, petition, or other document initiating a new proceeding and requiring action by the commission is processed, the executive director shall forward the pleading to the chief clerk for disposition. Pleadings, including those of the executive director and the public interest counsel, shall be accompanied by an agenda action request if the proceeding is to be immediately set before the commission.

§265.46. Acceptance for Filing. The acceptance of a pleading for filing is not a final decision of acceptance, but is a preliminary and rebuttable determination that the pleading meets the minimum standards required by law in order to be ready for a public hearing.

§265.47. Affidavit of Publication. Any notice which an applicant is required to publish shall be published in the manner required by law and as directed by the commission. The applicant shall cause the publisher of the notice to furnish a tear sheet copy of the published notice and a publisher's affidavit which the applicant shall file with the commission as quickly as possible following publication, but not less than ten days before the scheduled date of action or date of hearing on the application. The affidavit shall state the date or dates on which the notice was published and the pertinent counties in which the newspaper is of general circulation. The publisher's affidavit and tear sheet shall be considered prima facia evidence of publication.

§265.48. Effect of Failure to Furnish Affidavit. Failure to furnish evidence of publication of the notice in the manner required may be deemed evidence of abandonment of the application. If the affidavit of publication is not timely filed, the scheduled action or hearing on the application may be postponed and action withheld pending receipt of the affidavit. The application may be dismissed without prejudice if the affidavit of publication is not received within a reasonable time.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

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Chapter 265. Procedures Before Public Hearings

Subchapter E. Sanctions

- **30 TAC §§265.50, 265.51, 265.53-265.55**

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361. 024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The repeals implement the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382. 017.

§265.50. Abuse of Discovery; Sanctions.

§265.51. Sanctions for Failure to Serve or Deliver Copy of Pleadings and Motions.

§265.53. Failure to Identify or Limit Witnesses.

§265.54. Failure to Identify Testimony.

§265.55. Barring Exhibits.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

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Chapter 265. Contested Case Hearings

Subchapter D. Hearing Procedures

- **30 TAC §§265.61-265.73**

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new sections implement the Texas Water Code, §§5.103, 5.105, and 26. 011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017.

§265.61. Designation of Parties.

(a) Determination by judge. All parties to a proceeding shall be determined at the first day of hearing or at such time as may be designated by the judge. In order to be admitted as a party, a person must have a justiciable interest in the matter being considered and must, unless the person is specifically named in the matter being considered, appear at the proceeding in person or by representative and seek to be admitted as a party. Regardless of the designations of pleadings, the parties and their pleadings shall be accorded their appropriate alignment in the proceeding. After parties are designated, no other person will be admitted as a party except upon finding of good cause and extenuating circumstances and that the hearing in progress will not be unreasonably delayed. At the discretion of the judge, persons who are not parties may be permitted to make or file statements.

(b) Statutory parties.

(1) The executive director and public interest counsel of the commission are designated as parties to all commission proceedings.

(2) The Texas Water Development Board shall be designated a party to any commission proceeding in which the board requests party status.

(3) The Texas Parks and Wildlife Department shall be designated a party in commission proceedings on applications for permits to store, take, or divert water if the department requests party status.

(4) The statutory parties shall have such procedural rights and obligations as may be specified by applicable statutes and rules of the commission.

(c) Alignment of participants. Participants (both party and non-party) may be aligned according to the nature of the proceeding and their relationship to it. The judge may require participants of an aligned class to select one or more persons to represent them in the proceeding.

(d) Effect of postponement. If a hearing on an application is postponed for any reason, including the applicant's failure to provide notice as required by law, any person designated as a party retains party status.

§265.62. Persons Not Parties. Persons who are not designated as parties to the proceeding may register their protest or make comments orally or in writing. Such protest or comments shall be included in the files of the proceeding, but shall not be considered by the judge as evidence in the record. Additionally, a person who is not a party to the proceeding may, at the judge's request, submit questions to the judge. At the discretion of the judge, the judge may address any such questions to witnesses in the proceeding where it appears that such questioning may lead to a full disclosure of the facts without unduly delaying the hearing or burdening the record.

§265.63. Appearance.

(a) Any person may appear at a hearing in person or by authorized representative. A person appearing in a representative capacity may be required to prove his authority.

(b) Except for good cause and extenuating circumstances, the applicant or petitioner shall appear at the public hearing. Failure to so appear may be grounds for withholding consideration of a matter or for dismissal without prejudice.

(c) Whenever it is necessary or proper for any party to an application or proceeding to make an affidavit, it may be made by either the party or his representative, unless otherwise provided by statute.

§265.64. Rights and Obligations of Parties at the Hearing.

(a) Rights. A party has the right to conduct discovery, present a direct case, cross-examine witnesses in the hearing, make oral and written arguments, obtain copies of all pleadings, motions, replies, and other filed documents, receive copies of all notices issued by the commission concerning the application to which the person is a party, and, as directed by the judge, otherwise fully participate as a party in the proceeding. A person may seek leave to withdraw his or her party status at any time upon written request to the judge or by request stated on the record during a hearing. Party status is not withdrawn unless and until the judge grants the request for leave to withdraw.

(b) Order of presentation.

(1) In all proceedings the moving party shall have the right to open and close. Where several matters have been consolidated, the judge will designate who will open and close. The judge will determine at what stage intervenors will be permitted to offer evidence and argument. After all parties have completed the presentation of their evidence, the judge may call upon any party for further material or relevant evidence upon any issue.

(2) Before the moving party opens in a permit hearing, the Executive Director's Staff shall open with a simple statement of its preliminary position on the application and, in a permit hearing, will present the Staff's draft permit including special provisions, if any. In a permit hearing, the applicant presents evidence to meet its burden of proof on the application, any opponents present evidence, the Public Interest Counsel presents evidence, and the Staff presents its evidence. In all cases, the applicant shall be allowed to close with its rebuttal. Any party may present a rebuttal case when another party presents evidence which could not have been reasonably anticipated.

(c) Cross-examination of witnesses. Witnesses shall be subject to cross-examination by any party in conformance with any alignment required by the judge under §265.61(c) of this title (relating to Designation of Parties) . The judge may allow persons who are not parties to submit questions for witnesses to the judge as set out in §265.62 of this title (relating to Persons Not Parties).

§265.65. Continuance.

(a) The presiding officer may continue a public hearing or meeting from time to time and from place to place. If the time and place for the proceeding to reconvene are not announced at the hearing or meeting, a notice shall be mailed at a reasonable time to all parties and other persons who, in the judgment of the presiding officer, may be affected by action taken as a result of the hearing.

(b) Motions for continuance shall be in writing or stated on the record, and shall be sworn unless the facts alleged therein to show good cause are part of the record of the proceeding.

§265.66. Motions. A motion, unless made during a hearing, shall be made in writing, shall set forth the relief or order sought, and shall be timely filed with the judge. If parties have been designated, a copy shall be furnished by the movant to each applicant, petitioner, and other party of record. Any reply to the motion shall be timely

filed with the judge with copies served on the other parties. Failure to furnish copies may be grounds for withholding consideration of the motion or reply. Unless otherwise directed by the judge, motions based on matters which do not appear of record must be supported by affidavit. When necessary in the judgment of the judge, a hearing will be held to consider any motion.

§265.67. Conference After Preliminary Hearing.

(a) Upon written notice or notice stated in the record in any proceeding, parties or their representatives may be directed to appear at a specified time and place for a conference to consider the following:

(1) the formulation and simplification of issues;

(2) the necessity or desirability of amending the pleadings;

(3) the possibility of making admissions or stipulations;

(4) the procedure at the resumption of the hearing;

(5) the identification and specification of the number of witnesses;

(6) the filing and exchange of prepared testimony and exhibits;

(7) the designation of parties;

(8) the scheduling of discovery; and

(9) any other matters which may expedite the hearing or otherwise facilitate the hearing process.

(b) As determined by the judge, action taken at the conference shall be reduced to writing and made a part of the record or a statement thereof shall be made on the record at the close of the conference or at the hearing. After a hearing conference, the presiding officer may make appropriate rulings concerning matters discussed at the conference.

§265.68. Agreements to be in Writing. No agreement between parties or their representatives affecting any pending matter will be considered by the judge unless it is in writing, signed and filed as a part of the record, or unless it is announced at the hearing and entered of record.

§265.69. Evidence.

(a) General admissibility of evidence.

(1) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The Texas Rules of Civil Evidence as applied in nonjury civil cases in the district courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. The judge shall give effect to the rules of privilege recognized by law.

(2) When a proceeding will be expedited and the interest of parties will not be prejudiced substantially, testimony may be received in written form. The prepared testimony of a witness upon direct examination, either in narrative or question and answer form, may be admitted into evidence as if read or presented orally, upon the witness' being sworn and identifying the same as a true and accurate record of what his testimony would be if given orally. The witness shall be subject to clarifying questions and to cross-examination, and the prepared testimony shall be subject to objection.

(3) Testimony will be received only from witnesses called by a party or his or her representative or the judge. The presiding officer may allow or request testimony from any person whose position is not adequately represented by any party, subject to cross-examination by all parties or their representatives. Such testimony may be allowed at the presiding officer's discretion. All parties shall have an opportunity to take discovery of such person.

(b) Stipulation. Evidence may be stipulated by agreement of all parties. The judge and commission will determine the weight, if any, to be accorded stipulated evidence.

(c) Prefiled testimony and exhibits. The judge may require parties to prepare their direct testimony in written form if the judge determines that a proceeding will be expedited and that the interests of the parties will not be prejudiced substantially. The judge may require the parties to file and serve their direct testimony and exhibits prior to the beginning of the hearing.

(d) Abstracts of documents. When documents are numerous, the presiding officer may receive in evidence only those which are representative and may require the abstracting of relevant data from the documents and the presentation of the abstracts in the form of an exhibit. Parties shall have the right to examine the documents from which the abstracts are made.

(e) Exhibits.

(1) Exhibits of a documentary character shall not exceed 8-1/2 by 11 inches unless they are folded to the required size. Maps and drawings which are offered as exhibits shall be rolled or folded so as not to unduly encumber the record. Exhibits not conforming to this rule may be excluded.

(2) Each exhibit offered shall be tendered for identification and placed in the record. Copies shall be furnished to the presiding officer, each of the parties, and the hearings reporter, unless the presiding officer shall rule otherwise.

(3) In the event an exhibit has been identified, objected to, and excluded, it may be withdrawn by the offering party. If withdrawn, the exhibit will be returned and the offering party waives all objections to the exclusion of the exhibit. If not withdrawn, the exhibit shall be included in the record for the purpose of preserving the objection to the exhibit.

(f) Official notice.

(1) The presiding officer may take official notice of all facts judicially cognizable. In addition, the presiding officer may take official notice of any generally recognized facts within the specialized knowledge of the commission.

(2) The presiding officer shall notify all parties before or during the evidentiary hearing or by reference in preliminary reports, drafts of orders, or otherwise, of any material officially noticed, including any memoranda or data prepared by the executive director and relied upon by the commission in prior proceedings. All parties shall be afforded an opportunity to contest any material so noticed.

§265.70. Objections. Objections shall be timely noted in the record. Formal exception to the ruling of the judge is not necessary to preserve the objecting party's right on appeal.

§265.71. Interlocutory Appeals and Certified Questions.

(a) No interlocutory appeals may be made to the commission by a party to a proceeding before a judge.

(b) On a motion by a party served on the judge or on the judge's own motion, the judge may certify a question to the commission. Certified questions may be made at any time during a proceeding, regarding commission policy, jurisdiction, or the imposition of any sanction by the judge which would substantially impair a party's ability to present his or her case. Policy questions for certification purposes include, but are not limited to:

(1) the commission's interpretation of its rules and applicable statutes;

(2) which rules or statutes are applicable to the proceeding; or

(3) whether commission policy should be established or clarified as to a

substantive or procedural issue of significance to the proceeding.

(c) The judge shall file the certified question with the chief clerk and serve copies on the parties. Within five days after the certified question is filed, parties to the proceeding may file briefs or replies. The chief clerk shall provide copies of the certified question and any briefs or replies to the general counsel and commissioners. Upon the request of the general counsel or one or more commissioners to the general counsel, the certified question will be scheduled for consideration during a commissioners' meeting. The chief clerk shall give the judge notice of the scheduling. The judge may, in his or her discretion, abate the hearing until the commission answers the certified question, or continue with the hearing if the judge determines that no party will be substantially harmed by proceeding while awaiting a response. If no request to set the question for consideration is received from the general counsel by the chief clerk within 15 days after filing, the request will be deemed denied by operation of law.

§265.72. Oral Argument. At the conclusion of the hearing, oral argument may be heard upon request of the parties or upon directive of the judge. Reasonable time limits may be prescribed. The judge may require or accept written briefs in lieu of oral arguments. When any matter heard before the judge is presented to the commissioners for final decision, further oral argument may be heard by the commissioners.

§265.73. Submittal of Findings of Fact and Conclusions of Law. The judge may request that the parties submit proposed findings of fact and conclusions of law separately stated.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508183 Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: August 30, 1995

For further information, please call: (512) 239-1966

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Subchapter E. Discovery and Sanctions

• 30 TAC §§265.81-265.88

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new sections implement the Texas Water Code, §§5.103, 5.105, and 26. 011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017.

§265.81. Discovery.

(a) Power to authorize discovery. The presiding officer may allow any form of voluntary discovery and may compel any form of discovery authorized by the APA.

(b) Forms of discovery: voluntary and compellable.

(1) Voluntary discovery. Voluntary forms of discovery are highly favored by the commission. Parties must attempt to engage in voluntary discovery before seeking compelled discovery. Voluntary forms of discovery include requests for admission, interrogatories, requests for information, and all forms of compellable discovery voluntarily engaged in, such as depositions, the production of documents and things, or entry onto land pursuant to the APA. Copies of all voluntary discovery documents shall be filed with all parties, but need not be filed with the commission unless otherwise directed by the presiding officer. During voluntary discovery, the Texas Rules of Civil Procedure may be used for guidance by the requesting and responding parties. Any response made to a voluntary discovery request, other than a response objecting to the request, may be used in the same manner as if the discovery had been ordered by the presiding officer pursuant to the APA.

(2) Compellable discovery. Compellable includes all those forms of discovery authorized by the APA. A party may request the commission to compel discovery after voluntary discovery attempts have failed by filing a discovery motion with the presiding officer and upon notice to all other parties at least ten days before the hearing on the merits. Motions to compel discovery may be filed less than ten days before the hearing on the merits upon a showing of good cause. Copies of all compellable discovery documents, including answers and objections thereto, shall be filed with all other parties and the presiding officer. Affidavits regarding actions taken to engage in voluntary discovery may be considered as evidence in ruling upon motions to compel discovery and attendant requests for continuance.

§265.82. Scope of Discovery.

(a) Except as provided in subsection (b) of this section or §265.86 of this title (relating to Protective Orders), parties may obtain discovery regarding any matter which is relevant to the subject matter of the proceeding whether it relates to the position of the party seeking discovery or the position of the other party. It is not grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b) The following matters are not discoverable:

(1) the work product of an attorney;

(2) the written statements of potential witnesses and parties, except that any person, whether a party or not, shall be entitled to obtain, upon request, a copy of a statement he has previously made concerning the action or its subject matter and which is in the possession, custody, or control of any party;

(3) the identity, mental impressions, and opinions of an expert who has been retained or specially employed by another party in anticipation of a commission proceeding or in preparation for hearing, or any documents or tangible things containing such information if the expert will not be called as an expert witness, except that the identity, mental impressions, and opinions of an expert who will not be called to testify as an expert and any documents or tangible things containing such impressions and opinions are discoverable if the consulting expert's opinion or impressions have been reviewed by a testifying expert;

(4) with the exception of discoverable communications prepared by or for experts, any communication passing between agents or representatives or the employees of any party to the proceeding or communications between any party and his agents, representatives, or their employees, where made subsequent to the filing of the application, petition, complaint, motion, report, or other initial pleading upon which the proceeding is based, and made in connection with the prosecution, investigation, or protest of the subject of the proceeding.

(c) Nothing in this section shall be construed to render nondiscoverable the identity and location of any potential party, any person having knowledge of relevant facts, any expert who is expected to be called as a witness in the action, or of any consulting expert whose opinions or impressions have been reviewed by a testifying expert.

§265.83. Types of Discovery.

(a) Interrogatories to parties. Interrogatories may be used as a form of voluntary discovery under §265.81 of this title (relating to Discovery).

(b) Admission of facts and of genuineness of document. Requests for admission may be used as a form of voluntary discovery from other parties under §265.81 of this title.

(c) Requests for information. Requests for information may be used by any party as a part of voluntary discovery pursuant to §265.81 of this title. Requests for information by the Executive Director of the commission for matters arising out of the commission's rate setting jurisdiction under the Texas Water Code, Chapters 11 and 12, or the commission's statutory responsibilities under the Texas Water Code, Chapter 13, are deemed part of the commission's investigatory powers to which answers may be compelled upon proper motion and notice to all parties. Failure to adequately respond to requests for information by the Executive Director of the commission may result in sanctions authorized for compellable discovery pursuant to §265.86 of this title (relating to Protective Orders).

§265.84. Issuance of Subpoena or Commission to take Deposition.

(a) Upon proper request by a party, the judge shall issue subpoenas and commissions to take depositions. A request for issuance shall be filed with the chief clerk, and a copy shall be served on the judge and the parties.

(b) Before seeking issuance of either a subpoena or commission, the requestor shall attempt to secure voluntary appearance of the witness or production of materials. If this is not possible, the requestor shall indicate what circumstances prevent such voluntary appearance or production in the request.

(c) If the requestor and witness sign an "Agreement to Waive Fee" form, subpoenas and commissions may be issued without a witness fee deposit. Only a non-party witness or deponent is entitled to receive this fee.

(d) If the witness fee is not waived, the requestor shall make the witness fee deposit in the appropriate amount as indicated on the forms requesting issuance. This amount is based on an estimate of the mileage to be traveled to and from the hearing or deposition, if over 25 miles, and days expected to be spent in the hearing or deposition. This deposit should be made payable to the commission and should be filed with chief clerk and must be made before issuance of the subpoena or commission.

(e) Upon deposit of all necessary monies and completion of all forms, the subpoena or commission shall be issued to the requestor to effect service.

§265.85. Form of Subpoena. The heading of the subpoena shall be "The Texas Natural Resource Conservation Commission." It shall state the style of the hearing, that the hearing is pending before SOAH, the time and place at which the witness is required to appear, and the party at whose insistence the witness is summoned. It shall be signed by the chief clerk, but need not be under the seal of the commission and the date of issuance shall be noted thereon. It may be made returnable forthwith, or on any date for which hearing of the docketed matter may be set. It shall be addressed to any sheriff or constable of the State of Texas or other person authorized to serve subpoenas as provided in the Texas Rules of Civil Procedure, Rule 178.

§265.86. Protective Orders. On motion specifying the grounds and made by any person against or from whom discovery is sought, the judge may make any ruling in the interest of justice necessary to protect the party against whom compellable discovery is sought from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. Specifically, the judge's authority as to such rulings extends to, although it is not necessarily limited by, any of the following:

(1) ruling that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified;

(2) ruling that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the presiding officer; or

(3) ruling that results of discovery be sealed or otherwise adequately protected; that its distribution be limited; or that its disclosure be restricted.

§265.87. Duty to Supplement. A party who has responded to a request for voluntary or compellable discovery that was correct and complete when made is under no duty to supplement his response to include information thereafter acquired, except the following shall be supplemented not less than ten days prior to the hearing on the merits unless the presiding officer finds that a good cause exists for permitting or requiring later supplementation.

(1) A party is under a duty seasonably to supplement his response if he obtains information upon the basis of which:

(A) he or she knows that the response was incorrect or incomplete when made; or

(B) he or she knows that the response, though correct and complete when made, is no longer true and complete and the circumstances are such that failure to amend the answer is in substance misleading.

(2) If the party expects to call an expert witness when the identity or subject matter of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the name, address, and telephone number of the expert witness and the substance of the testimony which the expert witness is expected to testify, as soon as is practical, but in no event less than ten days prior to the hearing on the merits except on leave of the judge.

(3) In addition, a duty to supplement answers may be imposed by ruling of the judge or agreement of the parties, or at any time prior to hearing through new requests for supplementation of prior answers.

§265.88. Sanctions for Failure to Comply with Discovery.

(a) If a person fails to comply with a subpoena or commission for deposition issued by the judge, the commission or the party requesting the subpoena or commission for deposition may seek enforcement under the APA, §2001.201.

(b) If the judge finds a party is abusing voluntary discovery or if the judge finds that any interrogatory or request for information is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for the purpose of delay, then the judge shall allow compellable discovery. Affidavits regarding actions taken to engage in voluntary discovery may be considered as evidence in considering motions for compelled discovery and attendant motions for continuance. In considering motions for continuance occasioned by failure of voluntary discovery, the presiding officer may consider the degree of abuse in addition to other pertinent factors in setting new deadlines for compelled discovery and the hearing on the merits.

(c) If the judge finds a party is abusing compelled discovery, the judge may do any of the following:

(1) suspend processing of the application or petition if the applicant or petitioner is noncompliant;

(2) disallow any further discovery of any kind or a particular kind by the noncompliant party;

(3) rule that particular facts shall be regarded as established for the purposes

of the proceeding in accordance with the claim of the party obtaining the discovery ruling;

(4) limit the noncompliant party's participation in the proceeding;

(5) disallow the noncompliant party's presentation of evidence on issues that were the subject of the discovery request;

(6) disallow part or all of applicant's attorney fees from inclusion in the rate base in water and sewer utility cases;

(7) recommend to the commission that the hearing be dismissed with or without prejudice;

(8) allow evidence to be introduced against a party abusing discovery which would otherwise be excluded for not meeting the deadline for exchange of such evidence; and

(9) allow testimony against a party abusing discovery which would otherwise be excluded for not meeting the deadline established for listing potential witnesses.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508184 Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

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For further information, please call: (512) 239-1966

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Subchapter F. Special Procedures for Freezing the Process

Procedures

- **30 TAC §§265.101-265.104, 265.106-265.113**

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new sections implement the Texas Water Code, §§5.103, 5.105, and 26. 011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017.

§265.101. Applicability.

(a) The provisions of this subchapter shall apply to permit hearings as designated in the notice of hearing as well as to other hearings designated by the judge for good cause.

(1) Except by agreement of the parties, the provisions of this subchapter do not apply to permit hearings at which jurisdiction is established prior to July 22, 1994.

(2) Notwithstanding the designation made in the notice of hearing, an application may either be included in, or excluded from, the applicability of this subchapter or any portion of this subchapter by:

(A) agreement of the parties only with the approval of the judge; or

(B) by the judge for good cause. Good cause may include without limitation a finding that the lack of complexity of a proceeding in a hearing does not warrant the implementation of all or a portion of this subchapter.

(b) When evaluating whether the provisions of this subchapter should apply to a permit hearing, the judge shall consider at a minimum:

(1) the number and sophistication of the parties or potential parties;

(2) the expected length of the hearing; and

(3) the complexity of the issues. The judge shall allow the parties to present evidence and argument regarding this determination.

(c) If a judge orders a permit application to be placed under the provisions of this subchapter after the notice of hearing, the judge shall allow reasonable time for:

(1) the executive director and public interest counsel to comply with §265.102 of this title (relating to Procedures Applicable to the Executive Director and Public Interest Counsel); and

(2) all parties to comply with §265.103 of this title (relating to First Preliminary Hearing).

(d) The provisions of other chapters of this title and other subchapters of this chapter are inapplicable to proceedings to which this subchapter applies only to the extent that such provisions conflict with this subchapter.

§265.102. Procedures Applicable to the Executive Director and Public Interest Counsel.

(a) Executive director.

(1) After the executive director has conducted his technical review of an application, the executive director shall prepare a proposed permit based on the application submitted. The executive director shall develop an initial position recommending issuance, issuance with additional or different permit provisions, or denial of the permit. If the executive director recommends issuance with additional or different permit provisions, he or she shall specify those provisions in a document separate from the proposed permit. If the executive director's recommendation is to deny, he or she shall issue a document summarizing the basis for his or her position. The proposed permit and additional documents prepared by the executive director shall be forwarded to the Chief Clerk's Office for filing and setting. This provision does not impair the executive director's ability to return applications pursuant to §281.18 and §281.19 of this title (relating to Applications Returned and Technical Review).

(2) The executive director may change his or her position based on evidence or other new information. The executive director shall timely notify all parties on the record or in writing if he or she changes his or her opinion, and the other parties shall be afforded the opportunity to respond.

(b) Public interest counsel. The Public Interest Counsel shall comply with all time frames and procedures relevant to protestants pursuant to this chapter, unless otherwise determined by the judge.

§265.103. First Preliminary Hearing. After the required notice has been given and a request for hearing has been received, a judge will convene a public hearing to take jurisdiction over the application, accept public commentary, designate parties, and set a discovery and procedural schedule. At this hearing, the judge shall address the jurisdiction of the commission over the proceeding. If jurisdiction is established, the following shall occur:

(1) the judge shall accept public commentary and name the parties;

(2) the judge shall set acceptable methods of service of pleadings, motions, and discovery;

(3) the executive director shall provide his evaluation and assessment pursuant to §265.102 of this title (relating to Procedures Applicable to the Executive Director and Public Interest Counsel) along with the proposed permit and any additional documents prepared by the executive director related to his or her assessment;

(4) the applicant shall submit proposed findings of fact and conclusions of law;

(5) the applicant shall identify what constitutes the application and shall provide a total of two copies of the permit application, for use by all of the protestants

in the case. These copies shall include all notices of deficiency and the applicant's response to those notices;

(6) the executive director and the applicant shall provide their witness lists;

(7) the parties shall raise their claims of confidentiality of portions of the application or agency files in a request for a protective order; and

(8) the judge shall establish a procedural schedule for the hearing consistent with the provisions of §265.104 of this title (relating to Discovery Schedule and Freezing the Process for Hearings Conducted Pursuant to this Subchapter). Without limiting §265.102(a)(2) of this title, based on the executive director's position, the judge may also set a procedural schedule for the executive director to file responses or issues lists in accord with the time periods set out in §265.104 of this title.

§265.104. Discovery Schedule and Freezing the Process for Hearings Conducted Pursuant to this Subchapter.

(a) First discovery period. The first discovery period shall extend 30 to 80 days beginning immediately after the date on which jurisdiction is established, as set out in full in §265.121(a)(1) of this title (relating to Discovery in Hearings Held under Subchapter F).

(b) Protestants' first list of issues. On the last day of the first discovery period, the protestants shall identify issues based on the proposed findings of fact and conclusions of law submitted by the applicant pursuant to §265.103(4) of this title (relating to First Preliminary Hearing), and shall include a statement as to the basis of the protestant's dispute on each issue. In addition, on the last day of the first discovery period, protestants may also raise new issues and proposed findings of fact and conclusions of law.

(c) Second discovery period. The second discovery period shall extend 30 to 80 days beginning immediately after the protestants' list of issues is submitted, as set out in full in §265.121(a)(2) of this title.

(d) Applicant's response. The applicant may respond to issues raised by the protestants no later than the last day of the second discovery period by amending its application and/or proposed findings of fact and conclusions of law at this time, responses being limited to the issues raised by the other parties. Given the nature and degree of amendment, the application may be remanded by the judge to the executive director for further technical review. The application may be subject to additional notice, discovery, and hearing requirements. Subsequent to the time for filing a response pursuant to this subsection, the applicant may not file any amendment to its application except as provided in subsection (g) of this section.

(e) Third discovery period. This period shall extend 20 to 45 days immediately following the conclusion of the second discovery period, and shall be limited in accordance with §265.121(a)(3) of this title.

(f) Protestants' second list of issues. On or before the last day of the third discovery period, protestants are entitled to submit a second list of issues. The protestants' second list of issues shall be limited in scope to the applicant's response as provided in subsection (d) of this section.

(g) Applicant's second response. The applicant may respond to issues raised in the protestants' second list of issues within seven days after the third discovery period. The applicant may be allowed by the judge to respond with a minor amendment and proposed findings of fact and conclusions of law limited to protestants' second list of issues, within seven days of the third discovery period. Issues related to any minor amendment filed by the applicant will be considered by the judge at the prehearing conference for inclusion in the final issue list. Subsequent to the time for filing a response pursuant to this subsection, the applicant may not file any amendment except by agreement of the parties.

(h) Prehearing meeting. A prehearing meeting may be held within three or ten days after the conclusion of the third discovery period, depending upon whether protestants submit a second list of issues. The prehearing meeting is a meeting of the parties without the judge. At this meeting, the parties shall bring for submission to the judge and exchange among parties findings of fact, conclusions of law, stipulations, and exhibits. The parties may have the proceedings recorded. If parties do not convene a meeting pursuant to this subsection, they shall submit to the judge and exchange among parties findings of fact, conclusions of law, stipulations, and exhibits within three or ten working days after the conclusion of the third discovery period.

(i) Prehearing conference and order. Within seven to 14 days after the conclusion of the third discovery period, the judge shall hold a prehearing conference.

(1) All parties shall address the stipulations of the proposed findings of fact and conclusions of law beginning with the applicant. The judge shall determine which issues remain and which findings of fact and conclusions of law have been stipulated. Proposed findings and conclusions shall be treated as follows.

(A) A proposed finding or conclusion stipulated by all parties shall be regarded as established.

(B) A proposed finding or conclusion that has not been stipulated, was on the other parties' issue list, and for which the other parties have a reasonable basis for continuing to contest the issue, may be raised as an issue at the hearing. The reasonableness of the other parties' basis for contesting the issue may receive further inquiry by the judge during the prehearing conference. If the examiner determines that the other parties have not shown a reasonable basis for contesting the finding or conclusion and the executive director did not raise the issue as a basis for permit denial, the judge shall deem the finding or conclusion stipulated.

(2) Exhibits shall be offered and marked and the judge will rule on their admissibility insofar as possible. At hearing all objections to exhibits, which could have been cured if raised in a timely manner, shall be deemed waived if they were not raised during the prehearing conference. Parties wishing to offer exhibits at any time subsequent to the prehearing conference shall notify all other parties as soon as practicable of their intention to seek leave to submit additional exhibits. The judge has the discretion to permit the offer of exhibits not submitted at the prehearing conference for good cause. Good cause includes the need for one party to prepare an exhibit in response to another party's exhibit first seen at the prehearing conference, the need to prepare an exhibit in response to the direct testimony of another party, and other cases which are justified by the party seeking to submit the exhibit.

(3) The judge shall set final case time limitations at or before the prehearing conference.

(4) The judge shall promptly incorporate all rulings and determinations in a written prehearing order.

(j) Failure to comply with schedules. Parties who do not identify issues, make amendments, propose findings of fact and conclusions of law, or submit responses in accord with the schedules established under this subchapter and with the judge's orders implementing it will be regarded as waiving the right to pursue them in an evidentiary hearing conducted pursuant to this subchapter.

(k) Final preparation. Final preparation for hearing shall extend no more than 14 calendar days from the date of the prehearing conference.

(l) Evidentiary hearing. The evidentiary hearing shall extend from five to no more than 25 calendar days in duration

immediately following final preparation for hearing, subject to extension by the judge for good cause. The judge shall set reasonable time limitations for the presentation of the cases of all parties in order to limit the hearing to this time period.

(m) Proposal for decision. The judge shall issue a Proposal for Decision within 20 to 55 days from the conclusion of the evidentiary hearing.

(n) Modification of schedules. The scheduled periods set out in this section are presumptively the time limits, but they may be modified in exceptional circumstances for good cause either by the judge or by agreement of the parties with approval of the judge for good cause. Good cause may include without limitation a finding that the complexity or lack thereof of a proceeding warrants modification of one or more of the scheduled periods.

(o) Motion for rehearing. A party may not raise for the first time on motion for rehearing an issue of fact or law which it has not previously raised as a contested issue unless the issue is related to:

(1) a procedural irregularity; or

(2) changed circumstance, where the issue is material and a party demonstrates good cause for failure to raise it as an issue prior to the prehearing conference. Notwithstanding the foregoing, the commission may exercise its discretion to address an issue not raised by the other parties or remand an issue depending on the evidence in the record.

§265.106. Identification of Witnesses. The judge shall require the parties to exchange lists of witnesses who will be called to testify at the evidentiary hearing. The witness lists shall include the names and addresses of the witnesses and a brief description of the subject matter of their anticipated testimony.

(1) The witness lists of the applicant and the executive director shall be submitted on the day that jurisdiction is established over the proceeding, and may be amended by these parties to address the protestants' and Public Interest Counsel's list of issues.

(2) The witness lists of the protestants and Public Interest Counsel shall be submitted when the protestants and Public Interest Counsel list their issues.

(3) Parties may call rebuttal witnesses not identified on their witness lists only on a showing of good cause and after the parties are afforded a reasonable opportunity to conduct discovery.

(4) The judge may allow a party to amend its witness list upon a showing of good cause. The parties shall have sufficient time, as determined by the judge, to take discovery on newly added witnesses, as authorized in this paragraph or by paragraphs (1)-(3) of this section. There is a continuing obligation to update witness lists as soon as the need for and identity of the new witness is reasonably known.

§265.107. Limiting the Number of Witnesses. At the request of a party or on the judge's own motion, the judge may reduce excessive numbers of witnesses identified pursuant to §265.106 of this title (relating to Identification of Witnesses), as follows.

(1) The examiner may direct the party to do one of the following:

(A) voluntarily reduce its listed witnesses to a specified number; or

(B) provide a summary of the expected testimony of each witness sufficiently specific to show the need for the testimony.

(2) The judge may use the witness lists and any summaries of testimony provided to strike witnesses whose testimony would be unduly repetitious or irrelevant, or in order to render discovery and the hearing process manageable.

(3) If a party fails or refuses to comply with the directions of the judge pursuant to this section, the judge may limit or strike the testimony of witnesses called by the party in any reasonable manner.

§265.108. Rebuttal.

(a) Except as provided by subsection (b) of this section, the applicant, as the party with the burden of proof, is the only party allowed to present a rebuttal case. In all cases, the applicant shall be allowed to close with its rebuttal.

(b) If a party can demonstrate that evidence was presented by another party which could not have been reasonably anticipated at the time that party presented its direct case, the party may present a rebuttal case upon leave of the judge.

(c) Rebuttal cases must be presented within the time limitations set by the judge in the prehearing order.

§265.109. Prefiled Testimony.

(a) Unless otherwise directed by the judge, any party shall have the option to prefile all or any part of the testimony of all or any one of its witnesses. One party's election to prefile shall not control another party's decision regarding whether to prefile testimony. If a party decides to use prefiled testimony, it shall notify the other parties and the judge on or before the last day of the second discovery period, identifying the relevant witness(es).

(b) The judge may direct all parties to prefile their entire direct cases. If all direct testimony is prefiled, whether by judge's order or by agreement of the parties:

(1) no party shall be allowed to go beyond the scope of its prefiled testimony on direct examination; and

(2) the judge may limit or prohibit non-adverse cross-examination if unnecessary to the development of a complete evidentiary record.

(c) The live presentation of prefiled testimony at the evidentiary hearing shall be limited as provided by the judge within the scope of the original prefiled testimony to introductory material, corrections to the prefiled testimony, and a brief summary. The live presentation shall generally last no more than 30 minutes for each prefiled witness.

(d) The judge shall set the deadline for the filing of prefiled testimony at a reasonable time before the evidentiary hearing. The factors the judge shall consider include the complexity of the material, the expected length of the material, the number of witnesses or issues that are to be presented by prefiled testimony, and the acceptable method of presenting objections.

§265.110. Supplementing Prefiled Testimony and Objections.

(a) At the discretion of the judge, prefiled testimony may be supplemented with the introduction of newly discovered evidence, or when it becomes obvious to the witness that the original prefiled testimony was false or incomplete, or when substantive evidence has been excluded as a result of the judge's ruling on an objection to prefiled testimony.

(b) If prefiled testimony is supplemented as provided in this section, the other parties may be afforded the opportunity to supplement their prefiled testimony or prefiled objections. Supplementation by the other parties shall be limited to those subjects which were supplemented by the original witness.

§265.111. Witness Shall Attend Hearing. Every witness summoned in any hearing shall attend the hearing from day to day, and from place to place, until discharged by the judge or party summoning such witness. If any witness after being duly subpoenaed fails to attend, such witness may be subject to any remedies available through district court to the party summoning the witness.

§265.112. Evidence.

(a) In contested cases, irrelevant, immaterial, or unduly repetitious evidence will be excluded.

(b) Whenever necessary to ascertain facts not reasonably susceptible of proof under the Texas Rules of Civil Evidence, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.

§265.113. Additional Testimony. When it appears to be necessary to the administration of justice, the judge may permit additional evidence to be offered at any time.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508185 Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: August 30, 1995

For further information, please call: (512) 239-1966



Discovery

• 30 TAC §§265.121-265.134

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new sections implement the Texas Water Code, §§5.103, 5.105, and 26. 011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017.

§265.121. Discovery in Hearings Held under Subchapter F.

(a) Except when otherwise ordered by the judge, discovery in hearings held under this subchapter will be separated by time and manner into three distinct periods. Within the time frame set for each period in this subsection, the judge shall have the discretion to set the duration of each discovery period.

(1) First discovery period. The first discovery period shall extend 30 to 80 days from the date that jurisdiction is taken by SOAH. This period is reserved for the protestants' discovery from the applicant. The applicant may conduct limited discovery related to the nature of each protestant (including, for example, the type and date of organization, purpose, and number of members) and whether the source of funding is by a competitor of the applicant.

(2) Second discovery period. The second discovery period shall extend 30 to 80 days from the end of the first discovery period. Discovery during this period shall consist of the following:

(A) the protestant may discover from the staff;

(B) the applicant may discover from the protestant and the staff; the number of interrogatories available to the applicant during the second discovery period shall be reduced by the number of interrogatories submitted during the first discovery period; and

(C) the staff may discover from the protestant and the applicant.

(3) Third discovery period. The third discovery period shall extend 20 to 45 days from the end of the second discovery period. During this period, any discovery by the protestant or the applicant from the staff shall be limited to the staff's position regarding the applicant's response, and the staff's position regarding the protestants' issues. Discovery from the applicant and the protestant shall be limited to the scope of the listed issues as provided in §265.104(b) of this title (relating to Discovery Schedule) and the applicant's response as provided in §265.104(d) of this title. The judge shall have discretion to limit or expand discovery in this period further in the interest of fairness. The judge shall identify which of the time periods listed in paragraphs (1) or (2) of this subsection applies to discovery for those parties not fitting into the categories discussed as appropriate.

(b) Whenever discovery is sought of the staff of the executive director in any of the discovery periods, it shall be in accord with the following provisions.

(1) Beginning at the time jurisdiction is taken, all parties shall have access to all unprivileged documents in the agency's files without the necessity of submitting an Open Records request or a Request for Production. It shall be the agency's responsibility to ensure that documents protected from discovery as provided for under law are removed from agency public files and that all assertions of privilege by the executive director relating to those agency files are made at the time jurisdiction is taken or other timely manner.

(2) The executive director shall answer Interrogatories and Requests for Production during the second and third discovery periods.

(3) The executive director shall be subject to depositions during the second and third discovery periods under the following conditions.

(A) Each deposition shall be limited to a total of four hours.

(B) Any party seeking to depose a staff witness shall attempt to set the time and date of the deposition through agreement with the staff.

(C) The staff shall not be required to submit to a date for the deposition less than ten days from the date of the request.

(D) The staff shall not be required to submit to a deposition any later than a date 20 days prior to the prehearing conference.

(E) All depositions of staff witnesses shall be taken in Austin in one of the commission office buildings.

(F) All of these requirements may be waived by agreement of the staff or by the judge on a showing of good cause.

(c) Voluntary discovery may be sought at any time by any party.

§265.122. Forms and Scope of Discovery; Protective Orders; Supplementation of Responses.

(a) Forms of discovery. For purposes of hearings held under this subchapter, all forms of discovery are deemed compellable. Permissible forms of discovery for hearings under this subchapter include:

(1) oral or written depositions of any party or nonparty;

(2) written interrogatories;

(3) requests of a party for admissions of facts and the genuineness or identity of documents or things;

(4) requests and motions for production, examination, and copying of documents or other tangible materials; and

(5) requests and motions for entry upon and examination of real property.

(b) Scope of discovery. Except as provided in subsection (c) of this section, unless otherwise limited by order of the judge in accordance with these rules, the scope of discovery is as follows.

(1) In general. Parties may obtain discovery regarding any matter which is relevant to the subject matter in the pending proceeding. It is not grounds for objection that the information sought will be inadmissible at hearing if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence. It is also not grounds for objection that an interrogatory propounded pursuant to §265.125 of this title (relating to Interrogatories to Parties) involves an opinion or contention that relates to fact or the application of law to fact, but the judge may order that such an interrogatory not be answered until after designated discovery has been completed or until a prehearing conference or other later time. It is also not grounds for objection that a request for admission propounded pursuant to §265.126 of this title (relating to Requests for Admissions) relates to statements or opinions of fact or of the application of law to fact or mixed questions of law and fact or that the documents referred to in a request may not be admissible at trial.

(2) Documents and tangible things. A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of any and all documents (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, and any other data compilations from which information can be obtained and translated, if necessary, by the person from whom production is sought, into reasonably usable form) and any other tangible things which constitute or contain matters relevant to the subject matter in the proceeding. A person is not required to produce a document or tangible thing unless it is within the person's possession, custody, or control. Possession, custody, or control includes constructive possession such that the person need not have actual physical possession. As long as the person has a superior right to compel the production from a third party (including an agency, authority, or representative), the person has possession, custody, or control. The executive director and the public interest counsel of the commission are not required to amass, assemble, collect, compile, gather, and/or sort the materials described in this paragraph if those materials are readily available in the commission's records.

(3) Land.

(A) During the appropriate discovery period, a party may obtain a right of entry upon designated land or other property in the possession or control of a person upon whom a request or motion to produce is served when the designated land or other property is relevant to the application which is the subject of the hearing for the purpose of inspection and measuring, surveying, photographing, testing or sampling the property, or any designated object or operation thereon. This provision is not intended to affect any statutory rights authorizing access. If a person has a superior right to compel a third person to permit entry, the person with the right has possession or control. Upon request of the controller or possessor of the land, the judge may order that entry upon the land be subject to any existing safety regulations or protections of trade secrets or processes, and may impose other reasonable restrictions on this right as necessary. Unless otherwise ordered by the judge, the parties shall enter into a standard Agreement for Entry Upon Land which contains the following:

(i) a release and indemnification provision;

(ii) allowance for all parties to split samples;

(iii) a provision that the controller of the land shall allow entry within a reasonable period of time after the request; and

(iv) a provision that the controller of the land shall have the right to accompany the party entering the property.

(B) The parties may request and the judge will rule on whether a party intending to take samples shall be required to reveal the types of samples and methodology and parameters of tests performed on those samples prior to or subsequent to entry upon land.

(4) Potential parties and witnesses. A party may obtain discovery of the identity and location (name, address, and telephone number) of any potential party and of persons having knowledge of relevant facts. A person has knowledge of relevant facts when he or she has or may have knowledge of any discoverable matter. The information need not be admissible in order to satisfy the requirements of this subsection and personal knowledge is not required.

(5) Experts and reports of experts. Discovery of the facts known, mental impressions, and opinions of experts, otherwise discoverable because the information is relevant to the subject matter in the pending proceeding, but which were acquired or developed in anticipation of trial and the discovery of the identity of experts from whom the information may be learned may be obtained only as follows.

(A) General. A party may obtain discovery of the identity and location (name, address, and telephone number) of an expert who may be called as an expert witness, the subject matter of which the witness is expected to testify, the mental impressions and opinions held by the expert, and the facts known to the expert (regardless of when the factual information was acquired) which relate to or form the basis of the mental impressions and opinions held by the expert. The disclosure of the same information concerning an expert used for consultation and who is not expected to be called as an expert witness at trial is required if the consulting expert's opinion or impressions have been reviewed by a testifying expert.

(B) Reports. A party may also obtain discovery of documents and tangible things, including all tangible reports, physical models, compilations of data, and other materials prepared by an expert or for an expert in anticipation of the expert's hearing and deposition testimony. The disclosure of material prepared by an expert used for consultation is required even if it was prepared in anticipation of trial if the consulting expert's opinions or impressions have been reviewed by a testifying expert.

(C) Determination of status. The judge has discretion to compel a party to make the determination and disclosure of whether an expert may be called to testify within a reasonable and specific time.

(D) Reduction of report to tangible form. If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert who will be called as an expert witness have not been recorded and reduced to tangible form, the judge may order these matters reduced to tangible form and produced within a reasonable time.

(6) Statements. Any person, whether or not a party, shall be entitled to obtain, upon written request, his own statement previously made concerning the matter which is the subject of the hearing, or its subject matter, which is in the possession, custody, or control of any party. If the request is refused, the person may move for a judge's order under §265.141 of this title (relating to Abuse of Discovery; Sanctions). For the purpose of this paragraph, a statement previously made is:

(A) a written statement signed or otherwise adopted or approved by the person making it; and

(B) a stenographic, mechanical, electrical, or other type of recording, or any transcription thereof which is a substantially verbatim recital of a statement made by the person and contemporaneously recorded.

(c) Exemptions. The following matters are protected from disclosure by privilege.

(1) Work product. The work product of an attorney, subject to the exceptions of Texas Rules of Civil Evidence Rule 503(d), which shall govern as to work product as well as to attorney-client privilege;

(2) Experts. The identity, mental impressions, and opinions of an expert who has been informally consulted or of an expert who has been retained or specially employed by another party in anticipation of, or preparation for hearing, or any documents or tangible things containing such information if the expert will not be called as an expert witness, except that the identity, mental impressions, and opinions of an expert who will not be called to testify as an expert and any documents or tangible things containing such impressions and opinions are discoverable if the consulting expert's opinion or impressions have been reviewed by a testifying expert;

(3) Written statements. The written statements of potential witnesses and parties, when made in connection with, or in anticipation of, the prosecution, investigation, defense, or protest of the particular application or petition that is the subject of the proceeding, except that persons, whether parties or not, shall be entitled to obtain, upon request, copies of statements they have previously made concerning the application or petition or its subject matter and which are in the possession, custody, or control of any party. The term "written statements" includes:

(A) a written statement signed or otherwise adopted or approved by the person making it; and

(B) a stenographic, mechanical, electrical, or other type of recording, or any transcription thereof which is a substantially verbatim recital of a statement made by the person and contemporaneously recorded. For purposes of this paragraph, a photograph is not a statement.

(4) Party communications. Communications between agents or representatives or the employees of a party to the hearing or communications between a party and that party's agents, representatives, or employees, when made in connection with the prosecution, investigation, defense, or protest of the particular application or petition that is the subject of the particular proceeding, or in anticipation of the prosecution, protest, or defense of any claims made in a part of the pending hearing. This exemption does not include communications prepared by or for experts that are otherwise discoverable. For the purposes of this paragraph, a photograph is not a communication.

(5) Other privileged information; any matter protected from disclosure by any other privilege. Upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means, a party may obtain discovery of the materials otherwise exempt from discovery by paragraphs (3) and (4) of this subsection. Nothing in this subsection shall be construed to render non-discoverable the identity and location of any potential party, any person having knowledge or relevant facts, any expert who is expected to be called as a witness during trial, or of any consulting expert whose opinions or impressions have been reviewed by a testifying expert.

(d) Presentation of objections. Either an objection, a motion to compel, or a motion for protective order made by a party to discovery shall preserve that objection without further support or action by the party unless the objection or motion is set for special hearing and determined by the judge. At any reasonable time, any party may request a special hearing on any objection, motion to compel, or motion for protective order. The failure of a party to obtain a ruling prior to trial on any objection to discovery, motion to compel, or motion for protective order does not waive such objection or motion. In objecting to an appropriate request within the scope of subsection (b) of this section, a party seeking to exclude any matter from discovery on the basis of an exemption or immunity from discovery must specifically plead the particular exemption or immunity from discovery relied upon and at or prior to any special hearing, shall produce any evidence necessary to support such claim either in the form of affidavits served at least seven days before the special hearing or by testimony. If the judge determines that an in camera inspection and review by the judge of some or all of the requested discovery is necessary, the objecting party must segregate and produce the discovery to the judge in a sealed wrapper or by answers made in camera to deposition questions, to be transcribed and sealed in event the objection is sustained. When a party seeks to exclude documents from discovery and the basis for objection is undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights rather than a specific immunity or exemption, it is not necessary for the judge to conduct an inspection and review of the particular discovery before ruling on the objection. After the date on which answers are to be served, objections are waived unless an extension of time has been obtained by agreement or order of the judge or good cause is shown for the failure to object within such period.

(e) Protective orders. On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the judge may make any order in the interests of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. Insofar as the applicant is claiming confidentiality of any part of the permit application, the applicant shall request a protective order at the time that jurisdiction is taken. All other claims of confidentiality shall be handled as they arise, according to the timelines established under subsection (d) of this section. Unless amended by the judge, a standard order developed by SOAH shall be used. Motions or responses made under this section may have exhibits attached including affidavits, discovery pleadings, or any other documents. Specifically, the judge's authority as to such orders extends to, but is not limited by, any of the following:

(1) ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified;

(2) ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the judge.

(f) Duty to supplement. A party who has responded to a request for discovery that was correct and complete when made is under no duty to supplement his response to include information thereafter acquired, except the following shall be supplemented not less than 30 days prior to trial unless the judge finds that a good cause exists for permitting or requiring later supplementation.

(1) A party is under a duty reasonably to supplement his response if he obtains information upon the basis of which:

(A) he knows that the response was incomplete and incorrect when made;

(B) he knows that the response, though correct and complete when made, is no longer true and complete and the circumstances are such that failure to amend the answer is in substance misleading.

(2) If the party expects to call an expert witness when the identity or the subject matter of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the name,

address, and telephone number of the expert witness and the substance of the testimony concerning which the expert witness is expected to testify, as soon as is practical, but in no event less than 30 days prior to trial, except on leave of the judge.

(3) In addition, a duty to supplement answers may be imposed by order of the judge or agreement of the parties, or at any time prior to trial, through new requests for supplementation or prior answers.

(g) Discovery disputes.

(1) Discovery motions. All discovery motions shall contain a certificate by the party filing same that efforts to resolve the discovery dispute without the necessity of judge intervention have been attempted and failed.

(2) Motions to compel and for protective orders. Whenever a discovery dispute arises, the disputing party shall file a motion to compel or for protective order. Any response shall be filed within five working days of receipt. The response may be a showing of good cause for extra time to respond. The judge shall rule within five working days of the response.

(3) Finality of judge's ruling. No discovery issues shall be certified to the commission.

§265.123. Stipulations Regarding Discovery Procedure. Unless the judge orders otherwise, the parties may, by written agreement:

(1) provide that depositions be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions; and

(2) modify the procedures provided by these rules for other methods of discovery. An agreement affecting a deposition upon oral examination is enforceable if the agreement is recorded in the deposition transcript.

§265.124. Discovery and Production of Documents and Things for Inspection, Copying, or Photography.

(a) Any party may serve upon any other party a request:

(1) to produce and permit the party making the request or someone acting on his behalf, to inspect, sample, test, photograph, and/or copy, any designated documents or tangible things which constitute or contain matters within the scope of and subject to the limitations of §265.122 of this title (relating to Forms and Scope of Discovery; Protective Orders; Supplementation of Responses) which are in the possession, custody, or control of the party upon whom the request is served; or

(2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation within the scope of §265.122 of this title.

(b) The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner for making the inspection and performing the related acts.

(c) The party upon whom the request is served shall make the documents available in Texas and shall serve a written response which shall state, with respect to each item or category of items, that inspection or other requested action will be permitted as requested, and he shall thereafter comply with the request, except only to the extent that he makes objections in writing to particular items, categories or items, stating specific reasons why such discovery should not be allowed.

(d) A true copy of the request and response, together with proof of the service thereof on all parties, shall be filed promptly with the judge by the party making it, except that any documents produced in response to a request need not be filed.

(e) A party who produces documents for inspection shall produce them as they are kept in the usual course of business, or shall organize and label them to correspond with the categories in the request. The judge may require all documents to be produced in usable form, which may require production of computer disks. The judge may also require a party to provide reasonable indices to its documents or computerized information produced in response to discovery requests, and to maintain a log of documents produced.

(f) Testing or examination shall not extend to destruction or material alteration of an article without notice, hearing, and prior approval by the judge.

(g) In order to avoid unnecessary duplication, the judge shall, whenever convenient, group parties for document production.

(h) The judge may determine on a case-by-case basis a reasonable allocation of costs associated with the production.

(i) The request shall be served upon every party to the hearing. The party upon whom the request is served shall serve a written response and objections, if any, within 21 days after the service of the request. The time for making a response may be shortened or lengthened by the judge.

(j) If objection is made to a request or to a response, either party may file a motion and seek relief pursuant to §265.122 of this title or §265.141 of this title (relating to Abuse of Discovery; Sanctions).

§265.125. Interrogatories to Parties.

(a) Any party may serve upon any other party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation, or a partnership or association, or governmental agency, by an officer or agent who shall furnish such information as is available to the party. Upon request of the judge, a true copy of the interrogatories and the written answers or objections, together with proof of service, shall be filed promptly with the judge by the party making them, except that when an interrogatory is answered by reference as permitted in paragraph (2) of this subsection, the records so referenced need not be filed.

(1) Service. When a party is represented by an attorney, service of interrogatories and answers to interrogatories shall be made on the attorney unless service upon the party himself is ordered by the judge. Copies of all interrogatories and answers to interrogatories shall be sent to every other party.

(2) Scope. Interrogatories may relate to any matters which can be inquired into under §265.122 of this title (relating to Forms and Scope of Discovery; Protective Orders; Supplementation of Responses), but the answers, subject to any objections as to admissibility, may be used only against the party answering the interrogatories. Where the answer to an interrogatory may be derived or ascertained from public records, or from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and, if applicable, to afford the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. The specification of records provided shall include sufficient detail to permit the interrogating party to locate and identify as readily as can the party served, the records from which the answers may be ascertained.

(3) Discovery periods. The availability of interrogatories shall be limited according to the discovery period, as described in §265.121 of this title (relating

to Discovery in Hearings held under Subchapter F).

(A) In the first or second discovery period each party shall be allowed to serve one set of interrogatories, as permitted in Rule 168(5) of the Texas Rules of Civil Procedure. If the applicant has used interrogatories during the first discovery period, the interrogatories shall be considered as part of the total number of interrogatories the applicant is allowed during the second discovery period.

(B) In the third discovery period, each party shall also be allowed a second set of 20 interrogatories.

(b) Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the judge, on motion of the deponent or the party interrogated, may make such protective order as justice requires.

(c) Unless other time limits are set by the judge or by agreement of the parties, the party upon whom the interrogatories have been served shall serve answers upon the party submitting the interrogatories within the time specified by the party serving the interrogatories, which specified time shall not be less than 21 days after the service of the interrogatories. The judge may enlarge or shorten the time for serving answers or objections.

(d) The number of questions, including subsections, in a set of interrogatories served during the first or second discovery period shall be limited so as not to require more than 30 answers. In the second set of interrogatories allowed in the third discovery period, the interrogatories shall be limited so as not to require more than 20 answers. Each part of a compound question will be considered a separate question. No more than two sets of interrogatories may be served by a party to any other party, except by agreement or as may be permitted by the judge upon a showing of good cause. The judge may reduce or enlarge the number of interrogatories or sets of interrogatories if justice so requires. Furthermore, the judge may group parties specifically for discovery purposes, in order to limit the number of questions that must be answered by any party. In the event that parties are grouped, the judge may increase the allowable number of interrogatories beyond that specified in Rule 168(5) of the Texas Rules of Civil Procedure to the extent fairness requires. The provisions of §265.122 of this title are applicable for the protection of the party from whom answers to interrogatories are sought under this section.

(e) The interrogatories shall be answered separately and fully in writing under oath. Answers to interrogatories shall be preceded by the question or interrogatory to which the answer pertains. True copies of the interrogatories, and answers and objections thereto, shall be served on all parties or their attorneys, and copies thereof shall be provided to any additional parties upon request. The answers shall be signed and verified by the person making them and the provisions of §265.63(c) of this title (relating to Affidavit by Representative) shall not apply.

(f) A party may serve written objections to specific interrogatories or portions thereof. Objections must be served within 14 days of receiving the interrogatories. Answers only to those interrogatories, or portions thereof, to which objection is made, shall be deferred until the objections are ruled upon and for such additional time thereafter as the judge may direct.

§265.126. Requests for Admissions.

(a) Request for admission.

(1) At any time after jurisdiction over the application or petition has been taken by the judge except as provided in §265.142 of this title (relating to Sanctions for Failure to Serve or Deliver Copy of Pleadings and Motions), a party may serve upon any other party a written request for the admission, for purposes of the pending proceeding only, of the truth of any matters within the scope of §265.122 of this title (relating to Forms and Scope of Discovery; Protective Orders; Supplementation of Responses) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Except by agreement of the parties or upon leave of the judge, a party may serve only one set of admissions upon any other party.

(2) Copies of the documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection or copying. Whenever a party is represented by an attorney of record, service for a request for admissions shall be made on his attorney unless service on the party himself is ordered by the judge. Upon request of the judge, a true copy of a request for admissions or of a written answer or objection, together with proof of the service thereof, shall be promptly filed with the judge by the party making it.

(3) Each matter of which an admission is requested shall be separately set forth. The judge may specify the dates by which the admission may be served, answered, specifically denied, or objected to as provided in this section. The matter is admitted without necessity of a judge's order unless, within 14 days after service of the request, or within such time as the judge may allow, or as otherwise agreed by the parties, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney.

(4) If objection to a requested admission is made, the reason therefore shall be stated.

(5) The answer to a requested admission shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder.

(6) An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny.

(7) A party who considers that a matter of which an admission is requested presents a genuine issue for hearing may not, on that ground alone, object to the request; he may, subject to the provisions of §265.141 of this title (relating to Abuse of Discovery; Sanctions), deny the matter or set forth reasons why he cannot admit or deny it.

(b) Effect of admissions.

(1) Any matter admitted under this section is conclusively established as to the party making the admission unless the judge, on motion and for good cause shown, permits withdrawal or amendment of the admission.

(2) Subject to the provisions of §265.122 of this title governing duty to supplement discovery responses, the judge may permit withdrawal or amendment of responses and deemed admissions upon a showing of good cause for such withdrawal or amendment if the judge finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the proceeding will be subserved thereby.

§265.127. Depositions.

(a) Type of deposition. The types of depositions allowed shall include those under of the Texas Rules of Civil Procedure. The deposing party shall have the

option of selecting the type of deposition, but in all cases a recording shall be made. When a party seeks a deposition that is not transcribed by a court reporter, any other party may, at its own cost, provide for a court reporter.

(b) Deposition witnesses. The judge may order that all deposition witnesses be made available in Texas. At the time of deposition the witness shall be prepared to testify about those issues and opinions for which the witness is identified.

§265.128. Issuance of Subpoena or Commission to Take Deposition. A subpoena or commission to take deposition shall be issued under §265.84 of this title (relating to Issuance of Subpoena or Commission to take Deposition).

§265.129. Sanctions for Failure to Comply with Subpoena or Commission to Take Deposition. If a person fails to comply with a subpoena or commission to take deposition, the commission or the party requesting the subpoena or commission may seek enforcement under the APA, §2001.201.

§265.130. Non-Stenographic Recording; Deposition by Telephone.

(a) Non-stenographic recording. Any party may cause the testimony and other available evidence at a deposition upon oral examination to be recorded by other than stenographic means, including videotape recordings, upon leave of the judge, and the non-stenographic recording may be presented at trial in lieu of reading from a stenographic transcription of the deposition, subject to the following.

(1) Any party intending to make a non-stenographic recording shall give five day's of notice to all other parties by mail, return receipt requested, and shall specify in said notice the type of non-stenographic recording which will be used.

(2) After notice is given, any party may make a motion for relief under §265.122 of this title (relating to Forms and Scope of Discovery; Protective Orders; Supplementation of Responses). If a special hearing session is not held prior to the taking of the deposition, the non-stenographic recording shall be made subject to the judge's ruling at a later time.

(3) Any party shall have reasonable access to the original recording and may obtain a duplicate copy at his own expense.

(4) The expense of a non-stenographic recording shall not be taxed as costs, unless before the deposition is taken, the parties so agree, or the judge so orders, for good cause shown, on motion and notice.

(5) The non-stenographic recording shall not dispense with the requirement of a stenographic transcription unless the judge shall so order on motion and notice before the deposition is taken and such order shall make such provision concerning the manner of taking, preserving, and filing the non-stenographic recording as may be necessary to assure that the recorded testimony will be intelligible, accurate, and trustworthy. Such order shall not prevent any party from having stenographic transcription made at his own expense. In the event of an appeal, the non-stenographic recording shall be reduced to writing at the expense of the party making the recording.

(b) Deposition by telephone. The parties may stipulate in writing, or the judge may, upon motion, order that a deposition be taken by telephone. For the purposes of this section and §265.12(a) of this title (relating to Issuance of Subpoena or Commission to Take Deposition) and §265.141 of this title (relating to Abuse of Discovery; Sanctions), a deposition taken by telephone is taken in the district and at the place where the deponent is to answer questions propounded to him.

§265.131. Failure of Party or Witness to Attend or to Serve Subpoena; Expenses.

(a) Failure of party giving notice to attend. If the party giving the notice of the taking of an oral deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the judge may recommend that the commission order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.

(b) Failure of witness to attend. If a party gives notice of the taking of an oral deposition of a witness and the witness does not attend because of the fault of the party giving the notice, if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the judge may recommend that the commission order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.

§265.132. Deposition Examination, Cross-Examination, and Objections.

(a) Written cross-questions on oral examination. At any time before the expiration of ten days from the date of the service of the notice to take oral deposition, any party, in lieu of participating in the oral examination may serve written questions on the party proposing to take the deposition, who shall cause them to be transmitted to the officer authorized to take the deposition, who shall propound them to the witness and record the answers verbatim.

(b) Oath. Every person whose deposition is taken upon oral examination shall be first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth.

(c) Examination. The witness shall be carefully examined; his testimony shall be recorded at the time it is given and thereafter transcribed by the officer taking the deposition or by some person under his personal supervision.

(d) Objections to testimony. The officer taking the oral deposition shall not sustain objections made to any of the testimony or fail to record the testimony of the witness because an objection is made by any of the parties or attorneys engaged in taking the testimony. Any objections made when the deposition is taken shall be recorded with the testimony and reserved for the action of the judge before whom the cause is pending. Absent express agreement recorded in the deposition to the contrary:

(1) objections to the form of questions or the non-responsiveness of answers are waived if not made at the taking of an oral deposition; and

(2) except as provided in paragraph (1) of this subsection, or unless otherwise provided by agreement of the parties recorded by the officer in the deposition transcript, the judge shall not be confined to objections made at the taking of testimony.

§265.133. Submission to Witness; Changes; Signing.

(a) When the testimony is fully transcribed, the deposition officer shall transmit or provide the original deposition transcript to the witness, or if the witness is a party with an attorney of record, to the attorney of record, for examination and signature by the witness before any officer authorized to administer an oath, unless such examination and signature are waived by the witness and by the parties.

(b) No erasures or obliterations of any kind are to be made to the original testimony as transcribed by the deposition officer. Any changes in form or substance which the witness desires to make shall be furnished to the deposition officer by the witness, together with a statement of the reasons given by the witness for making such changes. The changes and the statement of the reasons for the changes shall be attached to the deposition by the depositions officer. The deposition transcript and any changes shall then be subscribed by the witness under oath, before any officer authorized to administer an oath, unless the parties by stipulation waive the signing or

the witness is ill or cannot be found or refuses to sign.

(c) If the witness does not sign and return the original deposition transcript within 20 days of its submission to him or his counsel of record, the deposition officer shall sign a true copy of the transcript and state on the record the fact of the waiver of examination and signature or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor. The copy of the deposition transcript may then be used as fully as though signed, unless on motion to suppress, the judge determines that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

§265.134. Use of Deposition Transcripts in Commission Proceedings.

(a) Use of deposition transcript in same proceeding.

(1) Use of depositions. At trial or upon a hearing on a motion, any part or all of a deposition taken in the same proceeding, insofar as admissible under the Texas Rules of Civil Evidence, may be used by any person for any purpose against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof. Further, the Texas Rules of Civil Evidence shall be applied to each question and answer as though the witness were then present and testifying. Depositions shall include the original transcripts or any certified copies thereof. Unavailability of the deponent is not a requirement for admissibility.

(2) Included within meaning of "same proceeding." Substitution of parties pursuant to these rules does not affect the right to use depositions previously taken.

(3) Parties joined after deposition taken. If one becomes a party after a deposition is taken and has an interest similar to that of any party described in paragraphs (1) or (2) of this subsection, the deposition is admissible against him if he has had a reasonable opportunity, after becoming a party, to redepose the deponent, and has failed to exercise that opportunity. Any existing deposition may be used by parties joined after the deposition is taken for any purpose against any party in accordance with paragraphs (1) and (2) of this subsection.

(b) Use of deposition transcript taken in different proceeding. At trial or upon the hearing of a motion or an interlocutory proceeding before a judge, any part or all of a deposition taken in a different proceeding may be used subject to the provisions and requirements of the Texas Rules of Civil Evidence. Further, the Texas Rules of Civil Evidence shall be applied to each question and answer as though the witness was then present and testifying.

(c) Motion to suppress. When a deposition transcript has been delivered by the deposition officer and notice of delivery given at least one entire day before the day on which the case is called for trial, errors and irregularities in the notice of delivery, and errors in the manner in which the testimony is transcribed or the deposition transcript is prepared, signed, certified, sealed, endorsed, delivered, or otherwise dealt with by the deposition officer are waived, unless a motion to suppress the deposition transcript or some part thereof is made and notice of the written objections made in the motion is given to every other party before trial commences.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508186 Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: August 30, 1995

For further information, please call: (512) 239-1966

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Sanctions

• 30 TAC §§265.141-265.145

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new sections implement the Texas Water Code, §§5.103, 5.105, and 26. 011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017.

§265.141. Abuse of Discovery; Sanctions.

(a) Motion for sanctions or order compelling discovery. A party, upon reasonable notice to all other parties and to all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows.

(1) Motion. According to subparagraphs (A)-(D) of this paragraph, the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the judge for imposition of any sanction authorized by subsection (b)(2) of this section without the necessity of first having obtained a judge's order compelling such discovery:

(A) if a party or other deponent which is a corporation or other entity fails to designate the persons or persons to testify on the deponent's behalf, and, if the deponent so desires, the matters on which each person designated will testify; or

(B) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:

(i) to appear before the officer who is to take his deposition, after being served with a proper notice; or

(ii) to answer a question propounded or submitted upon oral examination or upon written questions; or

(C) if a party fails:

(i) to serve answers or objections to interrogatories after proper service of the interrogatories; or

(ii) to answer an interrogatory; or

(iii) to serve a written response to a request for inspection after proper service of the request; or

(iv) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection;

(D) if a party fails to comply with any person's written request for the person's own statement.

(2) Depositions upon oral examination. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

(3) Protective orders. If the judge denies the motion in whole or in part, the judge may make an appropriate protective order.

(4) Material misrepresentations. Material misrepresentations, including misleading statements or omissions of material information in any application material, or in response to a discovery request or in testimony, constitutes a violation and may be punished by the judge with the full range of sanctions, including a recommendation of denial, of the relief requested in the hearing by the responsible party.

(5) Evasive or incomplete answer. For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

(b) Failure to comply with order or with discovery requests.

(1) Sanctions by court. If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a judge, the failure may be appealed to district court by the movant as provided by law.

(2) Sanctions by judge and commission. If a party or an officer, director, or managing agent of a party or a person designated under subsection (a)(1) of this section to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under subsection (a) of this section, the judge may impose any of the authorized sanctions or he or she may, after notice and hearing, make such orders, or recommendations to the commission, in regard to the failure as are just, and among others, the following:

(A) a judge's order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(B) a judge's order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(C) a judge's order refusing to allow the disobedient party to support or oppose designated claims, or prohibiting him or her from introducing designated matters in evidence; and

(D) a judge's order striking out pleadings, or parts thereof, or staying further proceedings until the order is obeyed. The commission may issue an order dismissing, with or without prejudice, the application, petition, or proceedings or any part thereof.

(c) Abuse of discovery process in seeking, making, or resisting discovery. If the judge finds a party is abusing the discovery process in seeking, making, or resisting discovery or if the judge finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for the purposes of delay, then the judge, or the commission may, after notice and hearing, impose any authorized sanction or recommend that the commission dismiss the proceedings. Such order of sanction shall be subject to review on appeal when the commission's order becomes final.

(d) Failure to comply with requests for admissions.

(1) Deemed admission. Each matter of which an admission is requested shall be deemed admitted unless, within the time provided for in §265.126 of this title (relating to Requests for Admission), the party to whom the request is directed serves upon the party requesting the admissions a sufficient written answer or objection in compliance with the requirements of §265.126 of this title, addressed to each matter of which an admission is requested. For purposes of this section, an evasive or incomplete answer may be treated as a failure to answer.

(2) Motion. The party who has requested the admission may move to determine the sufficiency of the answers or objections. Unless the judge determines that an objection is justified, the judge may order that an answer be served. If the judge determines that an answer does not comply with the requirements of §265.126 of this title, the judge may order either that the matter be admitted or that an amended answer be served.

(e) Failure to respond to or supplement discovery. A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the judge finds that good cause, sufficient to require admission, exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

§265.142. Sanctions for Failure to Serve or Deliver Copy of Pleadings and Motions. If any party fails to serve on or deliver to the other parties a copy of any pleading, plea, motion, prefiled testimony or prefiled objections, or other application for a judge's order, the judge may, in his discretion, on notice and hearing:

(1) order all or any part of such document stricken; or

(2) direct that such party shall not be permitted to present grounds for relief, protest, or defense contained therein.

§265.143. Failure to Identify Witnesses. A party shall be barred from calling a witness who has not been identified pursuant to §265. 106 of this title (relating to Identification of Witnesses).

§265.144. Failure to Identify Testimony. Absent good cause, a witness shall be barred from testifying about matters which were not identified by the sponsoring party in its witness list and amendments thereto, and/or in that witness' prefiled testimony, when election to prefile testimony has been noticed by the sponsoring party or when prefiled testimony has been directed by the judge.

§265.145. Barring Exhibits. Absent good cause under §265. 104(i)(2) of this title (relating to Discovery Schedule and Freezing the Process for Hearings Conducted Pursuant to this Subchapter), an exhibit shall not be accepted into the record which was not offered at the prehearing conference.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508187 Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: August 30, 1995

For further information, please call: (512) 239-1966

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Subchapter G. Post Hearing Procedures

• 30 TAC §§265.151-265.166

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new sections implement the Texas Water Code, §§5.103, 5.105, and 26. 011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017.

§265.151. Pleadings Prior to Proposal for Decision. Before the proposal for decision is issued, briefs or proposed findings of fact may be filed only when permitted or requested by the judge.

§265.152. Judge's Proposal for Decision.

(a) Judge's Proposal for Decision. After closing the hearing record, the judge will file a written proposal for decision with the chief clerk within 30 working days and will send a copy by certified mail to each party. If the judge is unable to file the proposal within the 30 days, the judge shall request an extension from the commission by filing a request with the chief clerk. Neither the judge's failure to request an extension, the commission's failure to grant

the requested extension, nor the judge's failure to file the proposal within the 30-day or extended period shall in any way affect the validity of the judge's proposal for decision or the commission's jurisdiction, consideration, or action relative to the proposal for decision.

(b) Judge's proposal for decision: adverse to a party. A written proposal for decision shall be filed by the judge who conducted the hearing or by a substitute judge who has read the record. If the proposal for decision is adverse to a party to the proceeding, it shall contain a statement of the reasons for the proposal as well as findings of fact and conclusions of law which support the proposal. If any party has filed proposed findings of fact upon request and by leave of the judge in accordance with §265.73 of this title (relating to Submittal of Findings of Fact and Conclusions of Law), the judge shall include with his proposal for decision recommended rulings on all findings of fact so proposed. Where more than one judge has been assigned to hear a particular proceeding, the presiding judge will issue the proposal for decision and the other assigned judge or judges may file comments thereto.

(c) Judge's proposal for decision: not adverse to any party. If the proposal for decision is not adverse to any party to the proceeding, the judge may informally dispose of the matter by proposing to the commission an order which need not contain findings of fact, conclusions of law, or reasons for the proposal. If the proposal for decision is not adverse to any party and a permit is to be issued, the judge need not propose an order to the commission.

§265.153. Waiver of Right to Review Judge's Proposal. Any party may waive the right to review and comment upon the judge's proposal for decision. The waiver shall be either in writing or stated on the record at the hearing.

§265.154. Pleadings Following Proposal for Decision.

(a) Pleadings. Unless right of review has been waived, any adversely affected party may, within ten days after the date of issuance of the proposal for decision, file exceptions or briefs. Proposed findings of fact may be filed when permitted or requested by the commission. Any replies to exceptions, briefs, or proposed findings of fact shall be filed within 20 days after the date of issuance of the proposal for decision.

(b) Amended and supplemental pleadings. Unless otherwise provided in these sections, the Texas Rules of Civil Procedure pertaining to amended and supplemental pleadings in trials before the district courts of this state shall apply in hearings before the commission.

(c) Motions. A motion, unless made during a hearing, shall be made in writing, shall set forth the relief or order sought, and shall be timely filed with the chief clerk. Any reply to the motion shall be timely filed with the chief clerk. Unless otherwise directed by the commission, motions based on matters which do not appear of record must be supported by affidavit. When necessary in the judgment of the commission, a hearing will be held to consider any motion.

(d) Change of filing deadlines. The general counsel may change the deadlines to file pleadings following the proposal for decision. A party requesting a change must file a written request with the chief clerk, and must serve a copy on the general counsel, the judge, and the other parties. The request must explain that the party requesting the change has contacted the other parties, and whether the request is opposed by any party. The request must include proposed dates (preferably a range of dates) and must indicate whether the judge and the parties agree on the proposed dates.

§265.155. Judge May Amend Proposal for Decision. The judge may amend the proposal for decision pursuant to exceptions, replies, or briefs submitted by the parties without the proposal for decision again being served on the parties.

§265.156. Scheduling Commissioners' Meetings.

(a) The chief clerk, in coordination with the judge, shall schedule motions by parties requiring commission action and the presentation of the proposal for decision. The judge, when transmitting the proposal for decision, shall notify the parties of the date of the commissioner's meeting and the deadlines for the filing of exceptions and replies. The general counsel, either by agreement of the parties and the judge, or on the general counsel's own motion, may reschedule the presentation of the proposal for decision. The chief clerk shall send notice of the rescheduled meeting date to the parties no later than ten days before the rescheduled meeting.

(b) Consistent with notices required by law, the commission may consolidate related matters if the consolidation will not injure any party and may save time and expense or otherwise benefit the public interest and welfare.

(c) The commission may sever issues in a proceeding or hold special hearings on separate issues if doing so will not injure any party and may save time and expense or benefit the public interest and welfare.

§265.157. Oral Presentation Before the Commission. In proceedings where a judge has held a public hearing and has issued a proposal for decision or other report to the commission, all oral presentations before the commission shall be limited to five minutes each, excluding time for answering questions, unless the chairman establishes other limitations. Before the commissioners' meeting the general counsel may alot time for oral presentations. Oral presentations and responses to questions shall be directed to the commission.

§265.158. Conduct and Decorum in Commissioners' Meetings and Hearings.

(a) The chairman, or in his or her absence, the acting chairman, shall preside over all meetings and hearings of the commission and have control of the floor.

(b) Participants shall not approach the commission's bench without first obtaining leave from the chairman, and must never lean on or go behind the bench.

(c) Participants should anticipate any need to set up or move furniture, appliances, or easels, and shall make advance arrangements with the chief clerk.

(d) Participants should remain seated except to address the commission or to appropriately handle documents, exhibits or physical evidence.

(e) Participants, except commission personnel, shall address the commission from the podium.

(f) Participants shall not ask argumentative questions, but may ask questions for informational or clarification purposes only.

§265.159. Remand to Judge. The commission may remand any proceeding to a judge with instructions as to the subject matter of further hearings, if any, and the judge's duties in preparing supplemental materials or revised orders for the commission's final adoption.

§265.160. Decision.

(a) Final decision. The commission shall make its final decision upon the expiration of 20 days or later, following service of the judge's proposal for decision, unless the parties have waived review under §265.153 of this title (relating to Waiver of Right to Review Judge's Proposal). The final decision, if adverse to any party, shall include findings of fact and conclusions of law separately stated. If any party has filed proposed findings of fact at the request of the judge in accordance with §265.73 of this title (relating to Submittal of Findings of Fact and Conclusions of Law), the com-

mission will include in its final decision a ruling on the proposed findings of fact, unless waived by the party.

(b) Prompt final decision. The commission's final decision customarily will be rendered within 60 days after the date the hearing is finally closed. In a case heard by a judge, a longer period of time may be necessary in order to present the matter to the commission for final decision. If additional time is likely to be required, that fact shall be announced by the judge at the conclusion of the hearing.

§265.161. After Public Hearing Before the Full Commission-Pleadings Prior to Final Decision. In matters heard before a majority of the commission, briefs or proposed findings of fact may be filed when permitted or requested by the commission. The general counsel shall set the deadlines for filing such documents.

§265.162. After Public Hearing Before the Full Texas Natural Resource Conservation Commission-Final Decision. The commission shall by written order make its final decision which, if adverse to any party, shall include findings of fact and conclusions of law separately stated. If any party filed proposed findings of fact at the commission's request, the commission will include in its final decision a ruling on the proposed findings of fact, unless waived by the party.

§265.163. Motion for Rehearing.

(a) Filing motion. Except as provided by the APA, a motion for rehearing is a prerequisite to an appeal. The motion shall be filed in writing with the chief clerk within 20 days after the date the party or his attorney of record is notified of the final decision or order. A party or attorney of record is presumed to have been notified on the date that the final decision or order is mailed by first-class mail. On or before the date of filing of a motion for rehearing, a copy of the motion shall be mailed or delivered to all parties with certification of service furnished to the commission. The motion shall contain the following information:

(1) the name and representative capacity of the person filing the motion;

(2) the style and official docket number assigned by SOAH, and official docket number assigned by the commission;

(3) the date of the final decision or order; and

(4) a concise statement of each allegation of error.

(b) Reply to motion for rehearing. A reply to a motion for rehearing must be filed with the chief clerk within 30 days after the date a party or his attorney of record is notified of rendition of the final decision or order. A party or attorney of record is presumed to have been notified on the date that the final decision or order is mailed by first-class mail.

(c) Ruling on motion for rehearing.

(1) The general counsel shall review any motion for rehearing and reply(ies) to a motion for rehearing, and may determine that the motion for rehearing should be scheduled for consideration during a commissioners' meeting. Unless the commission rules on the motion for rehearing within 45 days after the date the party or his attorney of record is notified of rendition of the final decision or order, the motion is overruled by operation of law.

(2) A motion for rehearing may be granted in whole or in part. When the motion for rehearing is granted, the final decision or order is nullified. The commission may reopen the hearing to the extent it deems necessary. Thereafter, the commission shall render a final decision or order as required by these sections.

(d) Modification of time limits. The time limits specified in this section may be modified as follows:

(1) the commission or the general counsel may extend the period of time for filing motions for rehearing and replies and for taking action on the motions so long as the period for taking agency action is not extended beyond 90 days after rendition of the final decision or order; or

(2) in the event of an extension, the motion for rehearing is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 90 days after the date of the final decision or order; or

(3) by agreement of the parties with the approval of the commission.

§265.164. Decision Final and Appealable. A decision or order of the commission is final, in the absence of a timely motion for rehearing, on the expiration of the period for filing a motion for rehearing. A decision or order of the commission is final and appealable on the date of rendition of the order overruling the motion for rehearing or on the date the motion is overruled by operation of law.

§265.165. Appeal of Final Decision.

(a) File petition. A person affected by a final decision or order of the commission may file a petition for judicial review within 30 days after the decision or order is final and appealable.

(b) The record. The record in a contested case shall include the following:

(1) all pleadings, motions, and intermediate rulings;

(2) evidence received or considered;

(3) a statement of matters officially noticed;

(4) questions and offers of proof, objections, and rulings on them;

(5) summaries of the results of any conferences held before or during the hearing;

(6) proposed findings, exceptions, and briefs;

(7) any decision, opinion, or report by the officer presiding at the hearing; and

(8) prefiled testimony.

§265.166. Costs of Record on Appeal. A party who appeals a final decision in a contested case shall pay all costs of preparation of the original or a certified copy of the record of the agency proceeding that is required to be transmitted to the reviewing court. A charge imposed as provided by this section is considered to be a court cost and may be assessed by the court in accordance with the Texas Rules of Civil Procedure.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508188

Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: August 30, 1995

For further information, please call: (512) 239-1966

♦ ♦ ♦

Subchapter H. Expiration

• 30 TAC §265.170

The new section is proposed under the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361. 024, and 382.017, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new section implements the Texas Water Code, §§5.103, 5.105, and 26. 011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017.

§265.170. Expiration. This chapter will expire on May 31, 1996.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508189 Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: August 30, 1995

For further information, please call: (512) 239-1966

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Chapter 330. Municipal Solid Waste

The Texas Natural Resource Conservation Commission (TNRCC) proposes an amendment to §330.4 and new §330.66, concerning municipal solid waste management facilities used in the transfer of grease trap waste, grit trap waste, septage, and other similar liquid waste. Transfer facilities meeting certain capacity requirements will be exempt from permit requirements and will be required to give notice of operation to the TNRCC and will be required to design and operate the facility in accordance with a new proposed section.

The amendment is intended to encourage the development of certain liquid waste transfer stations, thereby reducing transportation costs for liquid waste. Due to federal requirements of Subtitle D of the Resource Conservation and Recovery Act, many landfills in Texas have ceased accepting certain types of liquid waste, and the distance to an approved disposal or processing facility can cause an economic transportation burden.

The proposed changes are consistent with Senate Bill 963, 73rd Legislature (1993) which amended the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.111. The bill exempts certain municipal solid waste management facilities involved in the transfer of municipal solid waste from the TNRCC municipal solid waste permit requirements. In order to qualify for permit exemption, the facility must comply with certain design and operational requirements, and must meet certain capacity limits.

The amendment to §330.4 adds new subsection (r) to provide that a permit is not required for a municipal solid waste management facility that is used in the transfer of liquid waste if certain criteria are met. In lieu of permitting, these facilities must notify the TNRCC of their operation and must design and operate the facility pursuant to requirements of §330.66 (Liquid Waste Transfer Facility Design and Operation).

New §330.66 delineates operation and design criteria which must be met by transfer facilities exempted from permit requirements under §330.4(r).

Steve Minick, Strategic Planning and Appropriations Division, has determined that for the first five years the sections are in effect there will be fiscal implications as a result of administration and enforcement of the sections. The costs to the state of processing municipal solid waste permits will be reduced. The actual savings to the state are prospective and cannot be determined at this time, but will be reflected by the number of transfer stations sought. Cost savings will potentially be realized by applicants. These savings also cannot be estimated but will depend on individual circumstances and the potential savings from avoiding the costs of permit application and approval.

Mr. Minick also has determined that for the first five years the sections are in effect, the public benefit anticipated as a result of enforcement of and compliance with the sections will be improvements in the management and control of municipal solid waste, improvements in transporting municipal solid waste, and improved compliance with commission rules relating to municipal solid waste. No added cost impacts are anticipated to small businesses. No negative economic impacts are anticipated to applicants. There are no fiscal effects anticipated for any person required to comply to the sections as proposed.

Written comments on the proposal should mention Log Number 95063-330-WS and may be submitted to Bettie Mabry Bell, Texas Natural Resource Conservation Commission, MC-201, P.O. Box 13087, Austin, Texas 78711-3087, (512) 239-6087. Written comments must be received by 5:00 p.m., 30 days from the date of publication of this proposal in the *Texas Register*. For further information or questions concerning this proposal, please contact Wayne Lee, Waste Policy and Regulations Division, (512) 239-6815.

Subchapter A. General Information

• 30 TAC §330.4

The amendment is proposed under the authority of the Texas Water Code, §5.103, which provides the TNRCC with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state, and under Senate Bill 963, as passed by the 73rd Legislature; and pursuant to the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.024, which provides the TNRCC with the authority to regulate municipal solid waste and adopt rules as necessary to regulate the operation, management, and control of solid waste under its jurisdiction.

The amendment affects the Texas Health and Safety Code, §361.111.

§330.4. Permit Required.

(a)-(q) (No change.)

(r) A permit is not required for a municipal solid waste transfer station that is used only in the transfer of grease trap waste, grit trap waste, septage, or **other similar liquid waste if the facility used in the transfer will receive 32,000 gallons per day or less. Liquid waste transfer stations that will receive 32,000 gallons a day or less may operate if they notify the Executive Director 30 days prior to initiating operations and if the facility is designed and operated in accordance with the requirements of §330.66 of this title (relating to Liquid Waste Transfer Facility Design and Operation). Facilities that will receive over 32,000 gallons per day must apply for a permit.**

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508162 Lydia Gonzalez-Gromatzky
Acting Director, Legal Division
Texas Natural Resource Conservation Commission

Earliest possible date of adoption: August 11, 1995

For further information, please call: (512) 239-6087

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Subchapter E. Permit Procedures

• 30 TAC §330.66

The new section is proposed under the authority of the Texas Water Code, §5.103, which provides the Texas Natural Resource Conservation Commission (TNRCC) with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code, the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.024 and §361.061, which provides the TNRCC with the authority to regulate municipal solid waste and adopt rules as necessary to regulate the operation, management and control of solid waste under its jurisdiction.

The new section affects the Texas Health and Safety Code, §361.111.

§330.66. Liquid Waste Transfer Facility Design and Operation.

(a) Applicability.

(1) This section shall apply to a municipal solid waste management facility that handles only liquid waste and which is exempt from permit requirements under §330.4(r) of this title (relating to Permit Required).

(2) New liquid waste transfer facilities with permanent holding vessels (fixed facilities) must comply with all requirements of this section.

any party to a hearing conducted by the commission in connection with any issue of fact or law pertaining to a contested case in which the commission or party is involved.

(b) An employee of the commission, a commissioner, or a party to a hearing conducted by the commission may not attempt to influence the finding of facts or the application of law or rules by a hearings examiner of the commission except by proper evidence, pleadings, and legal argument with notice and opportunity for all parties to participate.

(c) If a prohibited contact is made, the hearings examiner shall notify all parties with a summary of that contact and notice of their opportunity to participate and shall give all parties an opportunity to respond.

Added by Acts 1991, 72nd Leg., ch. 296, § 1.08, eff. June 7, 1991.

§ 361.0832. Proposal for Decision; Certified Issues; Reversal by Commission

(a) After hearing evidence and receiving legal arguments, a hearings examiner of the commission shall make findings of fact, conclusions of law, and any ultimate findings required by statute, all of which shall be separately stated. The hearings examiner shall make a proposal for decision to the commission and shall serve the proposal for decision on all parties. The commission shall consider and act on the proposal for decision.

(b) If a contested case involves an ultimate finding of compliance with or satisfaction of a statutory standard the determination of which is committed to the discretion or judgment of the commission by law, a hearings examiner, on joint motion of all parties or sua sponte, may certify those policy issues to the commission. A certification request must contain a statement of the policy issue to be determined and a statement of all relevant facts sufficient to show fully the nature of the controversy. The commission may receive written or oral statements from parties to the hearing or the hearings examiner on the policy issue certified. The commission must answer policy issues not later than the 60th day after the date of certification or, in its discretion, may decline to answer. If the commission fails to answer a policy issue within that period, the commission shall be deemed to have declined to answer. The hearings examiner shall proceed with the contested case and make a proposal for decision as required by Subsection (a).

(c) The commission may overturn an underlying finding of fact that serves as the basis for a decision in a contested case only if the commission finds that the finding was not supported by the great weight of the evidence.

(d) The commission may overturn a conclusion of law in a contested case only on the grounds that the conclusion was clearly erroneous in light of precedent and applicable rules.

(e) If a decision in a contested case involves an ultimate finding of compliance with or satisfaction of a statutory standard the determination of which is committed to the discretion or judgment of the commission by law, the

commission may reject a proposal for decision as to the ultimate finding for reasons of policy only.

(f) The commission shall issue written rulings, orders, or decisions in all contested cases and shall fully explain in a ruling, order, or decision the reasoning and grounds for overturning each finding of fact or conclusion of law or for rejecting any proposal for decision on an ultimate finding.

Added by Acts 1991, 72nd Leg., ch. 296, § 1.08, eff. June 7, 1991.

§ 361.0833. Costs for Information Provided by a Person Affected Regarding Hazardous Waste Permit

(a) After considering the factors in Subsection (e), the commission may order the applicant for a permit for a new hazardous waste management facility to pay reasonable costs incurred by a person affected in presenting information set out in Subsection (b) to the commission on the question of the issuance of the permit.

(b) Information for which an award of costs under Subsection (a) may be made includes:

(1) technical studies of the area in which the new hazardous waste facility is proposed to be located;

(2) expert testimony given at a hearing on the permit application; and

(3) surveys of land use and potential use in the hazardous waste facility area.

(c) The commission may order the applicant for a permit for a new hazardous waste management facility to pay reasonable costs incurred by a person affected who presented information to the commission at a hearing showing that the applicant:

(1) knowingly made false or misleading statements in the application;

(2) knowingly made false or misleading statements during the hearing; or

(3) failed to present information that the applicant had in its possession that would have materially affected the issues of fact and law on which the decision of the commission was based.

(d) The total costs awarded to all persons affected under Subsection (a) may not exceed $100,000 for a new commercial hazardous waste management facility or $20,000 for a new noncommercial hazardous waste management facility. The total costs awarded to all persons affected under Subsection (c) may not exceed $150,000 for a new commercial hazardous waste management facility or $30,000 for a new noncommercial hazardous waste management facility.

(e) In determining the appropriateness of an award under Subsection (a) or (c), the commission shall consider:

TNRCC Permit Processing and Enforcement Hearing Rules

"Funny How Time Slips Away"

Jim Philips

TNRCC PERMITTING AND ENFORCEMENT HEARING RULES

JIM PHILLIPS
CHIEF HEARING EXAMINER
TNRCC

SEVENTH ANNUAL TEXAS
ENVIRONMENTAL SUPERCONFERENCE
AUGUST 3-4, 1995

APPENDIX 1

TNRCC ENFORCEMENT HEARING RULES

30 T.A.C. CHAPTER 337

Effective June 16, 1995

Chapter 337
Enforcement Rules

The Texas Natural Resource Conservation Commission ("TNRCC" or "commission") adopts the repeal of §§337.1-337.6, 337.31-337.40, 337.51-337.54 and new §§337.1-337.10, 337.21-337.58, and 337.71 concerning enforcement.

New §§337.3-337.9, 337.21-337.24, 337.28-337.32, 337.37-337.38, 337.41-337.42, 337.45-337.46, 337.49-337.51, 337.56-337.57, and 337.71 are adopted with changes to the proposed text as published in the December 2, 1994 issue of the Texas Register (19 TexReg 9468). The repeal of §§337.1-337.6, 337.31-337.40, 337.51-337.54 and new §§337.337.1-337.2, 337.10, 337.25-337.27, 337.29, 337.33-337.36, 337.38-337.40, 337.43-337.44, 337.47-337.49, 337.52-337.55, and 337.58, are adopted without changes and will not be republished.

The repeal of §§337.1-337.6, 337.31-337.40, 337.51-337.54 is required by, and premised upon, the adoption of the new §§337.1-337.10, 337.21-337.58, and 337.71 that will serve as the procedural rules for TNRCC enforcement generally, the TNRCC's contested enforcement case hearings, and the TNRCC's mandatory enforcement hearings, respectively.

A public hearing was held on January 26, 1995, in Austin. The comment period closed on February 13, 1995. Comments were received from the following groups, associations, businesses, and industries: Texas Mid-Continent Oil & Gas Association; Thompson & Knight, P.C.; Brown McCarroll & Oaks Hartline; American

Electronics Association; Exxon Company, U.S.A.; DuPont Gulf Coast Regional Manufacturing Services; Galveston-Houston Association for Smog Prevention; Vinson & Elkins; Guida, Slavich & Flores; The Dow Chemical Company; Amoco; Kelly, Hart & Hallman, P.C.; Texas Chemical Council; Eastman Chemical Company and other concerned citizens. The commission responds to the comments received as follows:

In §337.3, the definitions section, the second sentence of the definition of "petition" was removed because it was unnecessarily confusing. Some commenters opposed the definition of parties set forth in §337.3 because it did not include members of the general public, environmental groups, and others interested in contested enforcement case hearings. The commission disagrees that these persons or groups have standing to participate as parties in contested enforcement case hearings, but reiterates its willingness to receive input from such individuals and groups about enforcement cases. In addition, the Public Interest Counsel does have statutory authorization to participate in contested enforcement case hearings.

A change in §337.4 was made in response to comments concerning the filing of pleadings after the issuance of a Proposal for Decision ("PFD"). (See, comments regarding §337.53, following).

Section 337.5 has been changed in response to a request from a commenter to restate the language from §263.14 of this title, rather than just incorporating it by reference.

In response to comments, the commission removed the reference to "federal" in §337.6, making it clear that it does not intend to enforce federal laws or rules that have not been adopted and thus incorporated as state rules. Commenters also suggested that the commission add a sentence that states that the commission cannot prosecute an administrative and judicial enforcement action at the same time. The commission responds that such a provision is unnecessary under current Texas law. One commenter suggested that this section be amended to require notice to the commission before referring cases to the attorney general's office, in accordance with §382.081 of the Health and Safety Code. The commission notes that all sections are to be construed in a manner consistent with applicable statutes.

Comments on §337.7 included complaints that this section goes beyond the commission's statutory authority. Based on these comments and upon internal agency review, the Commission decided to delete this section.

The originally proposed §337.8, and sections which similarly refer to circumstances not requiring the normal process (see, also, §337.25) were the subject of many comments indicating confusion with the commission's intent. These sections refer to situations which are anticipated to occur extremely rarely, ones for which the applicable statutes do not require the normal process for a contested enforcement case. An example of such an exceptional case would be an action for an emergency order under §361.301 of the Health and Safety Code, which statute neither provides for a

hearing prior to issuance nor describes the procedures for a hearing on the action when such hearing is held. Thus, in §337.8, the commission has retained the authority to prescribe rules on an ad hoc basis for hearings, such as the Health and Safety Code §361.301 emergency order hearing, which do not fit within the standard contested enforcement case context. Similarly, §337.25(a) allows the executive director to file a petition as the instrument initiating an enforcement action, only where the statutes do not provide for an initial Executive Director's Preliminary Report ("EDPR"). For the vast majority of enforcement hearings, these sections, or subsections, will not be relevant.

Section 337.9 was modified in response to comments. The word "use" was substituted for "adopt," and the phrases "in appropriate circumstances" and "tentatively" were deleted. Also, staff noticed that the term "commission" had been used instead of the term, "executive director." Often times these terms are used interchangeably by commenters and staff, but in this instance "executive director" more accurately reflected the intent of the rule and has, thus, been substituted in the final version.

In response to comments on §337.21, a slight change was made to make clear that the rules do not contemplate an entity other than the commission or the office of hearings examiners to preside over contested enforcement cases. The remainder of this section, as well as the entirety of §337.31, have been deleted, in order to allow the commission to assess the ramifications of new legislation

transferring the function of the commission's office of hearings examiners to the State Office of Administrative Hearings.

Some commenters expressed concerns that these rules might indicate that informal resolution of enforcement matters would no longer be possible. Nothing in these rules was intended to produce such a result. A sentence was added to §337.22 to make that absolutely clear.

Regarding §337.23 the commission received comments which requested expansion upon the statutory processes and content for EDPR's, as well as some which would have had the commission diminish the legal significance given to the EDPR by the statutes. As to the latter, such a change could only be made by the legislature. As to the former category of comment, while the commission notes that agency programs and practices often do grant to respondents more process than required by constitutional "due process," the intent of this section was to state the statutory requirements for an EDPR.

In response to comments requesting same, the commission has added a cross-reference in §337.24(d), making clear that these instruments are pleadings, as defined in §337.3 and §337.24, and in §337.24(d), showing that these pleadings are, in turn, subject to the general service and notice provision of §337.27. As an interpretive note, the commission points out that these additions are redundant, as the terms, "petition" and "answer," are mentioned explicitly as fitting within the definition of "pleading" in §337.3, and are thereby subject to requirements of service under

§337.27, as well. The commission would add that failure in other sections or subsections of these rules to state, as here, that an instrument is a "pleading" or that service should be in accordance with §337.27 should not be construed as an indication of an exception to the broad meaning of §337.24 and §337.27.

In response to comments complaining that §337.24 (c), granting parties the right to file amended or supplemental pleadings up to 7 days before a hearing, is confusing and unfair, the commission has re-arranged the order of the language and added the last phrase of §337.24(c) ("and may constitute grounds for continuance"). It should be noted that this subsection provides for the same time limits on filing as do the Texas Rules of Civil Procedure.

Similarly, in response to comments that suggested that the rights to file amended and supplemental petitions were broader than those found in the Texas Rules of Civil Procedure, the commission points out that amendment and supplementation of petitions as provided by §337.24, is within the statutory authority of the commission and the executive director and is in accord with analogous procedures for amended and supplemental petitions found in the Texas Rules of Civil Procedure.

Some commenters also opposed the basic right, reflected in §337.24(d) of the executive director to use a petition as an instrument in a contested enforcement case in addition to EDPRs. It should be noted that these commenters cited no statutory limitation on the executive director, limiting that office to using EDPRs alone. This position has not been adopted in the rules.

One commenter asked that §337.26 address service of petitions which initiate a cause of action. The commission disagreed with this comment because this has been done in §337.25.

In response to several commenters who interpreted §337.28 as requiring an answer analogous to a "general denial" in state district court, the commission has decided to allow the answer to be filed "in the nature of a general denial." Also, regarding §337.28, a commenter requested a revision to make it clear that a respondent may consent to one or more issues in the EDPR or petition. As a result, §337.28(f) has been added.

Agency staff noted in its review that the inclusion of the sanction of a default order based upon failure to comply with discovery in §337.29(c) was redundant of similar language in §337.38(d). As a result, the proposed §337.29(c) has been deleted and the former subsection (d) renumbered.

Some commenters pointed out that the wording of §337.30 might have limited the scope of agreed orders unnecessarily. The commission agrees, and thus, the "any other lawful provisions" has been added. The majority of comments on this section, however, were based on the notion that the commission should address standardization of agreed orders and mandate particular language of agreed order provisions through this section. The commission disagrees, believing that limiting the executive director's power to negotiate with flexibility to address the circumstances of each individual case is not an appropriate use of the commission's rulemaking authority; nor would such a rule be likely to

significantly improve the efficiency of the enforcement process.

In response to several commenters who complained that the executive director was given unilateral authority to sever or consolidate cases and/or claims, the commission has changed §337.32 to provide that the executive director must get the hearings examiner's permission to consolidate or sever if the hearings examiner has assumed jurisdiction. The commission did not feel any additional changes to this section were necessary.

One comment, directed toward §337.33, requested a change to address notice in the event a continuance were granted by a hearings examiner. The commission agrees with this comment, but has modified §337.57 to reflect this change. Section 337.57 did not address rulings and decisions of a hearings examiner issued during the course of the case. The final version applies Government Code §2001.142, the Administrative Procedures Act ("APA") notice requirements to hearings examiner rulings and addresses the commenter's concerns about notice in the event of continuance. A commenter requested definitions of several terms in §337.37(d) in order to make it more difficult to seal records. The commission notes that this section requires that, at a minimum, sealing of records be in accordance with the Texas Open Records Act ("the Act"). Sections 337.37 (d)(3)(a) and (b) go beyond the Act in establishing safeguards to protect the public interest in openness of records, and the commission believes additional definitions are unnecessary.

It was pointed out by agency staff, that the discovery sanctions in §337.38 included recommendation by the hearing examiner of a default order but did not contain an allowance for "issue preclusion" based upon failure to comply with discovery. Therefore, this option has been included through additional language in §337.38(d).

The commission has corrected §337.37(f), for which the published proposal inadvertently left out the words "are hereby incorporated by reference."

Based on staff review section 337.40, regarding interlocutory appeals and certified questions, the commission has changed that section to allow interlocutory appeals for jurisdictional questions only.

For §337.41, one commenter suggested adding a subsection requiring hearings examiner to make written summaries of any prehearing conference. The commission has not added a subsection; however, subsection (b) has been modified to make clear that the hearings examiner has the authority to prepare his/her own prehearing order, or have the parties draft one. The sentence requiring a showing of manifest injustice to alter such orders, has been removed to allow more flexibility to the parties and the hearings examiner.

Based upon staff's review, the word, "offer," has been added to §337.42(c). This term avoids ambiguity as to the intent of the section.

Agency staff noted that prefiled testimony could actually slow down proceedings in matters that would not otherwise require much time to hear. As a result, §337.45(e) now requires the hearings examiner to conclude that a hearing would be expected to last more than 5 working days, before he/she may order prefiled testimony.

Commenters suggested that the burden of proof provision in §337.46 did not address the executive director's burden of proof on penalties. A proposed provision would have required the executive director to prove by a preponderance of the evidence "the appropriateness of the requested penalty," but such a provision would inaccurately reflect the law. The statutes do not require the executive director to prove that his/her recommendation is appropriate to the exclusion of any alternative penalty amount. Rather, the statutes require that the commission decide what penalty amount is appropriate based on evidence submitted by all parties which is relevant to certain listed statutory factors.

In other words, analogous to criminal punishment proceedings, the executive director's "recommendation" is in the nature of argument, not an element to be proven. Since some of the factors to be considered by the commission are mitigating factors, there is a strong possibility that the respondent will proffer more evidence relevant to these mitigating factors than the executive director. As a result, the final version of §337.46 requires that either party prove by a preponderance of the evidence, facts which it wants the commission to rely upon in making the penalty assessment.

In further response to comments on §337.46, a sentence was also added requiring respondents to carry the burden of proof on any asserted affirmative defenses.

Section 337.49, regarding requesting parties to submit findings of fact and conclusions of law, was deleted as unnecessary in light of commission rule §263.2(15) which authorizes an examiner to exercise any appropriate powers necessary or convenient to carry out his/her responsibilities.

In §337.50 staff deleted "issued under Texas Water Code, §26.136(d) or any other pleading" because that clause was unnecessarily narrow, and the word "petition" was added to reflect that the rules allow for petitions to either amend or substitute for EDPRs. Also, the term "decision" in the first sentence of §337.50(a) was changed to "recommendation," because the executive director's role in enforcement actions is that of a party and not that of the decision-maker or trier of fact.

In response to a comment, the commission is amending §337.53 by adding 10 days to the time period within which parties may file exceptions or briefs regarding the hearings examiner's PFD. The commission also added the phrase "with approval of the hearings examiner" at the end of the section to ensure that the process is not unnecessarily delayed by agreements among the parties without approval of the hearings examiner. Another comment on this section suggested clarifying language to ensure that pleadings are filed in accordance with §337.4 on filing of written instruments. Those changes have been made to §337.4. Language reiterating the need

to serve pleadings in accordance with §337.27 was suggested but not added because it would be redundant.

Sections 337.51 and 337.56 are analogous provisions detailing what is required of a hearings examiner to be included in a PFD and what is required of the commission to be included in its final enforcement order, respectively, following a contested enforcement case hearing. Staff recognized that rulings on submitted findings and conclusions were not required by the applicable statutes. Thus, such rulings were changed from being mandatory to being permissive.

Other changes were made to §337.56 because, as commenters pointed out, there was no requirement that the commission rule on "remedial," provisions. The phrase "other provisions as appropriate" has also been added to reflect that this rule is not designed to limit the flexibility of the commission. In response to another commenter, the word, "applicable" was inserted in subsection (b), in front of "statute," as it was in the similar section of §337.51.

Several commenters suggested adding a requirement of notice of orders not assessing administrative penalties to §337.57(c); in response, the commission has edited §337.57(c) to require notice for all enforcement orders, while reserving Texas Register publication for only those orders assessing administrative penalties.

Many commenters from the regulated community opposed §337.57(d) which required prior notice of proposed agreed

enforcement orders containing penalties of or above $100,000. That subsection has been deleted.

Except as indicated in the following paragraph, §337.58 has not been changed from the proposed version, which was developed through modification of the predecessor rule to §337.58, 30 TAC §337.40. In order to comply with the Texas Supreme Court's ruling in the Texas Association of Business v. Texas Air Control Board, et al. case, the former §337.40(c) was changed by deleting the phrase, "shall result in a waiver of all legal rights to judicial review." The commission believes that this change will bring its rules into compliance with the Supreme Court's ruling. One commenter objected that the section was still violative of that ruling because it maintains the right of the commission to seek enforcement through the attorney general's office for failure to either pay the penalty or submit a supersedeas bond. The Supreme Court's ruling directly addresses the commenter's question and affirms the right of the commission to seek enforcement through the attorney general's office for failure to either pay the penalty or submit a supersedeas bond. (Texas Association of Business v. Texas Air Control Board, et al., 852 S.W. 2d. 440 (Tex 1993), at 449).

Subsection (c) of §337.58 was modified to delete the phrase "upon approval by the commission" because the executive director has authority to refer cases to the Office of the Attorney General as indicated in §337.6.

One commenter requested a new section to set out procedural requirements for perfecting appeal that are found in statutes;

however, the commission believes that §337.58(g) is sufficient to alert practitioners of the need to look to the relevant statutes.

Many of the comments received on this rule were of a general nature, not specific to a given section or subsection of the chapter. One commenter stated that the commission should incorporate the penalty matrix in these rules; that without it, it appears that the commission could amend and seek additional penalties if a case goes to hearing. Although the use of penalty matrices extends throughout the agency, different matrices are used by different programs and sometimes within the same program for different types of violations. These internal guidance mechanisms are more appropriately located in Enforcement Guidelines (see, §337.9) which are tailored to each program. The commission also notes that the executive director has the authority to amend and seek additional penalties up to the statutory maximum at any time that the petition can be amended, in the same way in which an enforcement petition in district court can be amended. Additional information may be discovered during the discovery and preparation for contested enforcement case hearings that will make it appropriate to adjust the recommended penalty assessment. The penalty assessment that appears in the EDPR is in the nature of a settlement offer, subject to change.

One commenter suggested that §337.71 did not properly implement Health and Safety Code §382.082. Changes have been made in §337.71 by adding (a)(4) to make it clear that it is intended to implement Water Code §5.117 and that "substantial noncompliance"

under Chapter 382 of the Health and Safety Code will be handled according to §382.082.

The repeals and new sections are adopted under the Texas Water Code, §§5.103 and 5.105, which provide the TNRCC with the authority to adopt any regulations necessary to carry out its powers and duties under the Texas Water Code and other laws of the State of Texas.

Subchapter A
Enforcement Generally
§§337.1-337.10

The new sections are adopted under Texas Water Code, §§5.103 and 5.105, and Health and Safety Code §382.017 which provide the Texas Natural Resource Conservation Commission with the authority to adopt any rules necessary to carry out its powers and duties under the Texas Water Code and the Health and Safety Code, respectively, and other laws of the State of Texas, and to establish and approve all general policy of the commission.

§337.1. Purpose. The purpose of this chapter is to provide a procedural system governing enforcement actions before the commission, particularly for contested enforcement cases. In the event that some part or parts of these rules cannot be interpreted as consistent with the Texas Water Code, the Texas Health and Safety Code, or the Administrative Procedure Act, V.T.C.A. Government Code, Sec. 2001, et seq., ("Administrative Procedure Act"), or where applicable parts of those statutes are not specifically included in these rules, the referenced statutes shall control.

§337.2. Construction of Sections Incorporated by Reference. For purposes of this chapter only, where rules from other chapters of this code have been incorporated by reference, these rules shall be construed in a manner that makes their terms

consistent with the provisions of this chapter and accomplishes their application to the enforcement proceedings described in this chapter. Where reference within incorporated sections is made to proceedings or matters not applicable to enforcement proceedings in this chapter, or to other administrative rules which have not expressly been incorporated into this chapter, these shall be given no effect.

§337.3. Definitions. Unless specifically defined in this chapter, all terms used in these rules bear the same definitions ascribed by the Texas Water Code, the Texas Health and Safety Code, the Administrative Procedure Act, the Rules of Procedure of the Texas Natural Resource Conservation Commission and the substantive regulations promulgated by the Texas Natural Resource Conservation Commission. The terms specifically defined for the purposes of this chapter are as follows:

Contested Enforcement Case -- An action in which the executive director seeks an enforcement order and the respondent, where having a right to do so, contests the issuance of the order by requesting an evidentiary hearing.

Contested Enforcement Case Hearing -- The evidentiary hearing on the merits in a contested enforcement case, presided over by the office of hearings examiners.

Executive Director's Preliminary Report ("EDPR") -- A pleading filed by the executive director, which when issued and served in accordance with §337.26, seeks an enforcement order

against a respondent. Upon such pleading, a default order may be granted by the commission, in accordance with §337.29. EDPR is further defined in §337.23 of this chapter.

Enforcement Action -- A legal action initiated by the executive director seeking an enforcement order.

Enforcement Hearings -- Any hearing, whether required by law, or ordered based upon the discretion of the commission, held as a prerequisite by the commission to issuance of an enforcement order. Enforcement Hearings include, but are not limited to, hearings before the commission concerning actions brought pursuant to the Texas Health and Safety Code, §§361.301-361.303, 361.272, 361.252, and §§382.088 and 382.023; the Texas Water Code, §§26.136, 5.117, 13.4151, 27.1015, and 28.067.

Enforcement Order -- Any commission order enforcing or directing compliance with any provisions; whether of statutes, rules, regulations, permits or licenses, or orders; which the commission is entitled by law to enforce or with which the commission is entitled by law to compel compliance.

Parties -- The parties to a contested enforcement case hearing shall include the Executive Director, the Respondent(s), and any other parties authorized by statute.

Person -- An individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity.

Petition -- The instrument by which the Executive Director states a cause of action for an enforcement order against a

respondent. When an EDPR is filed and issued in accordance with the general requirements of §337.23 and §337.26 (regarding notice of EDPR), such EDPR and notice constitute a petition, as do amended EDPRs and amended or supplemental petitions.

Pleadings -- Any written petition, answer, motion or other written instrument, except exhibits, including an "EDPR," filed with the commission or the office of hearings examiners in a contested enforcement case; further defined in §337.24 of this title (relating to Requirements for Pleadings Other than EDPR).

Respondent -- A person against whom the executive director is seeking an enforcement order.

§337.4. Filing of Written Instruments. Any pleading filed pursuant to this chapter, unless presented orally during a hearing, shall be filed with the chief clerk with a copy to the hearings examiner where one is presiding in the case. Written decisions, rulings, or orders by the commission or a hearings examiner shall be filed with the chief clerk.

§337.5. Computation of Time. For purposes of this chapter, in computing any period of time prescribed or allowed by regulations of the commission, by order of the commission, or by any applicable statute, the period shall begin on the day after the act, event, or default in question and it shall conclude on the last day of that designated period, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until

the end of the next day which is neither a Saturday, Sunday, nor a legal holiday.

§337.6. Judicial Civil Enforcement. The executive director is authorized to institute or cause to be instituted, in courts of competent jurisdiction, legal proceedings to enforce and compel compliance with any provisions; whether of statutes, rules, regulations, permits or licenses, or orders; which the commission is entitled or required by law to enforce or with which the commission is entitled or required by law to compel compliance. Such legal proceedings may be initiated at any time by the executive director by a letter from the executive director referring the matter to the Texas attorney general's office and requesting that the attorney general take action on behalf of the commission.

§337.7. [RESERVED]

§337.8. Enforcement Hearings. If required by law, an enforcement hearing shall be held prior to commission issuance of any final enforcement order. In cases for which an enforcement hearing is not required by law to be held prior to issuance of an enforcement order, the commission may elect to hold a hearing, on its own motion, or upon the request of the executive director, prior to issuing a final enforcement order or direct the office of hearings examiners to hold such a hearing. In those cases for which an enforcement hearing is not required by law to be held prior to issuance of an enforcement order, or for which

procedures for an enforcement hearing are not specifically prescribed by rule or statute, the commission may elect to have such hearings be held by the office of hearings examiners under rules prescribed by the commission, including the procedures established by this chapter for contested enforcement cases.

§337.9. Enforcement Guidelines. The executive director may use enforcement guidelines which are neither rules nor precedents but rather announce the manner in which the agency expects to exercise its discretion in future proceedings. These guidelines do not establish rules which the public is required to obey or with which it is to avoid conflict. These guidelines do not convey any rights or impose any obligations on members of the public. These guidelines will be available to the public under the terms of the Texas Open Records Act, Texas Civil Statutes, Article 6252-17(a) (Vernon's Supplement 1992).

§337.10. Enforcement Report. TNRCC shall prepare an annual report of enforcement actions, covering the previous fiscal year. This report shall include, at a minimum, the following:

(1) the number of complaints received by the agency, indicating the distribution of those complaints geographically;

(2) an estimate of the total number of facilities subject to inspection by the agency, categorized by region and program area.

(3) a list of facilities actually inspected, giving location and program area conducting the inspection;

(4) number of cases referred from Regions to Central Office for enforcement, categorized by Region;

(5) number of cases resolved informally (without issuance of an agency order), categorized by Regional Offices and Central Office;

(6) a listing of all orders issued, including names of respondents, location of facility covered by the order, program(s) covered by the order, and amount of administrative penalty assessed (including whether any amount was deferred and, if an amount was deferred pursuant to approval of a supplemental environmental project, a description of the project);

(7) a calculation of the total, average, and mean of administrative penalties assessed, excluding deferred penalties, with an additional categorization of these numbers by program area;

(8) the number of permit revocations, suspensions, or amendments issued resulting from enforcement actions; and

(9) the average number of regional inspectors employed.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on

Subchapter B
Contested Enforcement Case Hearings
§§337.21-337.58

The new sections are adopted under Texas Water Code, §§5.103 and 5.105, and Health and Safety Code §382.017 which provide the Texas Natural Resource Conservation Commission with the authority to adopt any rules necessary to carry out its powers and duties under the Texas Water Code and the Health and Safety Code, respectively, and other laws of the State of Texas, and to establish and approve all general policy of the commission.

§337.21. Contested Enforcement Case Hearings to be Held by Office of Hearings Examiners. In a contested enforcement case, unless the commission chooses to hear the case itself, the office of hearings examiners shall have the delegated authority to preside over the case proceedings in accordance with the rules of this chapter.

§337.22. Remedies. Remedies available to the commission in enforcement actions conducted pursuant to these rules include all those found in the Texas Water Code, the Texas Health and Safety Code, and the Administrative Procedure Act. Nothing herein shall be construed to preclude the executive director from seeking any remedy in law or equity not specifically mentioned in these rules. In addition, an enforcement matter may be resolved

informally without the necessity of a contested enforcement case proceeding in appropriate circumstances.

§337.23. Executive Director's Preliminary Report ("EDPR").

(a) Any enforcement action brought under these rules may be initiated by the EDPR being filed by the executive director.

(b) The EDPR shall include a brief statement of the nature of the violation, the statute or statutes violated, the facts relied upon by the executive director in concluding that a violation has occurred, a recommendation that an administrative penalty be assessed, the amount of the recommended penalty and an analysis of the factors required in the relevant statute to be considered by the commission in determining the amount of the penalty. This EDPR may be superseded by a petition as provided in §337.24(d) of this title (relating to "Pleadings Other than EDPR).

§337.24. Pleadings Other than EDPR.

(a) In a contested enforcement case, all pleadings for which no other form is prescribed shall contain:

(1) the name of the party seeking to bring about or prevent action by the commission;

(2) the names of all other known parties;

(3) a concise statement of the facts and the law relied upon by the pleader;

(4) a prayer stating the type of relief, action, or order desired by the pleader;

(5) any other matter required by statute;

(6) a certificate in accordance with §337.27(b) of this title (relating to Service of Notice and Pleadings), showing service; and

(7) the signature of the submitting party or the party's authorized representative.

(b) All pleadings shall include the docket number assigned the case by the Chief Clerk and shall be served on the parties in accordance with §337.27 of this title.

(c) Up to seven days prior to the hearing, parties may file pleadings, supplemental or amended, so long as such do not operate as an unfair surprise to the opposite party. Amendments after that time will be at the discretion of the hearings examiner and may constitute grounds for a continuance.

(d) The executive director may amend an EDPR by filing a petition, in which the executive director may make such changes

as the law allows, including but not limited to changes in the following: the amount of the penalty, up to the maximum allowable by statute, the violations alleged to include any or all violations which are not precluded by law from being brought, the number of days of occurrence of previously alleged violations, and the injunctive relief (or remedial ordering provisions) sought. The right to change the violations alleged includes the right to add causes of action based on statutes within the Commission's jurisdiction other than the one or ones upon which the EDPR in the case was based. Petitions are pleadings and shall be served on the parties in accordance with §337.27 of this title.

(e) Any pleading may adopt and incorporate, by specific reference thereto, any part of any document or entry in the official files and records of the agency. Copies of the relevant portions of such documents must be attached to the pleadings.

§337.25. Petitions which Initiate a Cause of Action.

(a) Generally. Where there is no statutory requirement that a preliminary report (or EDPR) be filed, the executive director may file a petition as the instrument for initiating an enforcement action.

(b) Service. Where enforcement actions are initiated with a petition, as per this section, and there is a statutory requirement that the respondent be given notice, the petition shall be filed and notice given as if it were an EDPR, in

accordance with §337.26 of this title (relating to Notice of EDPR).

§337.26. Notice of EDPR.

(a) General requirements. Not later than the tenth day after the date on which the EDPR is issued, the executive director shall give written notice of the EDPR to the person charged therein. The EDPR is considered "issued" when it is filed with the Office of the Chief Clerk. Notice shall consist of a copy of the EDPR, a statement of the amount of the penalty recommended, if any, and a statement of the right of the person charged to a hearing on the occurrence of the violation, the amount of the penalty, or both.

(b) Timeliness and method of service. Notice shall be timely served if:

(1) sent to the respondent by registered or certified mail, return receipt requested, no later than the 10th day after the date on which the EDPR is issued, or

(2) delivered to the respondent, in person, with the date of delivery endorsed thereon, no later than the 10th day after the date on which the EDPR is issued.

(c) Service by publication. Where the executive director has been unable to deliver notice to the respondent through reasonable attempts to serve respondent by the methods described in subsection (b) of this section, notice may be effected by publishing in a newspaper of general circulation in

the county of the last known business or residential address of the respondent, for a period of seven consecutive days, the following:

(1) the name of the person charged;

(2) a brief summary of the charges;

(3) a statement of the amount of the penalty recommended, if any;

(4) a statement that injunctive or remedial relief is sought; and

(5) a statement of the right of the person charged to a hearing on the occurrence of the violation, the amount of the penalty, or both.

(d) Proof of notice. Where proof of notice of the EDPR is relevant, such as at a hearing for default judgment, a certificate by a party or an attorney of record or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service. In addition the executive director may offer live testimony as well as such other documentary evidence as permitted by the presiding officer, showing that the notice has been perfected. Nothing herein shall preclude any party from offering proof that the notice was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United State Postal Service, and upon so finding, the presiding officer

may extend the time for taking the action required of such party or grant such other relief as it deems just.

§337.27. Service of Notice and Pleadings.

(a) Method. Every notice required by this chapter, and every pleading filed pursuant to this chapter, other than the initial pleading in an enforcement action (usually an EDPR), unless presented during a hearing or otherwise expressly provided for in these rules, shall be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be. Delivery may be accomplished either in person or by agent, courier-receipted delivery, certified or registered mail, or intra- or inter-agency mail, to the party's last known address, or by telephonic document transfer to the recipient's current telecopier number, or by such other manner as the hearings examiner in his/her discretion may direct. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Service by telephonic document transfer after 5:00 p.m. local time of the recipient shall be deemed served on the following day, unless otherwise agreed upon by the parties. For purposes of this chapter, and with the exception of periods for filing and replying to exceptions pursuant to §337.53 of this title (relating to Amending the Proposal for Decision), whenever a

party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or telephonic document transfer, three days shall be added to the prescribed period. The party or attorney of record shall certify to the commission or the hearings examiner, as the case may be, compliance with this section in writing over signature and on the filed instrument.

(b) Proof. Where proof of service of notice or a written instrument is relevant, the executive director may offer proof in accordance with §337.26(d) of this title (relating to Notice of EDPR).

§337.28. Answer.

(a) A respondent may file a pleading, which may be in the nature of a "general denial" as that term is used in state district courts, entitled an "answer," either consenting to the imposition of the penalties and injunctive relief recommended in the EDPR, or requesting a contested enforcement case hearing. Any answer must be filed no later than the 20th day after the date on which notice of an EDPR is received. Failure to file the answer by the 20th day after the date on which notice of EDPR is received may result in a default order, as described in §337.29 of this title (relating to Default Order), being issued against respondent.

(b) If the person charged consents to the EDPR including the recommended penalty, the answer shall affirmatively so state.

(c) An answer as described herein must also be filed in response to a petition which initiates an enforcement action (as described in §337.25 of this title (relating to Petitions which Initiate a Cause of Action)).

(d) Answers to amended or supplemental petitions shall be filed if additional facts and claims are alleged in response to the said amended or supplemental petitions.

(e) Any affirmative defenses must be specifically pled in an answer.

(f) A respondent may consent in writing to parts of the EDPR, initial petition, or amended or supplemental petition, whichever is the most recent pleading. He/she may also enter into agreements with the executive director regarding evidence or other issues pending in the enforcement action by stipulations presented in writing to the hearings examiner.

§337.29. Default Order.

(a) How and when. If any respondent to an EDPR or petition initiating an enforcement action fails to timely file an answer as required by §337.28 of this title (relating to Answer), the executive director may make a motion that a default order be entered against the respondent. The executive director may support the motion with such documentary evidence, including

affidavits, exhibits and pleadings, and oral testimony to demonstrate that the respondent received proper notice, under §337.25 or §337.26 of this title (relating to Petitions which Initiate a cause of Action and Notice of EDPR), of the pleading initiating the cause of action; and that the respondent failed to timely file an answer under §337.28 of this title, and that the respondent is liable for the violations asserted in the cause of action. The executive director may also present documentary evidence and oral testimony regarding the amount of penalties that should be assessed against the respondent. In the motion for default order, or at the hearing on the motion, the executive director may also ask for additional penalties for violations alleged in the EDPR or petition, which have continued from the time of the filing of the EDPR or petition, up to the date of the default order. If the executive director recommends additional penalties for continuing violations, he shall briefly describe, either orally or in writing, the continuing violations and the evidence, circumstantial or otherwise, that forms the basis for the allegation that the violations are in fact continuing. The commission may grant the relief recommended in the EDPR or petition, or such other amount as may be justified by the evidence presented by the executive director.

(b) Failure to appear at hearing. Even though some or all of the parties fail to appear at a contested enforcement case hearing in person or through their duly authorized representatives, the commission may consider fully and dispose of

the matter pending if notice has been given in accordance with law.

(c) Upon issuance of a default order, notice of such order shall be given to the respondent according to the provisions of §337.28 of this title.

§337.30. Agreed Orders.

(a) The executive director and the respondent may reach an agreement, or settlement, in an enforcement action such that an agreed order is recommended to the commission for approval and issuance. In such an agreed order, the respondent may agree to: admit to none, any, or all of the violations alleged in any EDPR or petition in the case; assessment of a specific administrative penalty; remedial ordering provisions; any combination of the above; and any other lawful provisions agreed to by the Executive Director and the respondent. In order to have legal effect as an order of the commission, and in any case in which penalties are assessed, an agreed order must be approved and issued by the commission.

(b) The issuance date of an Agreed Order shall be the date upon which the order is signed indicating commission approval.

(c) When an agreement is reached, the case may then be set for consideration of an agreed order on the commission's agenda as soon as practicable, without need for a proposal for decision from the presiding officer, or hearings examiner.

§337.31. [RESERVED]

§337.32. Consolidation and Severance. Once the office of hearings examiners has assumed jurisdiction over the contested case, the executive director may consolidate or sever cases or claims involving any person or persons against whom the executive director has a right to proceed, including the consolidation or severance of claims involving different media, with permission of the hearings examiner. The hearings examiner may sever contested enforcement cases or claims involving any number of parties, upon motion by any respondent, where the respondent can show that he/she would be unduly prejudiced if severance were not granted.

§337.33 Continuance. A motion for continuance of any contested enforcement case hearing shall be granted by the hearings examiner whenever justice may require. All motions for continuance must be supported by an affidavit or by sworn written motion by the person or persons having knowledge of the facts supporting the motion.

§337.34. Preliminary Hearing.

(a) To assist in the disposition of the enforcement action without undue expense or burden to the parties, the office of hearings examiners may, at the request of any party or on its own motion, direct the parties and their respective representatives to appear before it for a Preliminary Hearing to consider:

(1) all pending motions;

(2) amendments to the pleadings;

(3) a scheduling order, which may include a statement of the discovery required by each party, the dates upon which discovery shall begin and end, the dates by which each party shall identify its experts and produce any reports by those experts, the date on which all supplementations of discovery are required, the date by which the parties must join any additional parties and amend any pleadings, the date by which all potentially dispositive motions must be filed, the date by which the final lists of witnesses and exhibits must be filed, the date by which all objections to witnesses and exhibits must be filed, the date of a final prehearing conference, the date upon which the hearing shall commence, and an estimate of the length of the hearing;

(4) the settlement of the enforcement action or any parts thereof; and

(5) such other matters as may aid in the disposition of the action.

(b) The hearings examiner shall make an order that recites the actions taken at the Preliminary Hearing, and such order shall control the subsequent course of the action, unless modified by the hearings examiner to prevent injustice.

§337.35. Notice of Contested Enforcement Case Hearing. For any contested enforcement case hearing, the chief clerk shall

give notice to the parties in accordance with §2001.052 of the Administrative Code.

§337.36. Rights of Parties in Contested Enforcement Case Hearings. A party has the right to conduct discovery; present a direct case; cross-examine witnesses; make oral and written arguments; obtain copies of all pleadings, motions, replies, and other filed documents; receive copies of all notices issued by the commission concerning the contested enforcement case to which he/she is a party; and, as directed by the hearings examiner, otherwise fully participate as a party in the contested enforcement case.

§337.37. Discovery.

(a) Discovery Generally. The hearings examiner may order that discovery be conducted in accordance with Rules 166b-169 of the Texas Rules of Civil Procedure, through a scheduling order as discussed in §337.34(a)(3) of this title (relating to Preliminary Hearing), so long as the Rules of Civil Procedure are interpreted in a manner consistent with this chapter, the Texas Water Code, the Texas Health and Safety Code, and the Administrative Procedure Act.

(b) Forms of Discovery. Parties may use any form of discovery provided in the Texas Rules of Civil Procedure or the Administrative Procedure Act. Discovery forms include requests for production of documents and other things for inspection,

written interrogatories to a party, requests for admissions to a party, oral or written depositions, requests for entry upon and examination of real property, and motions for a mental and physical examination of a party or person under the legal control of a party.

(c) Scope of Discovery. Parties may obtain discovery regarding any matter which is relevant to the subject matter of the proceeding. It is not ground for objection that the information sought will be inadmissible at hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Nor is it ground for objection that the discovery request involves an opinion or contention that relates to fact, the application of law to fact, or mixed questions of law and fact, but the hearings examiner, upon a party's motion, may order that such a request need not be answered until a later date.

(d) Protective Orders. On motion specifying the grounds and made by any person against or from whom discovery is sought, the hearings examiner may make a ruling in the interest of justice necessary to protect the person from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional or property rights. Specifically, the hearings examiner may issue an order:

(1) that requested discovery not be sought in whole or in part, or that the extent or subject of discovery be

limited, or that it not be undertaken at the time or place specified;

(2) that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the hearings examiner;

(3) that results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be restricted. However, in considering such an order, no order or decision issued by the hearings examiner or the commission may be sealed and other records filed pursuant to contested enforcement case procedures shall be presumed to be open to the general public. That presumption of openness may be overcome only upon a showing of all of the following:

(A) a specific, serious and substantial interest which clearly outweighs:

(i) this presumption of openness; and

(ii) any probable adverse effect that sealing will have upon the general public health or safety;

(B) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted; and

(C)) sealing of the records in question can be achieved in accordance with the Texas Open Records Act, Texas Civil Statutes, Article 6252-17a (Vernon Supplement 1992).

(e) Discovery compellable. The hearings examiner may compel any form of discovery if a party to a contested enforcement case fails to comply with appropriate rules. A party may file a motion to compel discovery at least 10 days prior to hearing. Motions to compel discovery may be filed less than 10 days prior to a hearing upon a showing of good cause.

(f) Incorporation of other rules. In addition to the foregoing subsections relating to discovery, §265.37(c) and (f); and §§265.42-265.49, of this title (relating to Forms and Scope of Discovery; Protective Orders; Supplementation of Responses; Depositions; Issuance of Commission to Take Deposition; Witness Shall Comply with Discovery; Non-Stenographic Recording; Deposition by telephone; Failure of Party or Witness to Attend or to Serve Subpoena; Expenses; Deposition Examination, Cross-Examination and Objections, Submission to Witness; Changes; Signing and Use of Deposition Transcripts in Commission Proceedings).

§337.38. Abuse of Discovery; Sanctions.

(a) Sections 265.50 and 265.51 of this title (relating to Abuse of Discovery; Sanctions; and Sanctions for Failure to Service or Deliver Copy of Pleadings and Motions) are hereby incorporated by reference.

(b) If a hearings examiner requires, or approves an agreement between the parties requiring that parties identify their witnesses according to a discovery schedule, the hearings

examiner may impose as a sanction upon a party who violates such requirement, that the party be barred from calling any witness not properly identified.

(c) Absent good cause, a witness shall be barred from testifying about matters which were not identified by the sponsoring party in its witness list and amendments thereto, and/or in that witness' prefiled testimony, when election to prefile testimony has been noticed by the sponsoring party or when prefiled testimony has been directed by the examiner.

(d) In addition to the foregoing, if a respondent fails to comply with discovery procedures, the hearings examiner may issue a proposal for decision recommending preclusion of the offending party from contesting a given issue of fact, or that a default judgment be rendered against the respondent, in accordance with §337.29 of this title (relating to Default Order).

§337.39. Summary Judgment.

(a) Motion. A party to an enforcement action may, at any time after the preliminary hearing as set forth in §337.34 of this title (relating to Preliminary Hearings) and up to at least 21 days prior to the date specified for an enforcement hearing, file a motion for a summary judgment in his/her favor upon all or any part of that action. The motion shall state the specific grounds justifying the summary judgment and shall include any

supporting affidavits, based on personal knowledge, reciting all material facts and any other available documentary evidence.

(b) Written Response. Upon the filing of a motion for summary judgment, any adverse party may, not later than seven days prior to the hearing upon the motion, file a written response and any opposing affidavits, based on personal knowledge.

(c) Oral testimony. No oral testimony shall be received at a hearing on the motion for summary judgment. At the discretion of the hearings examiner, oral argument of counsel may be presented on the motion. Partial Summary Judgment shall be rendered if the pleadings, admissions, affidavits, stipulations, and exhibits on file in the case at the time of the hearing show that, except as to the amount of penalties and the extent of any technical requirements, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the hearings examiner must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(d) Partial summary judgment. If a motion for summary judgment is denied, in whole or in part, the hearings examiner

may, if practicable, ascertain what facts are not in dispute or are incontrovertible by examining the evidence filed, interrogating counsel and/or directing a conference. The hearings examiner may then make a ruling denying the motion and specifying what facts, if any, will be deemed established for all purposes in the enforcement hearing.

§337.40. Interlocutory Appeals. No interlocutory appeals may be made to the commission by a party to a contested enforcement case before a hearings examiner, except on jurisdictional issues. However, at any time during a contested enforcement case, on a motion by a party, or on the hearings examiner's own motion, the office of hearings examiners may certify a question to the commission for guidance regarding commission policy, jurisdiction or the imposition of any sanction by the hearings examiner that would substantially impair a party's ability to present his/her case.

§337.41. Final Prehearing Conference.

(a) Upon a request by any party, and at the discretion of the hearings examiner, the hearing examiner may order that the parties and/or their designated representatives appear before him/her for a final prehearing conference as close to the time of an enforcement hearing as is reasonable under the circumstances. The purposes of such a conference are to:

(1) expedite the disposition of the enforcement action;

(2) establish the structure that will govern the enforcement hearing;

(3) improve the quality of the enforcement hearing; and

(4) facilitate the settlement of the enforcement action.

(b) The hearings examiner may prepare, or may order that the parties draft, a prehearing order in preparation for the final prehearing conference. Such an order, upon the hearings examiner's approval, will control the subsequent course of the enforcement hearing.

(c) If a party or his/her representative fails to appear at a prehearing conference, is substantially unprepared to participate in the conference, or fails to participate in good faith, the hearings examiner, upon motion or on the hearings examiner's own initiative, may make such orders as are just, including those included in §337.38 of this title (relating to Abuse of Discovery; Sanctions).

§337.42. Exhibits.

(a) Exhibits sought to be introduced by a party in a contested enforcement case hearing shall not exceed 8 1/2 by 11 inches unless they are folded to the required size. Maps and drawings that are offered as exhibits shall be rolled or folded

so as not to unduly encumber the record. Exhibits not conforming to this rule may be excluded.

(b) Each exhibit offered shall be tendered for identification and placed in the record. Copies shall be furnished to the hearings examiner, each of the parties, and the hearings reporter, unless the hearings examiner rules otherwise.

(c) If an exhibit has been identified, offered, objected to and excluded, it may be withdrawn by the offering party. If withdrawn, the exhibit will be returned and the offering party will have waived all objections to the exclusion of the exhibit. If not withdrawn, the exhibit shall be included in the record for the purpose of preserving the offering party's objection to the exclusion of the exhibit.

§337.43. Removing Case from Active Docket. At any time, the parties to an enforcement action may agree to file a joint motion requesting that the action be removed from the office's active docket of actions, so as to allow the parties to engage in and complete settlement negotiations which will dispose of all or part of the action. The action shall be returned to the active docket of actions upon the written request of any party. Upon the action's return to the active docket, any party may request that the hearings examiner issue a revised prehearing/discovery schedule to govern the timing of the enforcement hearing and the events leading up to that hearing.

§337.44. Agreements to be in Writing. No agreement between parties or their representatives affecting any pending matter will be considered by the hearings examiner unless it is in writing, signed by the parties, and filed as a part of the record; or is announced at the contested enforcement case hearing and entered of record.

§337.45. Presentation of Evidence.

(a) In addition to the following subsections relating to presentation of evidence, §§265.31-265.35 (relating to Subpoena of Witnesses and for the Production of Documentary Evidence; Form of Subpoena; Witness Shall Attend Hearing; Evidence; and Additional Testimony), are hereby incorporated by reference. (b) Oral testimony offered by any witness shall be under oath.

(c) The parties shall each have the right to call and examine witnesses, and to introduce exhibits. In a contested case, a party may conduct cross-examination required for a full and true disclosure of the facts. The rules of privilege shall be effective to the extent that they are otherwise required to be recognized by Texas statute.

(d) Official notice may be taken of any generally accepted technical or scientific matter within the commission's field of competence or any matter which may be judicially noticed by the courts of this state. Parties present at the hearing shall

be informed of and given an opportunity to rebut the matters proposed to be noticed.

(e) If in the opinion of the hearings examiner, it appears that the presentation of live testimony in a contested enforcement case hearing may last for more than 5 working days, the hearings examiner may order that the parties introduce their witnesses' direct testimony through prefiled written questions and answers. If the hearings examiner so orders, the parties shall provide the pre-filed testimony for each witness it intends to present at the enforcement hearing to all other parties of record within a reasonable time prior to the presentation of the testimony of the witness at hearing, with such reasonable time period to be determined by the hearings examiner. The prefiled testimony of a witness shall not be admissible if the witness is not available at the hearing for cross-examination.

§337.46. Burden of Proof. The executive director shall have the burden of proving by a preponderance of the evidence the occurrence of any violation and the appropriateness of any proposed technical ordering provisions. The respondent shall have the burden of proving by a preponderance of the evidence all elements of any affirmative defense he/she asserts. Any party submitting facts relevant to the factors prescribed by the applicable statute to be considered by the commission in determining the amount of the penalty shall have the burden of proving those facts by a preponderance of the evidence.

§337.47. Order of Presentation. In all contested enforcement case hearings, the executive director shall have the right to open and close. After all parties have completed the presentation of their evidence, the hearings examiner may call upon any party for further material or relevant evidence upon any issue. In all cases, the executive director shall be allowed to close with its rebuttal. At the discretion of the hearings examiner, a party may present a re-rebuttal case when another party presents evidence which could not have been reasonably anticipated.

§337.48. Oral Argument. At the conclusion of the hearing, oral argument may be heard upon the request of the parties or upon the directive of the hearings examiner. Reasonable time limits may be established by the hearings examiner. The hearings examiner may require or accept written briefs in lieu of or in addition to oral argument.

§337.49 [RESERVED]

§337.50. Financial Inability to Pay; Amount Necessary to Obtain Compliance.

(a) If any respondent, in response to an EDPR or petition asserts an inability to pay the penalty recommended in that pleading or challenges the executive director's recommendation regarding the amount of penalty which is

necessary to deter future violations, that party shall have the burden of establishing that a lesser penalty is justified under that party's financial circumstances.

(b) A party asserting a claim under this section must produce all financial records that would be potentially relevant to that issue within thirty days of raising that claim, but no later than thirty days prior to the specified date for hearing without leave from the hearings examiner. The executive director is not required to make a discovery request for such financial records. The failure of the party raising such a claim to provide all potentially relevant financial records within the time discussed in this subsection shall constitute a waiver of the claim.

§337.51. Proposal for Decision ("PFD").

(a) After closing the hearing record in any contested enforcement case hearing, the hearings examiner shall file a written proposal for decision, which shall contain a statement of the reasons for the proposal, findings of fact, conclusions of law, a proposal for remedial relief (technical ordering provisions) where appropriate, and one of the following recommendations:

(1) that a violation has occurred and that a specific amount of penalties should be assessed;

(2) that a violation has occurred but that no penalty should be assessed; or

(3) that no violation has occurred.

(b) The proposal may also contain, rulings on any findings of fact and conclusions of law that have been submitted by the parties, and other provisions deemed appropriate by the hearings examiner.

(c) When recommending the assessment of an administrative penalty, the hearings examiner shall analyze each factor prescribed by the applicable statute to be considered by the commission in determining the amount of the penalty. The hearings examiner shall recommend to the commission an appropriate penalty amount based upon the evidence adduced at the hearing and the factors articulated in the applicable statutes.

(d) Weight to be given by the hearings examiner to individual statutory factors for determining penalty amount need not be equal and may vary depending on the facts of the particular case. The absence of evidence as to any particular factor does not negate the ability of the hearings examiner to arrive at a finding of an appropriate penalty based upon the totality of the circumstances, though such lack of evidence may be a factor in determining the penalty amount.

§337.52. Waiver of Right to Review Proposal for Decision. Any party may waive the right to review and comment upon the hearings examiner's proposal for decision. The waiver shall be in writing or stated on the record at the hearing.

§337.53. Pleadings Following Proposal for Decision. Unless right of review has been waived under §337.52 of this title (relating to Waiver of Right to Review Proposal for Decision), any party may, within 20 days after the date of issuance of the proposal for decision, file exceptions or briefs. Any replies to such pleadings shall be filed within 30 days after the date of issuance of the proposal for decision. These deadlines may be changed upon the written agreement of the parties with approval of the hearings examiner.

§337.54. Amending the Proposal for Decision. The hearings examiner may file an amended proposal for decision in response to exceptions, replies or briefs submitted by the parties. The parties are not entitled to file exceptions or briefs in response to the amended proposal for decision, but may raise any issues before the commission as permitted by the commission at the time of oral presentation.

§337.55. Motion to Re-open the Record after Proposal for Decision. After the PFD has been filed in a contested enforcement case, along with any subsequent pleadings in accordance with §337.53 of this title (relating to Pleadings Following Proposal for Decision) and §337.54 of this title (relating to Amending the Proposal for Decision), the commission, on the motion of any party or on its own motion, may order the hearings examiner to reopen the record for further proceedings on

specific issues in dispute. The commission's order shall include instructions as to the subject matter of further proceedings and the hearings examiner's duties in preparing supplemental materials or revised orders based upon those proceedings for the commission's final adoption.

§337.56. Commission's Decision after Contested Enforcement Case Hearing.

(a) After its receipt of the hearings examiner's proposal for decision, the commission shall review the proposal and shall issue a decision, which shall contain findings of fact and conclusions of law, provisions requiring remedial relief (technical ordering provisions), as necessary, and one of the following findings:

(1) that a violation has occurred and that a specific amount of penalties should be assessed;

(2) that a violation has occurred but that no penalty should be assessed; or

(3) that no violation has occurred.

(b) The decision may also contain rulings on any findings of fact and conclusions of law that have been submitted by the parties and other provisions deemed appropriate by the commission.

(c) When assessing an administrative penalty, the commission shall analyze each factor prescribed by the applicable

statute to be considered by the commission in determining the amount of the penalty.

(d) Weight to be given by the commission to individual statutory factors for determining penalty amount need not be equal and may vary depending on the facts of the particular case. The absence of evidence as to any particular factor does not negate the ability of the commission to arrive at a finding of an appropriate penalty based upon the totality of the circumstances, though such lack of evidence may be a factor in reducing or increasing the penalty amount.

§337.57. Notice of Decisions and Orders.

(a) Notice of enforcement orders and decisions. For rulings, orders, or decisions issued by the commission or a hearings examiner in a contested enforcement case, parties shall be given notice, either personally or by first class mail, in accordance with the Administrative Procedure Act, §2001.142. Notice shall also be given in accordance with the Texas Health and Safety Code, §382.096, where applicable.

(b) Effective date. Effective date of an order for purposes of compliance with terms and conditions therein, including deadlines, shall be the date on which service of notice of the order is achieved in accordance with the Administrative Procedure Act, §2001.142.

(c) Notice of Enforcement Orders. In addition to the requirements of §337.27(a) of this title, (relating Service of

Notice and Pleadings) when the commission issues an enforcement order, notice of the order shall include: a copy of the order, a statement of the amount of the penalty, and a statement that the respondent has a right to judicial review of the order. For cases in which administrative penalties have been assessed, the chief clerk shall file notice of the commission's decision and order in the Texas Register not later than 10 days after the date on which the decision is adopted.

§337.58. Appeals of Enforcement Orders.

(a) Within the 30-day period immediately following the day on which the commission's order in a contested case is final, in accordance with the Administrative Procedure Act, the person charged with a penalty shall pay the penalty in full.

(b) The person assessed a penalty by the commission may suspend enforcement of the penalty while seeking judicial review by forwarding the amount of the penalty to the commission for placement in an escrow account or posting with the commission a supersedeas bond payable to the Texas Natural Resource Conservation Commission for the amount of the penalty, within the 30-day period immediately following the day on which the commission's order is final.

(c) In the event the person assessed fails to take any of the actions in subsections (a) and (b) of this section, the executive director may forward the matter to the attorney general for enforcement.

(d) In the event that the final appellate determination is against the person assessed a penalty, he or she shall pay the commission the full amount of the penalty, and the commission shall deposit the amount of the penalty in the state treasury to the credit of the general revenue fund.

(e) To the extent that the final appellate determination is in favor of the person assessed, he or she shall be absolved of liability for payment of that portion of the amount of the penalty as is required to comply with that determination, and the commission shall return that amount of the penalty assessed which is excessive according to that determination, or any amount of the supersedeas bond or escrow account filed with the commission for the purpose of suspending the enforcement of the penalty while seeking judicial review which is in excess of the final penalty determination with a certificate of its return.

(f) Any supersedeas bond or escrow account filed with the commission for the purpose of suspending the enforcement of the penalty while seeking judicial review of the final decision of the commission shall be drawn according to a form on file in the office of the chief clerk. Upon request, the chief clerk shall certify the receipt of the amount of any penalty received by the commission for the purpose of suspending the enforcement of the penalty while seeking judicial review.

(g) General procedures for appealing any enforcement orders or decisions of the commission are governed by the Government Code, Chapter 2001, the Administrative Procedure Act.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on

Subchapter C
Special Enforcement Proceedings
§§337.71

The new section is adopted under Texas Water Code, §§5.103 and 5.105, and Health and Safety Code §382.017 which provide the Texas Natural Resource Conservation Commission with the authority to adopt any rules necessary to carry out its powers and duties under the Texas Water Code and the Health and Safety Code, respectively, and other laws of the State of Texas, and to establish and approve all general policy of the commission.

§337.71. Mandatory Enforcement Hearings.

(a) The executive director shall monitor compliance with all permits and licenses issued by the commission. If the evidence available to the executive director through the monitoring process indicates that a permittee or licensee is in substantial noncompliance for a period of four consecutive months, or for a shorter period of time if the executive director considers an emergency to exist, the executive director shall report this fact to the commission together with the information relating to the noncompliance. A certificate of convenience and necessity is not considered to be a permit or license for the purpose of this section.

(1) The executive director may consider the magnitude and frequency of noncompliances with permit or license

limitations and conditions in determining the existence of substantial noncompliance.

(2) "Substantial noncompliance" includes situations involving permit or license violations which cause or have the potential to cause a significant water quality problem in, or impairment of the uses of a receiving stream, groundwater or other water in the state, infringes upon the water rights of diverters or appropriators of water of the state, or results in a release or threat of release of hazardous waste to the environment, or any other set of circumstances which present a threat to public health or safety or the environment. This set of circumstances includes but is not limited to a failure to monitor operations or report information required by a permit or license regarding the operation of a facility without which the operator and/or the commission may be unable to adequately assess the performance of the facility and thereby assure that environmental harm or threats to public health have not occurred and may not occur. In addition, "substantial noncompliance" will be assessed in terms of the degree of deviation from any requirement of a permit or license independent of the harm or potential harm to the environment or to public health.

(3) An "emergency," for purposes of this subsection, involves an unforeseen set of circumstances which calls for immediate commission action due to an actual or potential hazard to public health and safety, or severe adverse impact on or to the uses of a receiving stream, groundwater or other water in the

state. If the emergency is of sufficient gravity, the executive director shall report the emergency to the commission together with the information relating to the noncompliance and shall advise the commission of the necessity of seeking a temporary restraining order, temporary injunction, or any other remedy in equity or law necessary for the abatement of the condition or conditions causing or contributing to the emergency, if such remedy is authorized by statute.

(4) Substantial noncompliance with provisions of the Texas Health and Safety Code, Chapter 382 or with rules, permits or orders promulgated pursuant to that Chapter, shall be handled pursuant to the Texas Health and Safety Code, §382.082.

(b) On receiving a report under subsection (a) of this section, the commission shall call and hold a hearing to determine whether the permittee or licensee who is the subject of the executive director's report to the commission has been in substantial noncompliance with his or her permit or license. Notice for this hearing shall issue in accordance with §337.26(b) and (c) of this title (relating to Notice of EDPR), except that in the event that notice is performed under §337.26(c) of this title, by publication, the contents of that notice need only include the name of the respondent, a summary of the relief sought by the executive director, and the right of the person to a hearing if such exists.

(c) At the conclusion of the hearing, the commission shall issue an order stating one of the following:

(1) no violation of the permit or license has occurred;

(2) a violation of the permit or license has occurred but has been corrected and no further action is necessary to protect the public interest;

(3) the executive director is authorized to enter into a compliance agreement;

(4) a violation of the permit or license has occurred and an administrative penalty is assessed as provided by the Texas Water Code or the Texas Health and Safety Code; or

(5) a violation of the permit or license has occurred, and the executive director is directed to have enforcement proceedings instituted against the permittee or licensee through the office of the attorney general.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on

TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 337. Enforcement

The new sections can be described as follows:

Section 337.1 states the purpose of chapter 337.

Section 337.2 describes how those sections, from within Title 30 of the Texas Administrative Code, that have been incorporated by reference, within the new sections, should be construed.

Section 337.3 provides definitions of terms that are used in the new sections.

Section 337.4 describes how pleadings and other written instruments that are required to be filed by the new sections should be filed.

Section 337.5 describes the method for computing time under this chapter, and does so by incorporating the provisions of 30 TAC §263.14.

Section 337.6 states that the executive director of the TNRCC is authorized to seek judicial enforcement in courts of competent jurisdiction, by referring the matter to the Texas attorney general's office.

Section 337.7 describes the relevance of enforcement orders as a part of a person's compliance history for the purpose of commission proceedings.

Section 337.8 describes the powers of the commission in holding enforcement hearings.

Section 337.9 permits the commission to adopt guidelines which are neither rules nor precedents but rather announce the manner in which the agency tentatively expects to exercise its discretion in future proceedings.

Section 337.10 requires the commission to compile and publish an annual enforcement report.

Section 337.21 states that the authority to hold contested enforcement case hearings, unless otherwise ordered by the commission, is delegated to the office of hearings examiners, and that the authority shall be vested in the office of hearings examiners when the respondent invokes the right to an evidentiary hearing.

Section 337.22 describes the remedies available to the commission in enforcement proceedings conducted pursuant to the new sections.

Section 337.23 provides for initiation of an enforcement action by filing of the executive director's preliminary report ("EDPR"), and describes what must be included therein.

Section 337.24 states the requirements for pleadings, other than the EDPR, that are filed in a contested enforcement case. This section also provides for the amendment of an EDPR by the filing of a petition, and for the filing of a petition where an EDPR is not statutorily required.

Section 337.25 describes the notice requirements that must be complied with upon the filing of an EDPR, including service requirements and proof of notice.

Section 337.26 describes the notice requirements that must be complied with upon the filing of a petition that initiates an enforcement action.

Section 337.27 describes the notice requirements that must be complied with upon the filing of any notice or pleading, other than the initial pleading in an enforcement action.

Section 337.28 provides that a respondent may file an answer to an EDPR or petition, which initiates an enforcement action, in which the respondent may either consent to the imposition of penalties and injunctive relief or request a contested enforcement case hearing.

Section 337.29 describes the manner in which the executive director may seek and the commission may issue a default order against a respondent who fails to timely file an answer, who fails to appear at a contested enforcement case hearing, or who fails to comply with discovery requests.

Section 337.30 provides that the executive director and a respondent may enter into an agreed order to settle a contested enforcement case; states the definition of "issuance date" of the agreed order; and describes the procedure for bringing the agreed order before the commission for consideration.

Section 337.31 describes the assumption of jurisdiction over a contested enforcement case by the office of hearings examiners, and the duties of the hearings examiner in controlling and managing the contested enforcement case.

Section 337.32 provides that the executive director may consolidate or sever contested enforcement cases and that the hearings examiner may sever contested enforcement cases if the respondent would be unduly prejudiced without such a severance.

Section 337.33 allows the hearings examiner to grant a continuance in the interest of justice, and describes the requirements for a motion for continuance.

Section 337.34 permits the office of hearings examiners to hold a preliminary hearing; describes what action may be taken at such a hearing; and requires that the hearings examiner propose an order that recites the actions taken at the hearing.

Section 337.35 describes the duties of the chief clerk in notifying the respondent of the date of a contested enforcement case hearing.

Section 337.36, which is essentially identical to 30 TAC §267.3, describes the rights of the parties in contested enforcement case hearings.

Section 337.37 describes the procedures under which discovery may be conducted in a contested enforcement case; sets out the forms that discovery may take; describes the scope of discovery; provides for protective orders from discovery; makes all discovery compellable; and incorporates by reference other sections of Title 30 of the Texas Administrative Code dealing with various issues concerning the procedures that control depositions in contested enforcement cases.

Section 337.38 describes the sanctions that a hearings examiner may levy upon a party who abuses the discovery process in a contested enforcement case; who fails to properly identify his/her witnesses pursuant to a discovery schedule; or who fails to comply with requirements concerning the use of prefiled testimony.

Section 337.39 provides the procedures under which a motion for summary judgment may be filed, responded to by an opposing party and considered and ruled upon by the hearings examiner.

Section 337.40 states that no interlocutory appeals may be made to the commission by a party to a contested enforcement case. The section does permit the hearings examiner to certify a question to the commission regarding commission policy, jurisdiction or the imposition of a sanction by the hearings examiner.

Section 337.41 permits the office of hearings examiners to hold a final prehearing conference; describes the purposes of the conference; permits a hearings examiner to order the parties to file a joint prehearing order; and provides for sanctions which may be levied against a party who fails to adequately participate in the conference.

Section 337.42 describes the requirements for exhibits that are sought to be introduced by any party in a contested enforcement case hearing.

Section 337.43 states that the parties to a contested enforcement case may file a joint motion requesting that the case be removed from the office of hearings examiners' active docket for the purpose of engaging in and completing settlement negotiations to dispose of all or part of the case. The section states that the case will be returned to the active docket upon the written request of any party, and that the any party may request, at that time, that the hearings examiner issue a revised prehearing/discovery schedule.

Section 337.44, which is essentially identical to 30 TAC §267.9, states that agreements between the parties must be in writing to be considered by the hearings examiner, unless it is announced at the hearing on the record.

Section 337.45 describes the presentation of evidence in a contested enforcement case, and includes provisions for the hearings examiner to take official notice of matters; for the use of prefiled testimony; and for the use of subpoena with respect to witnesses and documents.

Section 337.46 describes the burden of proof placed on the executive director in contested enforcement cases.

Section 337.47 sets forth the order of presentation and the right to rebuttal in contested enforcement cases.

Section 337.48, which is essentially identical to 30 TAC §267.25, permits the hearings examiner to allow or direct oral argument at the conclusion of the hearing, and states that the hearings examiner may require that the parties submit written briefs instead of or in addition to the use of oral argument.

Section 337.49, which is essentially identical to 30 TAC §267.26, permits the hearings examiner to require that the parties submit proposed findings of fact and conclusions of law.

Section 337.50 describes the burden of proof placed on a respondent who asserts an inability to pay a recommended penalty or challenges the executive director's decision regarding the amount of penalty necessary to deter future violations; describes the respondent's burden of producing financial records that would be potentially relevant to such an assertion or challenge; and describes the consequences of failing to produce such records.

Section 337.51 describes the requirements that a hearings examiner must meet in drafting his/her proposal for decision, and describes how the hearings examiner should arrive at a recommendation of an administrative penalty.

Section 337.52, which is essentially identical to 30 TAC §269.5, provides that a party may waive his/her right to review the proposal for decision.

Section 337.53, which is based on 30 TAC §269.6, permits any party to file exceptions and replies to exceptions to a proposal for decision.

Section 337.54, which is based on 30 TAC §269.7, allows the hearings examiner to amend the proposal for decision in response to any pleadings filed by the parties.

Section 337.55, which is based on 30 TAC §269.9, allows the commission to order the hearings examiner to reopen the record for further proceedings on specific issues.

Section 337.56 describes the commission's review of the hearings examiner's proposal for decision, the factors that the commission should base its decision upon, and how the commission should arrive at a recommendation of an administrative penalty.

Section 337.57 describes the requirements for the notice of enforcement orders or decisions of the commission.

Section 337.58 describes the requirements for appealing administrative penalties and for suspending the enforcement of a penalty while seeking judicial review. The section also provides for the reimbursement of the person assessed a penalty if the final appellate determination is in favor of the person assessed.

Section 337.71 describes the basis for a mandatory enforcement hearing, premised on the existence of substantial noncompliance or an emergency. The section also describes the notice requirements that are applicable in a mandatory enforcement hearing, and the actions the commission may take at the completion of the hearing.

APPENDIX 2

PROPOSED AMENDMENTS TO 30 T.A.C. CHPT. 337

TNRCC ENFORCEMENT HEARING RULES

Chapter 337. Enforcement Rules

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes amendments to §§337.3, 337.8, and 337.9, the repeal of §337.4, new §337.4, amendments to §§337.21, 337.24, 337.27, 337.28, 337.30, 337. 32-337.34, 337.36-337.45, 337.47, 337.48, 337.50-337.57, and new §337.31 and §337.80, concerning Enforcement Rules as related to the TNRCC procedural rules. The proposed changes are part of an agency rulemaking project to implement recent legislation in Senate Bills (SB) 12, 741, and 1546. The commission published additional proposed changes to its procedural rules in the July 11, 1995, issue of the *Texas Register* (20 TexReg 5015). SB 12 directs the State Office of Administrative Hearings (SOAH) to conduct contested case hearings for the commission (other than hearings before one or more commissioners). SB 741 authorizes the commission to delegate to the executive director the authority to act on uncontested applications. SB 1546 requires the commission to adopt rules concerning whether a person is an "affected person" and is entitled to standing in a contested case hearing. The commission limited the scope of this review of the procedural rules so that the new rules may be finally adopted by September 1, 1995, which is the effective date of SB 12 and 1546.

In proposing this rule package, the TNRCC is attempting to limit any rule changes to those necessitated by recent legislation. Additionally, an attempt has been made to recodify the current TNRCC practices and reorganize the procedural rules into a more logical format. No substantive change is intended by this recodification. Comment is specifically solicited on any changes in the recodification that appear to be substantive in nature. Comment is also solicited upon those sections that enact recent legislative changes in the agency's authority, and how these rules comport with the new legislation.

The TNRCC is continuing to review the procedural rules of the agency, with an eye towards providing efficient and understandable application review procedures. Additional changes to streamline and improve upon these rules are contemplated that current time limits do not allow to be incorporated into this rule package. Therefore, another review of these rules will begin after the final promulgation of this package (TNRCC Rule Log Number 95124-263-AD). The second review will focus upon general agency procedures and will allow broad discussion of all agency procedures and application processes. To provide a firm time frame for the next review, the current rule package, as proposed, will expire on May 31, 1996.

Before publication, the TNRCC sought informal comment on the proposed rules from approximately 60 people representing agency advisory groups, various interest groups, and regular practitioners before the agency. Due to the complexities of transferring contested cases to the purview of another state agency and the short time prior to the effective date of the legislation, the TNRCC sought this early, informal review of the proposed rules to ensure that no large issues or problems were overlooked or created. Many thorough and detailed comments were received. These comments helped the staff clarify some rules and correct many errors that crept into the first draft. The TNRCC would like to thank those who reviewed this draft package and submitted the many helpful comments. Comments received, but not addressed in this proposal, will be considered either in the response to comments in this rulemaking, or in the subsequent rule package.

The only significant change made in response to the early comments involved redrafting Chapter 263, Subchapter A, regarding delegation of uncontested applications and approvals to the executive director. This change was reflected in the proposed rules published in the July 11, 1995, issue of the *Texas Register* (20 TexReg 5015) and is not a part of the following proposed changes to the enforcement rules.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections. The transfer of responsibilities from the commission to SOAH is not anticipated to significantly affect the costs of the transferred hearing functions; therefore, no net impact to state government will result.

Mr. Minick also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be improvement in the hearings process for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. There will be no effect on small businesses. There is no anticipated economic cost for persons who are required to comply with the sections as proposed.

A public hearing on the proposal will be held August 17, 1995, at 2:00 p.m. in Room 254S

of TNRCC Building E, located at 12118 North IH-35, Park 35 Technology Center, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC central office in Austin through August 17, 1995. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on August 17, 1995, will be considered by the commission prior to any final action on the proposal. Please mail written comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log #95124-263-AD. Please fax comments to (512) 239-5687. Copies of the proposed rules are available at the central office of the TNRCC, Air Policy and Regulations Division, located at 12118 North IH-35, Park 35 Technology Center, Building E, Austin, and at all TNRCC regional offices. For further information, contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

Subchapter A. Enforcement Generally

• 30 TAC §§337.3, 337.4, 337.8, 337.9

The amendments and new section are proposed under the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361. 011, 361.017, 361.024, and 382.017, which authorizes the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The amendments and new section implement the Texas Water Code, §§5.103, 5. 105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017.

§337.3. Definitions. Unless specifically defined in this chapter, all terms used in these rules bear the same definitions ascribed by the Texas Water Code, the Texas Health and Safety Code, the APA, the Rules of Procedure of the commission (TNRCC), and the substantive regulations promulgated by the TNRCC. The terms specifically defined for the purposes of this chapter are as follows.

Contested enforcement case hearing–The evidentiary hearing on the merits in a contested enforcement case, presided over by the commissioners or SOAH [office of hearing examiners].

Judge–An administrative law judge employed by SOAH.

Pleadings–Any written petition, answer, motion, or other written instrument, except exhibits, including an "EDPR," filed with the commission or a judge [the office of hearings examiners] in a contested enforcement case; further defined in §337.24 of this title (relating to Requirements for Pleadings Other than EDPR).

SOAH–State Office of Administrative Hearings.

§337.4. Document Filing Procedures.

(a) All documents to be considered in a commissioners' meeting or by judges in contested cases shall be filed with the chief clerk. Hearing requests and responses shall also be filed with the chief clerk.

(b) If a docket number has been assigned, it should appear on the first page of all filed documents.

(c) Documents shall be filed by mail, facsimile, or hand delivery. If a person files a document by facsimile, he or she must file with the chief clerk the appropriate number of copies by mail or hand delivery within two days.

(d) The original or one copy of a document shall be filed, except for documents to be considered at a commissioners' meeting. For documents to be considered at a commissioners' meeting, eleven copies shall be filed.

(e) The time of filing is upon receipt by the chief clerk.

(f) The chief clerk shall accept all documents presented for filing. The chief clerk's acceptance is not a determination that the document meets filing deadlines or other requirements.

(g) If the requirements of this section are not followed, the commissioners may choose not to consider the documents. In the absence of a waiver under subsection (h) of this section, the commissioners may choose not to consider documents filed within two days of a commissioners' meeting.

(h) The judge may waive one or more of the requirements of this section, or impose additional filing requirements in SOAH proceedings. The commissioners or general counsel may waive one or more of the requirements of this section, or impose additional filing requirements for commissioners' meetings.

(i) This section does not apply to offers of evidence during a hearing.

§337.8. Enforcement Hearings. If required by law, an enforcement hearing shall be held prior to commission issuance of any final enforcement order. In cases for which an enforcement hearing is not required by law to be held prior to issuance of an enforcement order, the commission may elect to hold a hearing, on its own motion, or upon the request of the executive director, prior to issuing a final enforcement order or direct SOAH [the office of hearings examiners] to hold such a hearing. In those cases for which an enforcement hearing is not required by law to be held prior to issuance of an enforcement order, or for which procedures for an enforcement hearing are not specifically prescribed by rule or statute, the commission may elect to have such hearings be held by SOAH [the office of hearings examiners] under rules prescribed by the commission, including the procedures established by this chapter for contested enforcement cases.

§337.9. Enforcement Guidelines. The executive director may use enforcement guidelines which are neither rules nor precedents, but rather announce the manner in which the agency expects to exercise its discretion in future proceedings. These guidelines do not establish rules which the public is required to obey or with which it is to avoid conflict. These guidelines do not convey any rights or impose any obligations on members of the public. These guidelines will be available to the public under the terms of the Texas Open Records Act, Texas Government Code [Civil Statutes], Chapter 552 [Article 6252-17(a)] (Vernon's Supplement 1992).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508545

Lydia Gonzalez Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: August 30, 1995

For further information, please call: (512) 239-1966

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• 30 TAC §337.4

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017, which authorizes the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The repeal implements the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382. 017.

§337.4. Filing of Written Instruments.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508546 Lydia Gonzalez Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: August 30, 1995

For further information, please call: (512) 239-1966

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Subchapter B. Contested Enforcement Case Hearings

- **30 TAC §§337.21, 337.24, 337.27, 337.28, 337.30-337.34, 337. 36-337.45, 337.47, 337.48, 337.50-337.57**

The amendments and new section are proposed under the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361. 011, 361.017, 361.024, and 382.017, which authorizes the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The amendments and new section implement the Texas Water Code, §§5.103, 5. 105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017.

§337.21. Contested Enforcement Case Hearings to be Held by SOAH [Office of Hearings Examiners]. In a contested enforcement case, unless the commission chooses to hear the case itself, SOAH [the office of hearings examiners] shall have the delegated authority to preside over the case proceedings in accordance with the rules of this chapter.

§337.24. Pleadings Other than the Executive Director's Preliminary Report (EPDR).

(a)-(b) (No change.)

(c) Up to seven days prior to the hearing, parties may file pleadings, supplemental or amended, so long as such do not operate as an unfair surprise to the opposite party. Amendments after that time will be at the discretion of the judge [hearings examiner] and may constitute grounds for a continuance.

(d)-(e) (No change.)

§337.27. Service of Notice and Pleadings.

(a) Every notice required by this chapter, and every pleading filed pursuant to this chapter, other than the initial pleading in an enforcement action, unless presented during a hearing or otherwise expressly provided for in these rules, shall be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, shall be served at the same time to the chief clerk, the judge, and all parties. [Delivery may be accomplished either in person or by agent, courier-receipted delivery, certified or registered mail, or intra- or inter-agency mail, to the party's last known address, or by telephonic document transfer to the recipient's current telecopier number, or by such other manner as the hearings examiner in his/her discretion may direct. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Service by telephonic document transfer after 5: 00 p.m. local time of the recipient shall be deemed served on the following day, unless otherwise agreed upon by the parties.]

(b) The person or attorney shall include a certificate of service, certifying compliance with this section. Failure to furnish copies may be grounds for withholding consideration of the document.

(c) Service by mail is complete upon deposit in the mail, properly addressed, with postage prepaid. Service by facsimile is complete when sent to the recipient's facsimile number. Service by facsimile after 5:00 p.m. local time of the recipient shall be deemed served on the following day.

(d) For purposes of this chapter, and with the exception of periods for filing and replying to exceptions pursuant to §337.53 of this title (relating to Amending the Proposal for Decision), whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or telephonic document transfer, three days shall be added to the prescribed period.

(e)[(b)] Proof. Where proof of service of notice or a written instrument is relevant, the executive director may offer proof in accordance with §337.26(d) of this title (relating to Notice of Executive Director's Preliminary Report).

§337.28. Answer.

(a)-(e) (No change.)

(f) A respondent may consent in writing to parts of the EDPR, initial petition, or amended or supplemental petition, whichever is the most recent pleading. He/she may also enter into agreements with the executive director regarding evidence or other issues pending in the enforcement action by stipulations presented in writing to the judge [hearings examiner].

§337.30. Agreed Orders.

(a)-(b) (No change.)

(c) When an agreement is reached, the case may then be set for consideration of an agreed order on the commission's agenda as soon as practicable, without need for a proposal for decision from the judge [presiding officer, or hearings examiner].

§337.31. Jurisdiction in SOAH. Not less than 30 days after the respondent has filed an answer under §337.28 of this title (relating to Answer), either the respondent or the executive director may request that the chief clerk refer the case to SOAH for a contested enforcement case hearing. The parties may request this referral by filing a letter with the chief clerk and serving that letter on the other parties. Upon receipt of the referral, SOAH shall assume jurisdiction over the contested enforcement case and shall assign a judge to hear the case. The judge shall control and manage the case and, if the parties fail to reach an agreed settlement, conduct a contested enforcement case hearing and issue a proposal for decision, according to the rules and procedures provided.

§337.32. Consolidation and Severance. Once SOAH [the office of hearings examiners] has assumed jurisdiction over the contested case, the executive director may consolidate or sever cases or claims involving any person or persons against whom the executive director has a right to proceed, including the consolidation or severance of claims involving different media, with permission of the judge [hearings examiner]. The hearings examiner may sever contested enforcement cases or claims involving any number of parties, upon motion by any respondent, where the respondent can show that he/she would be unduly prejudiced if severance were not granted.

§337.33. Continuance. A motion for continuance of any contested enforcement case hearing shall be granted by the judge [hearings examiner] whenever justice may require. All motions for continuance must be supported by an affidavit or by sworn written motion by the person or persons having

knowledge of the facts supporting the motion.

§337.34. Preliminary Hearing.

(a) To assist in the disposition of the enforcement action without undue expense or burden to the parties, SOAH [the office of hearings examiners] may, at the request of any party or on its own motion, direct the parties and their respective representatives to appear before it for a Preliminary Hearing to consider:

(1)-(5) (No change.)

(b) The **judge** [hearings examiner] shall make an order that recites the actions taken at the Preliminary Hearing, and such order shall control the subsequent course of the action, unless modified by the **judge** [hearings examiner] to prevent injustice.

§337.36. Rights of Parties in Contested Enforcement Case Hearings. A party has the right to conduct discovery; present a direct case; cross-examine witnesses; make oral and written arguments; obtain copies of all pleadings, motions, replies, and other filed documents; receive copies of all notices issued by the commission concerning the contested enforcement case to which he/she is a party; and, as directed by the **judge** [hearings examiner], otherwise fully participate as a party in the contested enforcement case.

§337.37. Discovery.

(a) Discovery generally. The **judge** [hearings examiner] may order that discovery be conducted in accordance with Rules 166b-169 of the Texas Rules of Civil Procedure, through a scheduling order as discussed in §337.34(a)(3) of this title (relating to Preliminary Hearing), so long as the Rules of Civil Procedure are interpreted in a manner consistent with this chapter, the Texas Water Code, the Texas Health and Safety Code, and the APA.

(b) (No change.)

(c) Scope of discovery. Parties may obtain discovery regarding any matter which is relevant to the subject matter of the proceeding. It is not ground for objection that the information sought will be inadmissible at hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Nor is it ground for objection that the discovery request involves an opinion or contention that relates to fact, the application of law to fact, or mixed questions of law and fact, but the **judge** [hearings examiner], upon a party's motion, may order that such a request need not be answered until a later date.

(d) Protective orders. On motion specifying the grounds and made by any person against or from whom discovery is sought, the **judge** [hearings examiner] may make a ruling in the interest of justice necessary to protect the person from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional or property rights. Specifically, the **judge** [hearings examiner] may issue an order:

(1) (No change.)

(2) that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the **judge** [hearings examiner];

(3) that results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be restricted. However, in considering such an order, no order or decision issued by the **judge** [hearings examiner] or the commission may be sealed and other records filed pursuant to contested enforcement case procedures shall be presumed to be open to the general public. That presumption of openness may be overcome only upon a showing of all of the following:

(A)-(B) (No change.)

(C) sealing of the records in question can be achieved in accordance with the Texas Open Records Act, Texas Government Code, Chapter 552 [Civil Statutes, Article 6252-17a] (Vernon Supplement 1992).

(e) Discovery compellable. The **judge** [hearings examiner] may compel any form of discovery if a party to a contested enforcement case fails to comply with appropriate rules. A party may file a motion to compel discovery at least ten days prior to hearing. Motions to compel discovery may be filed less than ten days prior to a hearing upon a showing of good cause.

(f) (No change.)

§337.38. Abuse of Discovery; Sanctions.

(a) (No change.)

(b) If a **judge** [hearings examiner] requires, or approves an agreement between the parties requiring that parties identify their witnesses according to a discovery schedule, the **judge** [hearings examiner] may impose as a sanction upon a party who violates such requirement, that the party be barred from calling any witness not properly identified.

(c) Absent good cause, a witness shall be barred from testifying about matters which were not identified by the sponsoring party in its witness list and amendments thereto, and/or in that witness' prefiled testimony, when election to prefile testimony has been noticed by the sponsoring party or when prefiled testimony has been directed by the **judge** [examiner].

(d) In addition to the foregoing, if a respondent fails to comply with discovery procedures, the **judge** [hearings examiner] may issue a proposal for decision recommending preclusion of the offending party from contesting a given issue of fact, or that a default judgment be rendered against the respondent, in accordance with §337.29 of this title (relating to Default Order).

§337.39. Summary Judgment.

(a)-(b) (No change.)

(c) Oral testimony. No oral testimony shall be received at a hearing on the motion for summary judgment. At the discretion of the **judge** [hearings examiner], oral argument of counsel may be presented on the motion. Partial Summary Judgment shall be rendered if the pleadings, admissions, affidavits, stipulations, and exhibits on file in the case at the time of the hearing show that, except as to the amount of penalties and the extent of any technical requirements, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the **judge** [hearings examiner] must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(d) Partial summary judgment. If a motion for summary judgment is denied, in whole or in part, the **judge** [hearings examiner] may, if practicable, ascertain what facts are not in dispute or are incontrovertible by examining the evidence filed, interrogating counsel, and/or directing a conference. The **judge** [hearings examiner] may then make a ruling denying the motion and specifying what facts, if any, will be deemed established for all purposes in the enforcement hearing.

§337.40. Interlocutory Appeals. No interlocutory appeals may be made to the commission by a party to a contested enforcement case before a **judge** [hearings examiner], except on jurisdictional issues. However, at any time during a contested enforcement case, on a motion by a party, or on the **judge's** [hearings examiner's] own motion, the **judge** [hearings examiners] may certify a question to the commission for guidance regarding commission policy, jurisdiction or the imposition of any sanction by the **judge** [hearings examiner]

that would substantially impair a party's ability to present his/her case.

§337.41. Final Prehearing Conference.

(a) Upon a request by any party, and at the discretion of the **judge** [hearings examiner], the **judge** [hearings examiner] may order that the parties and/or their designated representatives appear before him/her for a final prehearing conference as close to the time of an enforcement hearing as is reasonable under the circumstances. The purposes of such a conference are to:

(1) -(4) (No change.)

(b) The **judge** [hearings examiner] may prepare, or may order that the parties draft, a prehearing order in preparation for the final prehearing conference. Such an order, upon the **judge's** [hearings examiner's] approval, will control the subsequent course of the enforcement hearing.

(c) If a party or his/her representative fails to appear at a prehearing conference, is substantially unprepared to participate in the conference, or fails to participate in good faith, the **judge** [hearings examiner], upon motion or on the **judge's** [hearings examiner's] own initiative, may make such orders as are just, including those included in §337.38 of this title (relating to Abuse of Discovery; Sanctions).

§337.42. Exhibits.

(a) (No change.)

(b) Each exhibit offered shall be tendered for identification and placed in the record. Copies shall be furnished to the **judge** [hearings examiner], each of the parties, and the hearings reporter, unless the **judge** [hearings examiner] rules otherwise.

(c) (No change.)

§337.43. Removing Case from Active Docket. At any time, the parties to an enforcement action may agree to file a joint motion requesting that the action be removed from the office's active docket of actions, so as to allow the parties to engage in and complete settlement negotiations which will dispose of all or part of the action. The action shall be returned to the active docket of actions upon the written request of any party. Upon the action's return to the active docket, any party may request that the **judge** [hearings examiner] issue a revised prehearing/discovery schedule to govern the timing of the enforcement hearing and the events leading up to that hearing.

§337.44. Agreements to be in Writing. No agreement between parties or their representatives affecting any pending matter will be considered by the **judge** [hearings examiner] unless it is in writing, signed by the parties, and filed as a part of the record; or is announced at the contested enforcement case hearing and entered of record.

§337.45. Presentation of Evidence.

(a)-(d) (No change.)

(e) If in the opinion of the **judge** [hearings examiner], it appears that the presentation of live testimony in a contested enforcement case hearing may last for more than five working days, the **judge** [hearings examiner] may order that the parties introduce their witnesses' direct testimony through prefiled written questions and answers. If the **judge** [hearings examiner] so orders, the parties shall provide the pre-filed testimony for each witness it intends to present at the enforcement hearing to all other parties of record within a reasonable time prior to the presentation of the testimony of the witness at hearing, with such reasonable time period to be determined by the **judge** [hearings examiner]. The prefiled testimony of a witness shall not be admissible if the witness is not available at the hearing for cross-examination.

§337.47. Order of Presentation. In all contested enforcement case hearings, the executive director shall have the right to open and close. After all parties have completed the presentation of their evidence, the **judge** [hearings examiner] may call upon any party for further material or relevant evidence upon any issue. In all cases, the executive director shall be allowed to close with its rebuttal. At the discretion of the **judge** [hearings examiner], a party may present a re-rebuttal case when another party presents evidence which could not have been reasonably anticipated.

§337.48. Oral Argument. At the conclusion of the hearing, oral argument may be heard upon the request of the parties or upon the directive of the **judge** [hearings examiner]. Reasonable time limits may be established by the **judge** [hearings examiner]. The **judge** [hearings examiner] may require or accept written briefs in lieu of or in addition to oral argument.

§337.50. Financial Inability to Pay; Amount Necessary to Obtain Compliance.

(a) (No change.)

(b) A party asserting a claim under this section must produce all financial records that would be potentially relevant to that issue within 30 days of raising that claim, but no later than 30 days prior to the specified date for hearing without leave from the **judge** [hearings examiner]. The executive director is not required to make a discovery request for such financial records. The failure of the party raising such a claim to provide all potentially relevant financial records within the time discussed in this subsection shall constitute a waiver of the claim.

§337.51. Proposal for Decision (PFD).

(a) After closing the hearing record in any contested enforcement case hearing, the **judge** [hearings examiner] shall file a written PFD, which shall contain a statement of the reasons for the proposal, findings of fact, conclusions of law, a proposal for remedial relief (technical ordering provisions) where appropriate, and one of the following recommendations:

(1)-(3) (No change.)

(b) The proposal may also contain rulings on any findings of fact and conclusions of law that have been submitted by the parties, and other provisions deemed appropriate by the **judge** [hearings examiner].

(c) When recommending the assessment of an administrative penalty, the **judge** [hearings examiner] shall analyze each factor prescribed by the applicable statute to be considered by the commission in determining the amount of the penalty. The **judge** [hearings examiner] shall recommend to the commission an appropriate penalty amount based upon the evidence adduced at the hearing and the factors articulated in the applicable statutes.

(d) Weight to be given by the **judge** [hearings examiner] to individual statutory factors for determining penalty amount need not be equal and may vary depending on the facts of the particular case. The absence of evidence as to any particular factor does not negate the ability of the **judge** [hearings examiner] to arrive at a finding of an appropriate penalty based upon the totality of the circumstances, though such lack of evidence may be a factor in determining the penalty amount.

§337.52. Waiver of Right to Review Proposal for Decision (PFD). Any party may waive the right to review and comment upon the **judge's** [hearings examiner's] PFD. The waiver shall be in writing or stated on the record at the hearing.

§337.53. Pleadings Following Proposal for Decision (PFD). Unless right of review has been waived under §337.51 of this title (relating to Waiver of Right to Review Proposal for Decision), any party may, within 20 days after the date of issuance of the proposal for decision, file exceptions or briefs. Any replies to such pleadings shall be filed within 30 days after the date of issuance of the proposal for decision. These

deadlines may be changed upon the written agreement of the parties with approval of the judge [hearings examiner].

§337.54. Amending the Proposal for Decision (PFD). The judge [hearings examiner] may file an amended proposal for decision in response to exceptions, replies, or briefs submitted by the parties. The parties are not entitled to file exceptions or briefs in response to the amended PFD, but may raise any issues before the commission as permitted by the commission at the time of oral presentation.

§337.55. Motion to Re-open the Record after Proposal for Decision (PFD). After the PFD has been filed in a contested enforcement case, along with any subsequent pleadings in accordance with §337.53 of this title (relating to Pleadings Following Proposal for Decision) and §337.54 of this title (relating to Amending the Proposal for Decision), the commission, on the motion of any party or on its own motion, may order the judge [hearings examiner] to re-open the record for further proceedings on specific issues in dispute. The commission's order shall include instructions as to the subject matter of further proceedings and the judge's [hearings examiner's] duties in preparing supplemental materials or revised orders based upon those proceedings for the commission's final adoption.

§337.56. Commission's Decision after Contested Enforcement Case Hearing.

(a) After its receipt of the judge's [hearings examiner's] proposal for decision, the commission shall review the proposal and shall issue a decision, which shall contain findings of fact and conclusions of law, provisions requiring remedial relief (technical ordering provisions), as necessary, and one of the following findings:

(1)-(3) (No change.)

(b)-(d) (No change.)

§337.57. Notice of Decisions and Orders.

(a) Notice of enforcement orders and decisions. For rulings, orders, or decisions issued by the commission or a judge [hearings examiner] in a contested enforcement case, parties shall be given notice, either personally or by first class mail, in accordance with the APA, §2001.142. Notice shall also be given in accordance with the Texas Health and Safety Code, §382.096, where applicable.

(b)-(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508547 Lydia Gonzalez Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: August 30, 1995

For further information, please call: (512) 239-1966

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Subchapter C. Expiration

• 30 TAC §337.80

The new section is proposed under the Texas Water Code, §§5.103, 5.105, and 26.011, and the Texas Health and Safety Code, §§361.011, 361.017, 361. 024, and 382.017, which authorizes the TNRCC to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new section implements the Texas Water Code, §§5.103, 5.105, and 26. 011, and the Texas Health and Safety Code, §§361.011, 361.017, 361.024, and 382.017.

§337.80. Expiration. This chapter will expire on May 31, 1996.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 5, 1995.

TRD-9508548 Lydia Gonzalez Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: August 30, 1995

For further information, please call: (512) 239-1966

APPENDIX 3

PUBLIC NOTICE REQUIREMENTS

TNRCC ENVIRONMENTAL PERMITS

Compiled by
Richard O'Connell, General Counsel's Office
and
Alexandre Bourgeois, Office of Hearing Examiners

Disclaimer

This compliation is an agency draft generated by a project to analyze consolidating and harmonizing TNRCC requirements for public notice. This compilation may not be comprehensive or of a level of detail sufficient to be a substitute for independent research and verification. However, these materials should prove a useful guide for any research regarding this subject.

TNRCC

Public Notice Requirements

July 1995

	Before Application is filed	Upon filing of application			Upon staff declaring application is administratively complete, or issuing draft permit					Notice of Public Meeting		Notice of Evidentiary Hearing	
	Applicant may elect to undergo local review process	Mail notice to affected persons	Publish news-paper notice	Mail notice to state senator, rep.	Mail notice to affected persons	Publish news-paper notice	Mail notice to state senator, rep.	Post signs at facility	Radio Broad-casts	Mail notice to affected persons	Publish news-paper notice	Mail notice to affected persons	Publish news-paper notice
District Creation												Required[2]	Required[2]
District Dissolution												Required[2]	Required[2]
Utility Rate Change		Required[2]											
Water or Sewer Utility Certificate of Convenience & Necessity (CCN)					Required[3]	Required[3]							
Sale or Transfer of CCN		Required[3]											
Water Rights Permit					Required[2]	Required[2]							
Water Discharge Permit					Required[1]	Required[1]						Required[1]	Required[1]
(Air) Standard Exemption for concrete batch plant						Required[2]							Required[2]
(Air) Federal Operating Permit				Required[2]	Required[1]	Required[1]		Required[2]				Required[1]	Required[1]
(Air) Preconstruction Permit				Required[2]		Required[1]		Required[2]					Required[2]
Injection Well Permit		Required[3]			Required[1]	Required[1]						Required[1]	Required[1]
Class 2, Class 3 Mod. of IHW Permit		Required[1]	Required[1]							Required[1*]	Required[1*]		Required[2]
Industrial and Hazardous Waste Permit	Yes[2]			Required[2]	Required[1]	Required[1]			Required[1]		Required[2]	Required[1]	Required[1]
Municipal Solid Waste Permit	Yes[2]		Required[2]	Required[2]	Required[2]					Required[3]	Required[3]	Required[2]	Required[2]

* Meeting date must be listed in notice of application.

[1] Required by Federal Law
[2] Required by Texas Statute
[3] Required by TNRCC Rule

TNRCC

Public Notice Requirements

July 1995

	Before Application is filed	Upon filing of application			Upon staff declaring application is administratively complete, or issuing draft permit					Notice of Public Meeting		Notice of Evidentiary Hearing	
	Applicant may elect to undergo local review process	Mail notice to affected persons	Publish newspaper notice	Mail notice to state senator, rep.	Mail notice to affected persons	Publish newspaper notice	Mail notice to state senator, rep.	Post signs at facility	Radio Broadcasts	Mail notice to affected persons	Publish newspaper notice	Mail notice to affected persons	Publish newspaper notice
Concentrated Animal Feeding Operation Permit *, **					Required[3]	Required[3]						Required[3]	Required[3]
Land Application of Sludge Registration					Required[3]			Required[3]			Required[3]		
Permit by Rule ***													
State Certification of Application for an EPA Wastewater Discharge Permit					Required[3]					Required[3]			
Radioactive Substance Disposal License					Required[3]	Required[3]	Required[3]					Required[3]	Required[2]

* Notice provisions as shown in the adopted rules, Subchapter K (30 TAC §§ 321.181-.198) published in the Texas Register of June 1995, 20 Tex. Reg. 4727 (effective July 13, 1995).
** Only some CAFO's must obtain a permit.
*** The Commission authorizes several activities by rule; a person acting pursuant to such rules is not required to give public notice.

[1] Required by Federal Law
[2] Required by Texas Statute
[3] Required by TNRCC Rule

July 24, 1995

Public Notice Requirements for Applications Filed with the TNRCC

July 1995

	TYPE OF APPLICATION	PUBLIC NOTICE REQUIRED BY STATUTE, RULE
1.	Wastewater discharge permit	(The Administrator of the Environmental Protection Agency may delegate to the states the authority to implement the National Pollutant Discharge Elimination System permitting program. To date, the Administrator has not delegated this authority to Texas, and so the TNRCC only implements the state wastewater discharge permitting program. However, when delegation occurs Texas must comply with EPA regulations, including those concerning public notice. 40 C.F.R. 123.25. The citations below to the Code of Federal Regulations reflect federal requirements with which Texas must comply upon delegation. To a great degree, Texas statutes and TNRCC rules are already consistent with the federal requirements.) The commission must give public notice of the application when the application is administratively complete. Texas Water Code §5.115. The applicant must publish newspaper notice one time in the affected counties and must mail direct notice to affected persons 30 days before the commission considers the application in open meeting. 40 C.F.R. 124.10(a); 30 T.A.C. 281.17(a). Notice must be mailed to the affected county judges if the application concerns an average daily discharge of five million gallons or more. If the commission schedules an evidentiary hearing at the request of an affected person, the applicant must give public notice of the hearing. The applicant must publish newspaper notice one time in the affected counties and must mail notice to affected persons. 40 C.F.R. 124.10(a). Notice must be completed 20 days before the hearing. Texas Water Code §26.022; 30 T.A.C. §305.93. If an applicant proposes to improve water quality, the

		commission need not hold an evidentiary hearing, even if requested to do so by an affected person. However, the commission must give public notice of the application to affected persons when the application is administratively complete. Texas Water Code §5.115. Also, the applicant must mail notice of the application to the affected mayor, municipal health authorities, county judge and county health authorities ten days before the commission considers the application in open meeting. The applicant is not required to publish newspaper notice. Texas Water Code §26.022, .028; 30 T.A.C. §305.93.
2.	Water rights permit	The applicant must publish notice of the application one time in a newspaper, and must mail notice to each claimant or appropriator of water from the source of water supply and to all navigation districts within the river basin. Texas Water Code §§5.115, 11.132(d); 30 T.A.C. Chapter 295, Subchapter C. Notice must be completed 30 days before the commission evaluates the application in an open meeting. The commission shall hold an evidentiary hearing if an affected person requests one. However, the applicant need not issue additional public notice of the hearing. Texas Water Code §11.132(f).
3.	Air permit--preconstruction permit	The Commission mails notice of an application to the local state senator and representative upon the receipt of an application. Texas Health & Safety Code §382.0516. The applicant must give public notice of intent to apply for a permit after the staff issues its preliminary recommendation to issue or not issue the permit. The applicant must (1) publish notice in a newspaper in two successive issues, (2) post signs at the site of the facility, and (3) mail notice to the EPA, affected states, and local air pollution control agencies. The newspaper notice and mailed notice is required by federal law. 40 C.F.R. 51.161. (In some instances the newspaper notice and signs also must be issued in an alternative language). Texas Health & Safety

		Code §382.0517, .056; 30 T.A.C. §116.130 - .132. The Commission must provide an opportunity for an evidentiary hearing. 42 U.S.C. §7475(a)(2). If the commission schedules an evidentiary hearing the applicant must publish notice of the hearing in a newspaper. Texas Health & Safety Code §382.031(a).
4.	Air permit-- standard exemption from preconstruction permit	There are no requirements concerning public notice of intent to apply for a standard exemption. The exception is an application for a standard exemption for a concrete batch plant. There, the applicant must give public notice of intent to file an application for an exemption. The statutory requirement is newspaper notice in the manner prescribed for an application for a preconstruction permit (see, above). Texas Health & Safety Code §382.057, .058. The commission's rules set out the specific requirements for newspaper notice. 30 T.A.C. §116.212. If the commission schedules an evidentiary hearing the applicant must publish notice of the hearing in a newspaper. Texas Health & Safety Code §382.031(a).
5.	Air permit-- federal operating permit	The Commission mails notice of an application to the local state senator and representative upon the receipt of an application. Texas Health & Safety Code §382.0516. The applicant must give public notice of intent to apply for a permit when the commission staff issues a draft operating permit. Texas Health & Safety Code §382.056; 30 T.A.C. §122.152(a). The applicant must (1) publish notice in a newspaper in two consecutive issues, and (2) post signs at the facility. Federal law requires newspaper notice and mailed notice to persons who have requested notice of permit applications. 40 C.F.R. 70.7(a), (h). (In some instances the newspaper notice and signs also must be issued in an alternative language). Texas Health & Safety Code §382.056; 30 T.A.C. §122.153(a). The commission mails notice of the

draft operating permit to the EPA and any affected state. 42 U.S.C. §7661d(a); 30 T.A.C. §122.311(a).

The notice requirements do not apply to an application for a general permit. 30 T.A.C. §122.150(b).

The Commission must provide an opportunity for a comment hearing. 42 U.S.C. 7661a(b)(6). A hearing concerning an application for a federal operating permit is not an evidentiary hearing. Texas Health & Safety Code §382.0561(a). Federal law requires newspaper notice and mailed notice to persons who have requested notice of permit applications. 40 C.F.R. 70.7(a), (h). If the commission schedules a hearing the applicant must publish newspaper notice of the hearing 30 days in advance. Texas Health & Safety Code §382.031. The commission publishes notice of the hearing in the Texas Register, and mails notice to persons who submitted written comments. 30 T.A.C. §122.316(2).

6. Solid waste permit--industrial waste and/or hazardous waste

(The Administrator of the EPA has delegated to Texas the authority to implement the federal permitting program for hazardous waste facilities. The citations below to the Code of Federal Regulations reflect federal requirements with which Texas must comply.)

Notice of intent to file application. If an applicant elects to conduct the pre-application local review process, the applicant files with the commission a notice of intent to file an application. The applicant must file a copy of the notice with the local county judge and mayor. Texas Health & Safety Code §361.063(c).

Notice of application. When an applicant files a notice of intent to file an application or files an application the commission must given notice to the local state senator and representative. Texas Health & Safety Code §361.0641. The commission must

give other public notice of the receipt of the application at the time the application is submitted. Texas Health & Safety Code §361.079(c). Federal law requires the Commission to give public notice by newspaper notice, by radio broadcast, and by mail to affected local governmental agencies. 40 C.F.R. 124.10(a)(ii). The commission, upon determining that an application is administratively complete, must mail notice of the application to the local county judge, county health authorities, mayor, and municipal health authorities. Texas Health & Safety Code §361.067(a). The applicant must broadcast on radio public notice of the application in the affected area. 30 T.A.C. §305.104.

Notice of public meeting. The commission must hold a public meeting concerning an application for a new hazardous waste facility. The commission must hold a public meeting concerning a major amendment to a hazardous waste facility if an affected person requests a public meeting. A public meeting is not an evidentiary hearing. The applicant must publish notice of the public meeting in a newspaper once each week during the three weeks prior to the meeting. Texas Health & Safety Code §361.0791(a), (e).

Notice of evidentiary hearing. If the commission schedules an evidentiary hearing concerning the application, the applicant must publish newspaper notice one time in the affected county and in each contiguous county 30 days before the hearing. 30 T.A.C. §305.102(a). The commission must hold one session of the evidentiary hearing in the county of the facility. The applicant must publish notice of this hearing date in a newspaper once each week during the three weeks prior to the hearing date. Texas Health & Safety Code §361.080. If the applicant proposes a new facility the applicant must mail notice that the commission has determined the application is administratively complete to each residential and business address and to each real property owner located within one half mile of the facility. The notice must be mailed no more than 45

		days or less than 30 days before the evidentiary hearing. Texas Health & Safety Code §361.081(a); 30 T.A.C. §305.103(f). Federal law requires the Commission to give public notice by newspaper notice, by radio broadcast, and by mail to affected local governmental agencies. 40 C.F.R. 124.10(a)(ii).
7.	Solid waste permit--municipal solid waste	Notice of intent to file application. If an applicant elects to conduct the pre-application local review process, the applicant files with the commission a notice of intent to file an application. The applicant must file a copy of the notice with the local county judge and mayor. Texas Health & Safety Code §361.063(c). Notice of application. When an applicant files a notice of intent to file an application or files an application the commission must given notice to the local state senator and representative. Texas Health & Safety Code §361.0641. The commission must give other public notice of the receipt of the application at the time the application is submitted. Texas Health & Safety Code §361.079(c). The applicant must publish notice in a newspaper one time, and the commission must publish notice in the Texas Register. Texas Health & Safety Code §361.0665. The commission, upon determining that an application is administratively complete, must mail notice of the application to the local county judge, county health authorities, mayor, and municipal health authorities. Texas Health & Safety Code §361.067(a). Notice of public meeting. The commission must hold a public meeting concerning an application for a new municipal solid waste facility. A public meeting is not an evidentiary hearing. Texas Health & Safety Code §361.079. The applicant must publish notice of the public meeting in a newspaper once each week during the three weeks prior to the meeting. The commission mails notice of the meeting to nearby landowners.

		Notice of evidentiary hearing. If the commission schedules an evidentiary hearing concerning the application, the applicant must publish newspaper notice one time in the affected county and in each contiguous county 30 days before the hearing. 30 T.A.C. §305.102(a). If the applicant proposes a new facility the applicant must mail notice that the commission has determined the application is administratively complete to each residential and business address and to each real property owner located within one half mile of the facility. The notice must be mailed no more than 45 days or less than 30 days before the evidentiary hearing. Texas Health & Safety Code §361.081(a); 30 T.A.C. §305.103(f).
8.	Solid waste permit--class 1 modification of (1) municipal solid waste permit or, (2) industrial waste and/or hazardous waste permit	The applicant must mail notice of the class 1 modification within 90 days after the applicant puts the modification into effect, or obtains the executive director's approval of the modification. The applicant must mail notice to affected landowners, the local county judge and county health authorities, the local mayor and municipal health authorities, and several additional authorities. 30 T.A.C. §305.69(b)(1), .70(b).
9.	Solid waste permit--class 2 or class 3 modification of industrial permit and/or hazardous waste permit	The applicant must give public notice of the filing of the application within seven days of filing the application. Notice must be mailed to affected landowners, the local county judge and county health authorities, the local mayor and municipal health authorities, and several additional authorities. The applicant must publish newspaper notice in the affected county one time. 30 T.A.C. §305.69(c)(2), (d)(2). Notice of public meeting. The commission must hold a public meeting concerning the application. A public meeting is not an evidentiary hearing. The date and location of the public meeting must be listed in the notice of application. Texas Health & Safety Code §361.0791(a); 30 T.A.C. §305.69(c)(2), (d)(2).

		Notice of evidentiary hearing. Concerning class 3 modifications only, the commission must schedule an evidentiary hearing if an affected person requests one. 30 T.A.C. §305.69(d)(6). If the commission schedules an evidentiary hearing, the applicant must publish newspaper notice one time in the affected county and in each contiguous county 30 days before the hearing. 30 T.A.C. §305.102(a). The commission must hold one session of the evidentiary hearing in the county of the facility. The applicant must publish notice of this hearing date in a newspaper once each week during the three weeks prior to the hearing date. Texas Health & Safety Code §361.080. Notice of grant or denial of application. The Commission must mail notice of its decision to grant or deny an application to affected persons. 30 T.A.C. 305.69(g).
10.	Emergency order and/or permit	The Texas Clean Air Act and Texas Water Code Chapters 11 (water rights) and 26 (water discharges) provide for emergency orders. The Texas Solid Waste Disposal Act also provides for emergency orders. Generally, the statutes and rules on emergency orders do not impose specific public notice requirements, but suggest public notice as the commission deems practicable. But see, Texas Water Code §5.115, which requires the Commission give notice of all applications filed pursuant to the Water Code to affected persons when the application is administratively complete. See, Texas Water Code §11.139, and 30 T.A.C. 295.156 (water rights); Texas Water Code §26.0191 and 30 T.A.C. §305.24, .25 (water discharges); and Texas Health and Safety Code §361.301, and 30 T.A.C. §305.29, .30 (solid waste). The commission must give public notice of air emergency orders in the Texas Register. Texas Health & Safety Code §382.063; 30 T.A.C. §116.412.

11.	Temporary permit	The Texas Water Code Chapters 11 (water rights) and 26 (water discharges) provide for temporary permits. Generally, the commission does not require public notice of an application, but requires public notice of the evidentiary hearing if one is scheduled. But see, the Texas Water Code requires the Commission to give notice of applications to affected persons when the application is administratively complete. Texas Water Code §5.115. The statutes and rules do not provide for temporary permits concerning air emissions. The commission does not require public notice concerning temporary water rights of less than 10 acre feet and of less than one year duration. Concerning applications for more extensive temporary water rights, the applicant must mail notice of any evidentiary hearing to protestants and to downstream diverters. Texas Water Code §11.138; 30 T.A.C. §§281.17(b), 295.154. The commission publishes notice of receipt of an application concerning provisional temporary water rights in the Texas Register. 30 T.A.C. §281.17(c). Concerning an application for a temporary water discharge permit, the applicant must give public notice of the evidentiary hearing by mail to affected persons, and by newspaper publication one time in the affected counties. Texas Water Code §26.0191(h); 30 T.A.C. §305.24. The Commission may grant temporary class 2 or class 3 modifications of an industrial waste permit or hazardous waste permit. The applicant must mail notice of the application to affected persons within seven days of filing the application. 30 T.A.C. 305.69(f)(4).
12.	Injection well permit	(The Administrator of the Environmental Protection Agency delegated to Texas the authority to implement the federal underground injection control program, and so the state must comply with several EPA regulations, including those concerning public notice. 40 C.F.R. 145.11(a)(28). The citations

below to the Code of Federal Regulations reflect federal requirements with which Texas must comply).

An application that proposes the disposal of hazardous waste in an injection well is subject to the preapplication review process and the public meeting requirements for hazardous waste applications. Texas Water Code §27.018(d).

The commission must give notice of the application to affected persons when the application is administratively complete. Texas Water Code §5.115. The commission meets this requirement by mailing notice of the application to adjacent landowners and to adjacent mineral rights owners when the application is filed.

When the staff issues the final draft permit the applicant publishes newspaper notice of (1) the application, and (2) the opportunity to request a hearing. The Commission mails mail notice to affected persons. 40 C.F.R. 124.10(a)(ii); Texas Water Code §27.018. However, if the applicant proposes a minor amendment, then the notice is only published in the Texas Register, and mailed to adjacent landowners and to adjacent mineral rights owners.

Notice of evidentiary hearing. The commission requires notice mailed to nearby landowners and notice published in a newspaper. 40 C.F.R. 124.10(a)(iii). If the applicant proposes an injection well as part of a solid waste facility, the applicant must comply with the notice of hearing requirements concerning solid waste facilities.

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Subchapter K. Concentrated Animal Feeding Operations

• 30 TAC §§321.181-321.198

§321.186. Notice of Application.

(a) Notice of application. The notice of application and administrative/technical completeness shall contain the following information:

(1) the identifying number given the application by the commission;

(2) the type of authorization being sought under the application;

(3) the name and address of the applicant;

(4) the date on which the application was submitted;

(5) a brief summary of the information included in the application, including but not limited to the general location of facilities and disposal areas associated with the application, and the location where a copy of the application may be reviewed by interested persons;

(6) the format for submission of a comment in accordance with this subchapter to the Executive Director regarding the application; and

(7) the date, time and place where all comments are to be received by the Executive Director in relation to the

numbered application, such comment period shall not be less than 30 days or more than 35 days from the actual date of publication.

(b) Publication.

(1) The applicant shall cause the notice of application and administrative/technical completeness approved by the Executive Director to be published once in a newspaper regularly published, and generally circulated within the county and area wherein the proposed facility is to be located, and within an adjoining county wherein any potential affected person may reside.

(2) The date of publication for notice of application and administrative/technical completeness shall not be later than the date set by the Executive Director.

(3) The applicant is responsible for the cost of publication. The applicant shall notify the Executive Director verbally or by facsimile within 24 hours of the first available working day after the publication of the notice, and shall provide the Executive Director a certified copy of the publication, within 20 calendar days of the date established by the Executive Director for publication. If the applicant does not provide the Executive Director with the appropriate publisher's affidavit within 20 days of the date established by the Executive Director, the Executive Director shall cease processing and return the application.

(c) Application returned. If an application is received which is not administratively/technically complete, the Executive Director shall notify the applicant of the deficiencies prior to expiration of the review period (15 working days) by certified mail return receipt requested. If the additional requested information is received within 30 days of receipt of the deficiency notice, the Executive Director will evaluate the information within eight working days and, where applicable, shall prepare a statement of receipt of the application and declaration of administrative/technical completeness in accordance with subsection (a) of this section. If the requested information is not submitted by the applicant within 30 days of the date of receipt of the deficiency notice, the Executive Director shall return the incomplete application to the applicant.

(d) Notice by mail.

(1) The Executive Director will transmit the notice of application and administrative/technical completeness by first-class mail to persons listed in paragraph (2) of this subsection and to other persons who, in the judgment of the Executive Director, may be affected. The applicant is responsible for the cost of required notice. A record on file with the staff of the Executive Director which includes the list of persons to whom notice was mailed and the date of mailing, signed by a person with personal knowledge that the mailout occurred, shall create a presumption that notice was mailed in accordance with this section.

(2) the notice shall be mailed by the Executive Director to the following:

(A) the potentially affected landowners named on the final site plan submitted with the application;

(B) the mayor and health officials of the city or town in which the facility is or will be located or in which waste is or will be disposed of;

(C) the county judge and health authorities of the county in which the facility is located or in which waste is or will be disposed of;

(D) the Texas Department of Health;

(E) the Texas Parks and Wildlife Department;

(F) the applicant;

(G) persons who request to be put on the mailing list, including participants in past commission proceedings for the facility who have submitted a written request to be put on the mailing list;

(H) state and federal agencies for which notice is required in 40 Code of Federal Regulations, §124.10(c); and

(I) for applications regarding operations located in an area designated under §321.197 of this title (relating to Dairy Outreach Program Areas), notice shall be mailed to the river authority whose jurisdictional watershed includes that location; and

(3) the date of mailing for a notice of application and administrative/technical completeness shall be established by the Executive Director.

(4) The notice shall include instructions regarding the requirements contained in §321.187 of this title (relating to Public Comments) providing the manner and timeframe for the submission of comments to the proposed application.

§321.187. Public Comments.

(a) For comments to the application to be qualified and considered by the Executive Director, such comments must:

(1) be sworn and in writing;

(2) be received by the Executive Director not later than 30 days from the date of publication or actual receipt of the notice;

(3) describe in detail how the application, if approved, would affect a personal, property, or other legally justiciable interest of the commenter;

(4) describe in detail how the application technical merit, i.e., fails to meet the applicable requirements set forth in this subchapter and therefore issuance of the permit-by-rule may result in detrimental impacts to ground water underlying the related CAFO, detrimental impacts to surface water quality within one mile of the facility or evidence demonstrating that the history of compliance by the applicant has resulted in detrimental impacts to such ground or surface water quality within these geographic limits; and

(5) the specific action, e.g., special conditions, denial of application, etc., the commenter wishes the commission to take in response to the application.

(b) The Executive Director shall, within 21 days of the deadline by which comments must be received by the Executive Director, prepare and make available to all commenters, the applicant, and the public interest counsel a copy of, and the Executive Director's responses to, all comments to the proposed application or amended application which were timely filed with the Executive Director. Such notification shall include the Executive Director's determination of whether any comments did or did not demonstrate technical merit.

(c) Not later than the 20th day after the date of the Executive Director's letter notifying the applicant, commenter(s) and public interest counsel of the Executive Director's determination that a comment(s) has demonstrated technical merit, applicant shall either:

(1) file a request, in accordance with subsection (e) of this section, to have the commission review the Executive Director's determination that a comment has demonstrated technical merit;

(2) request the Executive Director to suspend processing of the application for a period of time not to exceed 30 days to enable the applicant to provide additional information in accordance with subsection (g) of this section;

(3) request the Executive Director to forward the application for a contested case hearing in accordance with applicable rules; or

(4) withdraw the application from consideration without prejudice and without reimbursement of fees.

(d) Not later than the 20th day after the date of the Executive Director's letter notifying the applicant, commenters and public interest counsel of the Executive Director's determination that no comments demonstrated technical merit, any qualified commenter may file with the chief clerk, general counsel and Executive Director a request to have the commission review the Executive Director's determination that the commenter's comments have not demonstrated technical merit.

(e) Any person requesting commission review of the Executive Director's determination of whether any comments did or did not demonstrate technical merit shall also provide copies of the request to the applicant or commenters, whichever is applicable, as well as the public interest counsel, at the same time the request is filed with the chief clerk, general counsel and the Executive Director. The commission shall consider a request to review the Executive Director's determination of whether any comments did or did not demonstrate technical merit within 30 days of receipt by the chief clerk of the request for review. The applicant or commenter may not request more than one review each of an original or amended application by the commission under this subsection.

(f) If the commission has affirmed the Executive Director's determination that a comment did demonstrate technical merit, then the applicant shall request, within 20 days after the date of issuance of the commission's written order, one of the actions specified under subsection (c)(2)-(4) of this section.

(g) Any submission of additional information or other change to the application under subsection (c)(2) of this section can not constitute a major amendment to the application as provided by §281.23 of this title (relating to Application Amendment). The Executive Director and chief clerk shall hold in abeyance all requests for commission review submitted in accordance with subsection (d) of this section. Not later than 14 days following the submission of an amended application under this subsection, the Executive Director shall provide a copy of the amended application to the commenters requesting review and the public interest counsel and shall notify the applicant, commenters and the public interest counsel of whether any of the original comments received still demonstrate technical merit. Not later than the 20th day after the date of the letter notifying the applicant, commenters requesting review and the public interest counsel, the commenters and applicant shall notify the Executive Director, chief clerk and general counsel in writing of whether they wish to request commission review of the Executive Director's determination in reference to the amended application.

(h) The issuance of a permit-by-rule under this subsection can only occur if all technical merit issues have been resolved and there has been no substantial modification(s), which would constitute a major amendment to the application as provided by §281.23 of this title (relating to Application Amendment). The Executive Director shall issue a permit-by-rule in accordance with this subchapter within 14 days of the following, whichever is applicable, if:

(1) no timely comments demonstrating technical merit were received by the end of the comment period, as specified under subsection (a)(2) of this section;

(2) no requests for review by the commission were filed by commenters on the original application, in accordance with subsections (d) and (e) of this section;

(3) no commenter pursued a request for a review before the commission on the amended application, in accordance with subsection (g) of this section; or

(4) the issuance of a commission order affirming the Executive Director's determination that no comment demonstrated technical merit.

(i) In the event the applicant does not provide written response to the Executive Director in accordance with subsections (c) or (g) of this section, then the Executive Director may notify the applicant and person(s) commenting in writing that the application is denied or returned, or take other appropriate action as authorized by Chapter 305 of this title (relating to Consolidated Permits) and the provisions of this subchapter.

§321.188. Permit Issuance.

(a) A permit-by-rule issued under this subchapter by the Executive Director shall contain the following:

(1) name and address of the permittee;

(2) the maximum number and type of animals authorized for confinement at the facility;

(3) the applicable water quality and/or air quality provisions of §§321.191-321.195 of this title (relating to Proper CAFO Operation and Maintenance, Pollution Prevention Plans, Best Management Practices, Other Requirements, and Monitoring and Reporting Requirements); and

(4) the applicable provisions of §305.125 of this title (relating to Standard Permit Conditions).

(b) A permit-by-rule issued by the commission after contested case hearing as provided by §321.187 of this title (relating to Public Comments) shall contain the elements listed under subsection (a) of this section and either any requirements or additional conditions determined appropriate as a result of an alternative dispute resolution process or any additional conditions or provisions the commission has determined appropriate in accordance with its findings of fact and conclusions of law.

§321.189. Amendments.

(a) Any request for a change in term, condition or provision of a permit-by-rule issued under this subchapter or a modification of the final site plan will require the permittee to file an application in accordance with §321.184 of this title (relating to Application Requirements).

(b) Amendment initiated permit-by-rule expiration. The existing permit-by-rule will remain effective and will not expire until action on the application for amendment is final. The commission or Executive Director, in accordance with this subchapter, may extend the term of a permit-by-rule when taking action on an application for amendment.

(c) Amendment application considered a request for renewal. For applications filed in accordance with this subchapter, an application for an amendment to a permit-by-rule may also be considered as an application for renewal of the permit-by-rule if so requested by the applicant.

§321.190. Renewal. The permittee shall file an application for renewal of a permit-by-rule issued under this subchapter. Any permittee with an issued and effective permit-by-rule shall submit an application for renewal at least 180 days before the expiration date of the effective permit-by-rule, unless permission for a later date has been granted by the Executive Director. The Executive Director shall provide the permittee notice of deadline for application for renewal at least 240 days before the permit-by-rule expiration date. The Executive Director shall not grant permission for applications to be submitted later than the expiration date of the existing permit-by-rule.

(1) An application for a renewal of a permit-by-rule which does not propose any other change to the authorization and where there has been no related formal major enforcement action against the authorized facility during the last 36 months of the term of the permit-by-rule may be granted by the Executive Director without notice and public comment. As used in this subchapter, the term "major enforcement action" shall apply to those enforcement actions in which the Executive Director or the commission has determined that a violation which would contribute to pollution of surface water or ground water, or an unau-

APPENDIX 4

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APPENDIX 5

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1 T.A.C. CHAPTER 155

PROPOSED RULES

Before an agency may permanently adopt a new or amended section or repeal an existing section, a proposal detailing the action must be published in the *Texas Register* at least 30 days before action is taken. The 30-day time period gives interested persons an opportunity to review and make oral or written comments on the section. Also, in the case of substantive action, a public hearing must be granted if requested by at least 25 persons, a governmental subdivision or agency, or an association having at least 25 members.

Symbology in proposed amendments. New language added to an existing section is indicated by the use of **bold text**. [Brackets] indicate deletion of existing material within a section.

TITLE 1. ADMINISTRATION

Part VII. State Office of Administrative Hearings

Chapter 155. Rules of Procedure

• 1 TAC §§155.5, 155.22, 155.55

The State Office of Administrative Hearings proposes amendments to §155. 5 and §155.22 and proposes new §155.55, concerning the rules of practice and procedure before the Office. The proposed amendment to §155.5 (concerning General) is made to clarify the position of the Office on conflicts between these rules and the rules of the agency for which a hearing is being conducted. The proposed amendment to §155.22 (concerning Filings) is made to reflect new filing procedures for cases that will be referred to the Office by the Public Utility Commission of Texas and the Texas Natural Resource Conservation Commission, effective September 1, 1995; to establish uniform procedures for the filing of confidential materials; and, generally, to reflect more closely the needs and practices of participants in contested case hearings at the State Office of Administrative Hearings. The proposed new §155.55 (concerning Agency-Specific Rules) establishes procedures for judges to send certified questions to the Public Utility Commission of Texas and the Texas Natural Resource Conservation Commission.

Steven L. Martin, Chief Administrative Law Judge, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Martin also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be to ensure more streamlined and fair procedures for participants in contested case hearings. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Barbara C. Marquardt, Administrative Law Judge, State Office of Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025, (512) 475-4993.

The amendments and new section are proposed under the Government Code, Chapter 2003, which authorizes the State Office of Administrative Hearings to conduct contested case hearings; Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures, Senate Bill 12, §1, 74th Legislature, Regular Session (to be codified at Government Code, Chapter 2003, §2003.047), and Senate Bill 373, §1.35, 74th Legislature, Regular Session (to be codified at Government Code, Chapter 2003, §2003.047).

Government Code, Chapter 2003 is affected by the amendments and new section.

§155.5. General.

(a) Administrative hearings in contested cases conducted by the Office shall be conducted in accordance with the APA and with the applicable law and rules of the agency for which the hearing is conducted.

(b) If there is any conflict between these rules and the rules of the agency for which a hearing is being conducted, the rules of the agency control unless:

(1) the agency rules are contrary to other controlling law; or

(2) these rules specifically state they control; or

(3) the judge so orders, when necessary to ensure the fair and efficient handling of a case. [otherwise specifically stated in these rules. This subsection does not apply if the rules of the agency for which a hearing is being conducted are contrary to or are otherwise precluded by statutory or other controlling law, including Government Code, Chapter 2003].

(c) The agency for which an administrative hearing is conducted, shall provide the administrative law judge with a written statement of applicable rules or policies, at the time the Office acquires jurisdiction under §155.7 of this title (relating to Jurisdiction).

(d) The administrative law judge who conducts an administrative hearing shall consider any applicable agency rules or policies in conducting the hearing.

§155.22. Filings. The following requirements govern the filing or service on the judge of documents in contested cases pending before the Office unless modified by order of the judge.

(1) Place for Filing Original Materials.

[(a) All notices, pleadings, motions, answers, affidavits and all other filings in a contested case, made in accordance with the APA, the Texas Rules of Civil Evidence, or other applicable law, shall be filed with the State Office of Administrative Hearings (Office) at the time the Office acquires jurisdiction under §155. 7(b) of this title (relating to Jurisdiction) or at the time the instrument is issued and delivered if that time is later than the time the Office acquires jurisdiction.]

(A) General Contested Cases. The original of all pleadings and documents in a contested case, except contested cases referred to the Office by the Public Utility Commission of Texas and the Texas Natural Resource Conservation Commission, shall be filed with the Office once it acquires jurisdiction under §155.7(b) of this title (relating to Jurisdiction). The time and date of filing shall be determined by the file stamp affixed by the Office. Unless otherwise ordered by the judge, only the original and no additional copies of any pleading or document shall be filed.

(B) Cases Referred by the Public Utility Commission of Texas.

(i) Except for exhibits filed at a prehearing conference or hearing, the original of all pleadings and doc-

uments in a contested case referred to the Office by the Public Utility Commission of Texas shall be filed with the clerk at the Public Utility Commission of Texas in accordance with the rules of the Public Utility Commission of Texas.

(ii) The time and date of filing said materials shall be determined by the file stamp affixed by the clerk.

(iii) The party filing a document with the clerk at the Public Utility Commission of Texas, except those excluded under §155. 22(3) of this title (relating to Discovery Materials), shall serve a copy of the document on the judge by delivery on the same day as the filing.

(iv) The transcript and exhibits in a proceeding shall be served on the judge at the time the transcript is provided to the requesting party. The Office shall maintain the transcript and exhibits until they are released to the Public Utility Commission of Texas by the judge. If no court reporter is requested by a party, the Office shall maintain the record and exhibits until they are released to the Public Utility Commission of Texas by the judge.

(C) Cases Referred by the Texas Natural Resource Conservation Commission.

(i) Except for exhibits filed at a prehearing conference or hearing, the original of all pleadings and documents in a contested case referred to the Office by the Texas Natural Resource Conservation Commission shall be filed with the chief clerk at the Texas Natural Resource Conservation Commission in accordance with the rules of the Texas Natural Resource Conservation Commission.

(ii) The time and date of filing said materials shall be determined by the file stamp affixed by the chief clerk.

(iii) The party filing a document with the chief clerk at the Texas Natural Resource Conservation Commission, except those excluded under §155.22(3) of this title (relating to Discovery Materials), shall serve a copy of the document on the judge by delivery on the same day as the filing.

(iv) The transcript and exhibits in a proceeding shall be served on the judge at the time the transcript is provided to the requesting party. The Office shall maintain the transcript and exhibits until they are released to the Texas Natural Resource Conservation Commission by the judge. If no court reporter is requested by a party, the Office shall maintain the record and exhibits until they are released to the Texas Natural Resource Conservation Commission by the judge.

(2) Confidential Materials.

[(b) Pursuant to §155.21(d) of this title (relating to Appearance of Parties at Hearings; Representation), a copy of all filings shall be sent by mail or otherwise delivered to all parties. A certificate of service, signed by the person making the filing, showing the manner of service, stating that the filing has been served on all other parties, and identifying those parties shall be contained in or attached to all filings. The certificate is prima facie evidence of service. If a filing does not contain a required certificate of service, or otherwise show service on all other parties:]

(A) General Filings. A party filing materials made confidential by law shall file them in an enclosed, sealed and labelled container, accompanied by an explanatory cover letter. The cover letter shall identify the docket number and style of the case and explain the nature of the sealed materials. The container shall identify the docket number, style of the case, and name of the submitting party, and be marked "CONFIDENTIAL & UNDER SEAL" in bold print at least one inch in size. Each page of the confidential material shall be marked "confidential."

[(1) the Office may return the filing to the filing party; or]

(B) Materials Submitted for In Camera Review. A party submitting materials for in-camera review by the judge shall supply them to the judge in an enclosed, sealed and labelled container, accompanied by an explanatory cover letter copied to all parties. The cover letter, addressed to the judge, shall identify the docket number, style of the case, explain the nature of the sealed materials, and specify the relief sought. The container, addressed to the judge, shall identify the docket number, style of the case, and name of the submitting party, and be marked "IN CAMERA REVIEW" in bold print at least one inch in size. Each page for which a privilege is asserted shall be marked "privileged." Said materials will not be received for filing by the Office unless the judge so orders. Unless otherwise ordered by the judge, materials reviewed in camera will be returned to the party which submitted them.

[(2) the Office may send a notice to all parties stating that the filing does not show service on all parties and will not be considered unless and until the Office is notified that all parties have been served with the filing; or

[(3) the Office may, in the interest of economy of effort, send a copy of the filing to all parties.]

(3) Discovery Materials.

[(c) This section applies regardless of any conflicting rules of an agency for which a hearing is being conducted.]

(A) Discovery documents shall be served upon other counsel or the parties, but shall not be filed with the Office, except on special order of the judge. The party responsible for service of the discovery material shall retain the original and become its custodian.

(B) If relief is sought in a discovery dispute, copies of the portions of the material in dispute only shall be filed with the Office contemporaneously with any pertinent motion.

(C) If discovery documents are to be used at trial or are necessary to a prehearing motion which might result in a final order on any issue, only the portions to be used shall be supplied to the Office.

(4) Service on All Parties. Pursuant to §155.21(d) of this title (relating to Appearance of Parties at Hearings; Representation), a copy of all filings shall be served on all parties.

(5) Certificate of Service. The person filing the document shall include a certificate of service that certifies compliance with this rule. If a filing does not contain a certificate of service or otherwise show service on all other parties, and the judge, if applicable, the Office may:

(A) return the filing; or

(B) send notice of noncompliance to all parties, stating the filing will not be considered until all parties have been served; or

(C) send a copy of the filing to all parties.

(6) Time of Filing. Documents may be filed with the Office or served on the judge until 5:30 p.m. local time, Monday through Friday, on working days, unless otherwise ordered by the judge.

(7) Electronically Transmitted Filings. Documents containing 20 or fewer pages, including exhibits, may be filed, or served on the judge in Public

Utility Commission or Texas Natural Resource Conservation Commission cases, by electronic transmission according to the following requirements.

(A) The quality of the original hard copy shall be clear and dark enough to transmit legibly.

(B) Neither the original nor any additional copies of electronically transmitted filings should be filed with the Office.

(C) The sender shall maintain the original of the document with the original signature affixed.

(D) The date and time imprinted by the Office's fax machine on the transaction report that accompanies the document will determine the date and time of filing. Documents filed after 5: 30 p.m. local time shall be deemed filed the first day following that is not a Saturday, Sunday or official state holiday.

§155.55. Agency-Specific Rules.

(a) Certified Questions in Cases Referred by the Pubic Utility Commission of Texas. The judge may certify to the Public Utility Commission of Texas an issue that involves an ultimate finding of compliance with or satisfaction of a statutory standard, the determination of which is committed to the discretion or judgment of the commission by law.

(1) Issues Eligible for Certification. The following types of issues are appropriate for certification:

(A) the commission's interpretation of its rules and applicable statutes;

(B) which rules or statutes are applicable to a proceeding; and

(C) whether commission policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding.

(2) Procedure for Certification. The judge shall submit the certified question to the secretary of the commission. The secretary shall place the certified question on the commission's agenda to be considered within twenty days of its submission. Parties may file briefs on the certified question no less than seven days before it is scheduled to be considered by the commission. The judge may abate the proceeding while a certified question is pending.

(3) Commission Action. The commission shall issue a written decision on the certified question within thirty days of its submission. A commission decision on a certified question is not subject to motion for rehearing.

(b) Certified Questions in Cases Referred by the Texas Natural Resource Conservation Commission. On a motion by a party served on the judge or on the judge's own motion, the judge may certify a question to the Texas Natural Resource Conservation Commission at any time during a proceeding.

(1) Issues Eligible for Certification. Issues regarding commission policy, jurisdiction, or the imposition of any sanction by the judge that would substantially impair a party's ability to present the case are appropriate for certification. Policy questions, for certification purposes, include, but are not limited to:

(A) the commission's interpretation of its rules and applicable statutes;

(B) which rules or statutes are applicable to a proceeding; and

(C) whether commission policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding.

(2) Procedure for Certification. The certified question shall be filed with the chief clerk. Within five days after the certified question is filed, parties to the proceeding may file briefs or replies. The chief clerk shall provide copies of the certified question and any briefs or replies to the general counsel and commissioners.

(A) Upon the request of the general counsel or one or more commissioners to the general counsel, the certified question will be scheduled for consideration during a commissioners' meeting. The chief clerk shall give the judge notice of the request. The judge may, in his or her discretion, abate the hearing until the commission answers the certified question, or continue with the hearing if the judge determines that no party will be substantially harmed by proceeding while awaiting a response.

(B) If no request to set the question for consideration is received from the general counsel by the chief clerk within 15 days after filing, the commission's decision is that it does not wish to consider the question.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 7, 1995.

TRD-9508385 Sheila Bailey Taylor
Deputy Chief Administrative Law Judge
State Office of Administrative Hearings

Earliest possible date of adoption: August 18, 1995

For further information, please call: (512) 475-4993

WELCOME TO SOAH

INFORMATION FOR PARTICIPANTS IN CASES CONDUCTED BY A SOAH ADMINISTRATIVE LAW JUDGE

ABOUT SOAH

The State Office of Administrative Hearings ("SOAH"), created by the Texas Legislature in 1991, provides independent administrative law judges to conduct hearings in cases referred by over 50 state agencies. Examples of cases include licensing of professionals and businesses (insurance agents, doctors, accountants, pawn shops, establishments serving alcoholic beverages, etc.) and resolving state employee health insurance or retirement claims. SOAH also hears drivers license suspension cases that result from DWI charges. The information below applies to cases **other than drivers license cases.**

STATE OFFICE OF ADMINISTRATIVE HEARINGS
300 West 15th Street, Suite 502
Post Office Box 13025
Austin, Texas 78711-3025
(512) 475-4993
(512) 475-4994 Facsimile
(512) 475-3445 Docketing

LAW GOVERNING HEARINGS

Applicable law in a case may include:

1. the statutes governing the agency that referred the case to SOAH and rules adopted by that agency found in the Vernon's Texas Civil Statutes and the Texas Administrative Code (TAC);
2. the Administrative Procedure Act, Chapter 2001 of the Texas Government Code;
3. the Texas Rules of Civil Evidence; and
4. the rules of SOAH, Title 1, Chapter 155, of the TAC.

The laws and rules are available at many public and county courthouse libraries.

ADMINISTRATIVE LAW JUDGES

A SOAH judge is a neutral presiding attorney who will conduct the hearing, listen to all sides of a controversy, and write a recommendation for the person or persons at the referring agency who will ultimately decide the case.[1] The judge is authorized to conduct conferences prior to hearing to resolve certain matters in the case, issue written orders, and control the course of the hearing.

RIGHT TO COUNSEL

The staff of the referring agency is usually represented by a state-employed attorney. Other parties may appear on their own behalf ("pro se") or by representative. Any party intending to employ a lawyer must do so soon enough after receipt of the notice of hearing so the lawyer can prepare for the hearing.

[1]In rare cases, state law requires the judge to make a final decision instead of a recommendation.

PREHEARING PROCEDURES

HEARING NOTICE — The notice of hearing identifies the issues in the case and the applicable law and rules, as well as the time, date, and place of hearing. Unless the judge allows the issues to be broadened at the request of a party, which should be made as soon as possible before the hearing, the evidence and the outcome of the hearing must relate to the allegations or issues in the hearing notice.

COMMUNICATIONS WITH THE JUDGE — Except for issues raised during a conference or at a hearing, a request for any type of relief or communication of any information to the judge about a case must be in writing, must be filed with SOAH, and must show copies have been sent to all parties in the case.

DISCOVERY — In most cases, the Administrative Procedure Act and the agency's rules allow a party to prepare for hearing by "discovering" relevant information. Discovery is obtained by each party deposing witnesses or obtaining documents from each of the other parties. The parties should complete their discovery before the scheduled hearing.

CONTINUANCES — Requests for continuance (to reschedule a hearing) should be in writing and filed as soon as a party is aware of the need for rescheduling. A request should explain in writing why a continuance is necessary, specify the date the hearing should be reset, indicate the person requesting the continuance has attempted to contact other parties to the case, and state whether any party objects to the continuance.

The SOAH judge will not call the other parties to determine whether they agree to the continuance. SOAH's rules require that all parties must have adequate time to respond to a request not agreed to by all parties. If the judge has not issued an order ruling on the request for continuance by the time for hearing, it will convene as scheduled, and the request will be decided at the hearing.

PROCEEDINGS CONDUCTED BY TELEPHONE

In certain circumstances, the judge may conduct all or part of a prehearing conference or the hearing by telephone or video conference. Any party that requests a telephonic prehearing conference to deal with procedural disagreements before the hearing must submit a written request to SOAH at least 24 hours in advance of the requested telephone conference.

HEARINGS PROCEDURE

OPENING STATEMENT — Each party explains its position in the case, briefly outlining what it will prove by exhibits and testimony. The opening statement is not evidence.

PRESENTATION OF THE EVIDENCE — In most cases, the party requesting relief from or action by the state agency must show by evidence (testimony, records, etc.) it is entitled to that relief or action. Usually, this party presents its evidence first, and the other parties follow with their evidence.

Witnesses: On the day of the hearing, each party may call as witnesses those persons who are present. Witnesses testify in response to questions from the party who called them to testify and then to questions from other parties. In some circumstances, witnesses may be required to wait outside the hearing room until they are called to testify.

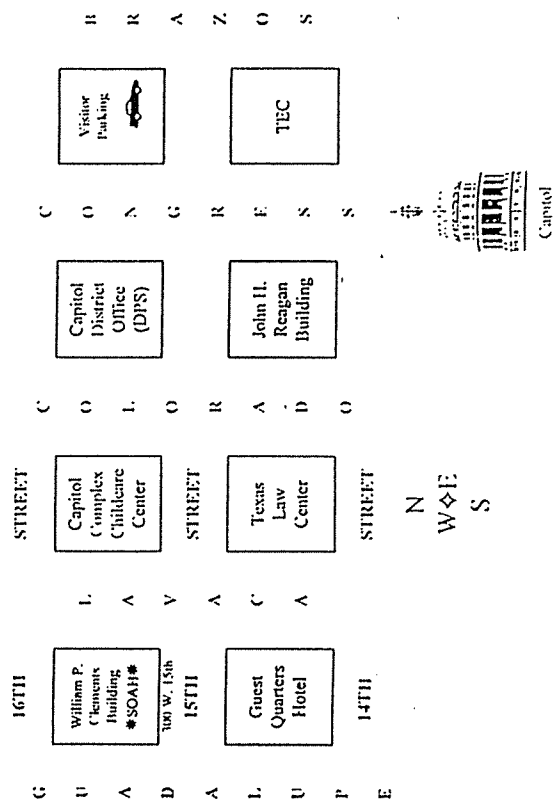
Exhibits: If a party intends to offer a document into evidence, the party should provide a copy for the judge, a copy for each other party, and a copy for itself. The person who prepared a document may need to testify about it before it can be admitted as evidence. Letters to the judge or the agency are not evidence unless offered by one of the parties and admitted.

Objections: Any party may object to questions, testimony, or exhibits. An objection must have a reason. The judge will either "sustain" the objection (excluding the testimony or exhibit from the record) or "overrule" the objection (admitting the evidence).

CLOSING STATEMENT — Each party may summarize what the evidence shows and argue why the judge should recommend a decision in that party's favor. The closing statement is not evidence.

COMPLETION OF THE CASE

After the hearing record is complete, the judge will send all parties a proposal for decision ("PFD") based on the evidence admitted at the hearing. In the PFD the judge will discuss the issues and recommend a specific outcome to the ultimate decision maker of the referring agency. Each party may object to the PFD by filing written exceptions within the deadlines set by order or by the rules of the referring state agency. The decision-making body of the state agency will consider the PFD, the exceptions, and any other party's replies to exceptions before making its final decision.



LOCATION AND PARKING

Unless the notice of hearing states otherwise, SOAH hearings take place in the William P. Clements Building, 300 West 15th Street, Suite 502, Austin, Texas. A state visitors' parking lot is located northeast of the 15th Street and Congress Avenue intersection, about three blocks from SOAH. A person may arrange for handicapped parking by contacting the Capitol Police at (512) 463-3476 at least one day before the hearing. Because SOAH is located near the State Capitol where parking is limited, you should allow enough time to park and get to the hearing.

Key Issues in Air Quality (Panel Discussion)

"I Don't Care If The Sun Don't Shine"

Jerry Demo
David Duncan
Karen Olson
Jeff Saitas

KEY ISSUES IN AIR QUALITY

"POTENTIAL TO EMIT"

Speaker

JERRY M. DEMO, P.E.

SEVENTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

AUGUST 3, 1995

FEDERAL OPERATING PERMIT APPLICABILITY

The owner or operator of a site and shall submit an application to the Texas Natural Resource Conservation Commission (TNRCC) for a Federal Operating Permit under the requirements of Regulation XII if the site has one or more of the following:

(1) any major source as defined in §122.10;

(2) any affected source as defined in §122.12;

(3) any solid waste incineration unit required to obtain a federal operating permit pursuant to the Act, §129(e) of Title I;

(4) any non-major source which the U.S. Environmental Protection Agency, through further rule making, has designated as no longer exempt from the obligation to obtain a federal operating permit. For the purposes of this section, non-major source shall be defined as:

(A) any source, including an area source subject to requirement under the Act, §111 (NSPS);

(B) any source, including an area source subject to requirement under the Act, §112 (Hazardous Air Pollutants), except if it is solely subject to requirements under the Act, §112(r), (Prevention of Accidental Releases); or

(C) Any source in a source category designated by the Administrator pursuant to Title III of the Act.

MAJOR SOURCE

A major source is defined as any site which emits or has the potential to emit air pollutants as described in subparagraphs (A), (B), or (C) of this definition.

(A) Any site which, in whole or part, is a major source under the Act, §112, which is defined as a site that emits or has the potential to emit, in the aggregate:

(i) 10 tons per year or more of any single hazardous air pollutant; or

(ii) 25 tons per year of any combination of such hazardous air pollutants.

(B) Any site which directly emits or has the potential to emit, 100 ton per year or more of any air pollutant. Fugitive emissions will be considered if source belongs to one of 27 listed sources.

(C) any site which, in whole or in part, is a major source under Part D of Title I of the Act, including:

(i) any site with the potential to emit VOC or NOx in a quantity of 100 tpy or more in Collin, Dallas, Denton, or Tarrant Counties (Marginal or Moderate); 50 tpy or more in El Paso, Hardin, Jefferson, or Orange Counties (Serious); 25 tpy or more in Brazoria, Chamber, Fort Bend, Galveston, Harris, Liberty, Montgomery, or Waller Counties (Severe) and 10 tpy or more in any ozone nonattainment area classified as (Extreme);

(ii) for Victoria County, sites with the potential to emit 100 tpy or more of VOC;

(iii) for the CO nonattainment area in El Paso county, sites with the potential to emit 100 tpy or more of CO;

(iv) for the city of El Paso, sites with the potential to emit 100 tpy or more of PM-10;

(v) for the lead nonattainment area in Collin county, sites with the potential to emit 100 tpy or more of lead.

(D) The listed source for fugitive emissions in subparagraph (B) shall also apply under subparagraph (C).

(E) Emission from any oil or gas exploration or production well and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units to determine whether such units or stations are major sources under subparagraph (A)

POTENTIAL TO EMIT (DEFINITION)

The potential to emit is the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design or configuration. Any certified registration or preconstruction authorization restricting emissions or any physical or operational limitation on the capacity of a stationary source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the Administrator. This term does not alter or affect the use of this term for any other purpose under the Act, or the term "capacity factor" as used in acid rain provisions of the Act or the acid rain rules.

LIMIT POTENTIAL TO EMIT

(a) For purposes of determining applicability of the Federal Operating Permit program under this chapter, the owner or operator of stationary sources without any other federally enforceable emission rate may limit their sources' potential to emit by maintaining a certified registration of emissions, which shall be federally enforceable. Emission rates in permits, standard exemptions, other preconstruction authorizations, and registrations of emissions provided for under Chapter 116 of this title (relating to control of Air pollution by Permits for New Construction or Modification) are also federally enforceable emission rates.

(b) All representations in any registration of emissions under this section with regard to emissions shall become conditions upon which the stationary source shall operate. It shall be unlawful for any person to vary from such representation unless the registration is first revised.

(c) The registration of emissions shall include documentation of the basis of emission rates and a certification in accordance with §122.165 of this title, that the maximum emission rates listed on the registration reflect the reasonably anticipated maximums for operation of the stationary source.

(d) In order to qualify for registration of emissions under this section, the maximum emission rates listed in the registration must be less than those rates defined for a major source.

(e) The certified registrations of emissions and records demonstrating compliance with such registration shall be maintained on-site, or at an accessible designated location, and shall be provided, upon request, during regular business hours to representatives of the TNRCC or any air pollution control agency having jurisdiction.

David D. Duncan - Senior Attorney, Air Quality
Texas Natural Resource Conservation Commission

B.A. - University of Texas, 1985 (Government)
J.D. - University of Houston, 1989 (Top 15%)

October 1994 - present - Senior Attorney, Air Quality, Texas Natural Resource Conservation Commission ("TNRCC") Legal Division. Direct legal support for the TNRCC Office of Air Quality ("OAQ"). Supervise the work of seventeen staff attorneys and one paralegal on permit hearings and legal opinions, contracts, rulemaking and regulatory interpretation, and implementation of federal Clean Air Act requirements. Meet regularly with management and staff of the TNRCC OAQ, and senior TNRCC management on major pending cases.

October 1993 - October 1994 - Senior Attorney, PST/Superfund, TNRCC Legal Division. Directed legal support for two TNRCC Divisions (Petroleum Storage Tanks and Pollution Cleanup (Superfund)), including assigning, tracking, and evaluating the work of six staff attorneys and a paralegal on enforcement, PST fund disputes, hearings, agenda presentations, and superfund negotiations and legal issues. Personally participated in or handled several cases (litigation, enforcement, negotiations on superfund cleanups, and contract disputes and drafting).

August 1991 - September 1993 - Staff Attorney, Texas Air Control Board ("TACB") Legal Division. Handled administrative hearings and enforcement actions for the agency; responsible for several hazardous waste permit hearings at Texas Water Commission; involved in numerous meetings and conferences on air issues in hazardous waste permitting; attorney for litigation involving Lafarge Balcones' (BIF) request to burn hazardous waste in cement kiln; worked on numerous other civil litigation and administrative order cases for TACB, as well as several potential criminal cases.

September '91 to August '92 - Assistant Director, University of Houston Law Center Environmental Liability Law Program. Supervised and conducted research on complex tort cases involving presentation of scientific evidence; developed and implemented an externship program that placed law students in government and non-profit organizations, where students received credit for their supervised work in environmental law; handled administrative matters for Program.

BIOGRAPHY

Jerry M. Demo, P.E. is Principal of the independent consulting firm of Pollution Solutions of Cedar Park, Texas. His fields of specialization are: Project Management, Air Compliance Audits, Compliance Resolution, Air Permits, Emissions Inventory, Federal Clean Air Act, Texas Air Regulations, and Arizona Air Regulations.

Previously, Mr. Demo was an Air Program Manager for Geraghty & Miller and Manager of Air Quality Services for the Austin office of Law Environmental. He also served as Program Manager for Permits and Compliance for the State of Arizona, Office of Air Quality. As such, he was responsible for all permitting activities within the state and for enforcement of all state air regulations, including the regional offices and their activities. Prior to that, Mr. Demo worked 15 years for the Texas Air Control Board (now part of the Texas Natural Resource Conservation Commission). He has over twenty years of experience in the air quality field and is a Registered Professional Engineer in Texas and Arizona.

Mr. Demo has a B.S. degree in Chemical Engineering from Youngstown State University and a M.S. degree in Environmental Engineering from the University of Texas.

CONTACT: **Pollution Solutions**
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(512) 259-3277
Fax (512) 259-5454

Jeffrey A. Saitas, P.E.

Texas Natural Resource Conservation Commission

Jeffrey A. Saitas holds a Bachelor of Science Degree in Mechanical Engineering from the Georgia Institute of Technology and a Master of Science Degree in Engineering from the University of Texas at Austin. Mr. Saitas has received certification as a registered Professional Engineer in Texas. Mr. Saitas was previously employed by Exxon Company USA in Houston and spent several years in various engineering positions in the oil and gas industry before joining the Texas Air Control Board in April of 1989. Mr. Saitas currently is the Deputy Director, Office of Air Quality of the Texas Natural Resource Conservation Commission.

Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087
Telephone: (512)239-5440
FAX: (512)239-1123

Karen N.T. Olson

Texas Natural Resource Conservation Commission

Karen N.T. Olson, P.E. received her B.S. in Chemical Engineering from the University of Texas in Austin in 1978. September 1979, after a short time as an environmental consultant, she joined the Texas Air Control Board Permits Program. Ms. Olson was a permit engineer reviewing coatings, combustion, and chemical construction permits for approximately 10 years. She became technical specialist primarily responsible for negotiations and coordination with the U.S. Environmental Protection Agency concerning permitting and Federal Clean Air Act program development within the Permits Program. Ms. Olson is now Director of the Operating Permits Program in the Office of Air Quality of the Texas Natural Resources Conservation Commission. Her primary responsibility is the development and implementation of the Title III (Toxics) and Title V (Operating Permits) programs to satisfy the Federal Clean Air Act Amendments.

Telephone: (512) 239-1334

RECENT EVENTS IN AIR QUALITY REGULATION IN TEXAS

David D. Duncan
Senior Attorney
Texas Natural Resource Conservation Commission

Seventh Annual Texas
Environmental Superconference
August 3-4, 1995
Austin, Texas

I. Introduction

This paper gives a glimpse of recent changes affecting the Texas Natural Resource Conservation Commission's ("TNRCC" or "the Commission") regulation of air quality in the State of Texas. Of primary interest are statutory changes from the 74th Texas Legislature regarding permitting requirements and implementation of several key programs based on requirements of the federal Clean Air Act Amendments of 1990 ("FCAAA"), as well as several new or modified TNRCC rules involving air regulation.

This paper is not meant as a comprehensive look at the entire system of regulation of air emissions from Texas sources, but is intended to give practitioners a guide to changes occurring within this area of the law. If you have general questions regarding the regulation of air emissions, I encourage you to ask them of the panel speaking at the Superconference, or you may call me at (512) 239-0465. If I can't answer your question on air quality regulation, I will find someone who can.

The opinions (if any) expressed in this paper are solely those of the author, and do not necessarily reflect those of the TNRCC or the Executive Director of the TNRCC.

II. The 74th Legislature

The biennial meeting of the Texas Legislature resulted in several key bills modifying the air programs of the TNRCC. Where possible, the discussions of each bill also contain the status of any required rulemaking at the TNRCC.

A. Senate Bill 1125 - Permit Renewals

SB 1125, sponsored by Senator Drew Nixon (R-Carthage) amended the Texas Clean Air Act ("TCAA" or "the Act"), Texas Health and Safety Code Sections 382.055(e) and 382.056(d), relating to the renewal, amendment, and modification of New Source Review ("NSR") permits. The bill was effective immediately upon signature by Governor Bush (May 19, 1995).

In the past, a limited review of control technology was performed on certain facilities seeking renewal, and hearings were held upon request of an affected person. The renewal section of the TCAA, as amended by SB 1125, prevents the Commission from imposing requirements more stringent than those in existing permits, unless the new limits are determined by the Commission to be necessary to avoid creation of a nuisance. Due to this limitation, the technical review of facilities at renewal will be more limited.

The bill also changes the public notice section of the TCAA to state that the TNRCC may not hold contested case hearings for applications where there is no associated emissions increase in excess of allowable limits. The TNRCC "may hold a hearing on an air permit . . . renewal" application if it is determined that the facility for which the permit is sought has "unresolved" violations which amount to "a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process . . .." It must be noted that the statute does not limit the requirement that the applicant publish notice of their "intent to obtain the . . . permit review." TCAA, §382.056(a). The statute also still contains a requirement that the notice include "a statement that a person who may be affected by emissions of air contaminants from the facility . . . is entitled to request a hearing from the [Commission]." TCAA, §382.056(b)(2).

The TNRCC is in the process of drafting rules to implement the requirements of SB 1125, and these rules will be published soon in the Texas Register. The language of the bill has already been used by the TNRCC Office of Hearing Examiners ("OHE") to dismiss one contested case hearing that was past the prehearing stage (this case will be presented to the Commission in August), and has been used by the Commission to dismiss three requests for hearing on renewals.

B. Senate Bill 1126 - Permit Modifications

SB 1126, also sponsored by Senator Nixon, changes the definition and application of the sections of the TCAA outlining when changes at a permitted facility are "modifications" pursuant to the Act. When a facility is to be "modified", the TCAA (before and after SB 1126) requires submittal of an application, technical review by air quality staff, and public notice. This bill was also effective immediately (May 19).

The bill makes a significant impact on what changes at permitted facilities are regulated by the Act's modification provisions. For qualified facilities (those facilities which have received authorization within the previous ten years or have equivalent technology), changes which result in a net increase in allowable emissions, as opposed to an increase in actual emissions, will trigger a permit review as a "modification." In determining whether a net increase in allowable emissions has occurred, the application of control technology and any decreases in actual or allowable emissions from other qualified facilities will be considered. The definition also excludes facility changes made pursuant to flexible permits, and changes at certain natural gas gathering or transmission facilities.

The result of SB 1126 is that facility operators may be able to

make changes between and among several sources within their facility without triggering the requirements for full permit review, including notice and opportunity for hearing.

This bill will also require rules. Like the SB 1125 rules, the rules to implement SB 1126 should be published soon in the Register.

C. Senate Bill 178 - Motor Vehicle Inspection and Maintenance

The much debated motor vehicle inspection and maintenance programs, based upon FCAAA requirements, received a restructuring by this bill. Sponsored by Senator John Whitmire (D-Houston), this bill moves enforcement of an interim I&M program to the Texas Department of Public Safety ("DPS") beginning June 1, 1995. The bill's provisions were effective immediately upon signature by Governor Bush (May 2, 1995).

The I&M program mandated by the bill applies to vehicles in the Dallas-Fort Worth, El Paso, and Houston-Galveston areas. Areas not included in the program that were part of the original program are the Beaumont-Port Arthur area, and Chambers, Liberty and Waller counties.

SB 178 requires that after the second anniversary of a vehicle's sale it must be tested annually at a "decentralized" facility (one that is privately operated) which may conduct both testing and repair. If the vehicle cannot pass the emissions test, it cannot be issued a safety inspection sticker. The TNRCC and DPS are directed to adopt rules to implement the program. The TNRCC prescribes the types of testing in the nonattainment areas, which may differ for the different areas. The tests may not be more stringent than those required before January 1, 1994. Authority is transferred from the TNRCC to the DPS to license inspection stations, ensure that testing equipment is properly maintained and operated, and establish a maximum inspection fee (but may not set a minimum). The testing facilities may also be licensed to conduct safety inspections. The new law removes the requirement that a person demonstrate they do not live in a nonattainment area in order to obtain a vehicle registration.

The TNRCC is directed to work with EPA to develop reasonable alternatives to the I&M program, including fuel additives and greater use of heat pumps by utilities. The Governor is delegated authority to modify the program by executive order after completing negotiations with EPA regarding the type of program Texas must implement. The order may specify the types of technology to be used, the fees to be charged, and may include or exempt specific counties.

Finally, the managing contractors under the previous program who

received money during the 90-day delay (pursuant to Senate Bill 19) of the I&M program (Tejas Testing) must repay that money by September 1, 1995, or they may not participate in the program.

The Mobile Source Division of the TNRCC's Office of Air Quality released copies of the three options being considered by the Governor's office for the reconstituted program. Attached to this paper is a copy of the package released in several press conferences the week of July 17th.

D. SB 200 - Alternative Fuels

Sponsored by Senator Kenneth Armbrister (D-Victoria), this bill modifies the requirements of the state's alternative fuels program. It is effective September 1, 1995. The legislation amends the compliance schedules for state agency, mass transit, private, and local government fleets. It also establishes two emission credit trading programs, entitled Program Compliance Credits and Mobile Emission Reduction Credits (MERCs).

The bill changes the definition of an "alternative fuel" to mean any fuel that, when used in a clean fuel vehicle, allows the vehicle to meet emission limits at least as stringent as EPA's low emitting vehicle (LEV) standards. Acquisition of vehicles meeting this definition can generate Program Compliance Credits and MERCs. the TNRCC is also allowed to grant waivers from the program in certain instances.

TNRCC Rulemaking is anticipated on this bill as well. The rules will be proposed after discussions with stakeholders (tentatively December 1995 or January 1996).

E. Senate Bill 290 - Employer Trip Reduction

This bill, sponsored by Senator Don Henderson (R-Houston), suspends the employer trip reduction ("ETR") program until 180 days past the effective date of the legislation (April 12, 1995). The bill also exempts employers from compliance with the program, except for the submittal of an ETR compliance plan, until 180 days after the effective date. This suspension may be extended for 45-day periods, as deemed necessary or desirable, by the governor, who may also seek 45 day waivers of the federal enforcement deadlines.

Under the bill, employers making good faith efforts to comply with the provisions of the ETR rules are considered to be in compliance with those rules. Employees may not be required to participate in the program if the employee lives within 30 miles of his or her place of employment, or travels no more than one hour from his or her residence to place of work.

The TNRCC will be conducting rulemaking to implement the new ETR program. These rules are scheduled to be developed this fall and proposed in early 1996.

F. Miscellaneous Interesting Bills

This legislative session saw the transfer of the TNRCC Office of Hearing Examiners to the State Office of Administrative Hearings (SOAH). This move is made pursuant to Senate Bill 12, sponsored by Senator John Montford (D-Lubbock). SOAH will provide hearing examiner services to the TNRCC, with TNRCC paying a fixed annual fee for the services. The agency will be amending its rules in order to have procedures consistent with the transfer of authority.

Senator Teel Bivins (R-Amarillo) sponsored Senate Bill 1546, which defines "affected person" for purposes of TNRCC hearings as someone who has a "personal justiciable interest related to a legal right, duty, privilege, power, or economic interest." The Commission is required to promulgate rules to incorporate this definition.

From the House side, House Bill 2473 created the "Texas Environmental, Health, and Safety Audit Privilege Act." Sponsored by Representative Warren Chisum (D-Pampa), the bill grants certain privileges and immunities to entities performing environmental audits. Since this is a bill primarily focused on enforcement, I will leave a more detailed discussion of it to those charged with enforcement.

Finally, the Senate originated and passed a bill (SB 1660, Ratliff) regarding the requirements of agreed orders. Pursuant to the bill, the TNRCC is not required to make findings of fact and conclusions of law other than those which give the agency jurisdiction for the order. Agreed orders may contain reservations that the order is not an admission, the occurrence of a violation is in dispute, and that the order is not intended to become a part of the party's compliance history. The Bill also limits the admissibility of agreed orders in civil actions not brought by the Attorney General.

III. Update on Title V Operating Permits

The Operating Permits Program ("OPP") of the TNRCC Office of Air Quality has recently been the focus of significant attention from industry and EPA. The OPP submitted its proposal for an interim approval of the program in the fall of 1993. The EPA published its proposal to grant the interim approval, along with an opportunity to comment on the proposal, June 7, 1995 (60 Fed. Reg. 30,037-46).

While the EPA actions were taking place, Texas industry was given an opportunity to recommend alternatives to the TNRCC staff implementing the OPP. At "roundtable" meetings held May 18th and 19th of 1995, industry began formulating positions on key issues in the Title V permitting arena. The ultimate result of these roundtable discussions was the formation of the Texas Title V Planning Committee ("the Committee"), chaired by Larry Feldcamp of Baker Botts in Houston. The Committee is comprised of representatives of key industrial groups (chemical, oil and gas E&P, oil refining, pipeline, natural gas processing, utilities, forest products, electronics, and coatings) and several "at-large" members. The TNRCC is not sponsoring the Committee, nor are TNRCC staff members of the Committee or any of its subcommittees. Members of staff regularly attend the discussions to act as information resources.

The Committee has conducted several meetings since the May roundtable discussions, and has broken out into numerous subcommittees dealing with specific issues on Title V permits. The subcommittees are generally chartered according to the subject matter being addressed by the group. The subject matter areas include the scope of the permit, permit by rule, grandfathered facilities, monitoring, compliance certification and enforcement, process and forms, and applicability.

The Committee projects their package of recommendations will be transmitted to the TNRCC in mid to late August of this year. In order to give sufficient time for the submission of these recommendations and to allow the Commission to consider them, the Committee requested a 90-day extension of the comment period for the EPA's proposed interim approval package. That request for extension was granted by EPA July 13, 1995, making October 5, 1995 the new deadline for comments on that proposal.

Texas Inspection & Maintenance Program

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

July 18, 1995

John Steib, Director
Air Quality Mobile Source Division

Goals
Concepts
Strategy
Strategy Timeline

Goals

- Decentralized
- Low Cost to Public and Business
- Maximum Convenience to Motorists
- Achieve 100% EPA Credit for I/M

Program Concepts

	Decentralized	Motorists Choice	Low Impact
Equipment	BAR 90 Test/Repair	BAR 90 Test/Repair BAR 90 Test Only	Remote Sensing (RSD)/Resale I/M240 Test Only
Remote Sensing	15% Total Fleet	15% Total Fleet	20% Total Fleet
Test Frequency	Annual	Annual for Test/Repair Biennial for Test Only Test on Resale - Test Only	Remote Sensing Failures On Resale
Vehicles Subject to Testing	Up to 25 Year Old (6.5 Million)	Up to 25 Year Old (6.5 Million)	RSD up to 25 Yr Old (.5 Million) Resale 6 Yr and Older (1.2 Million)
Test Population	100%	100%	RSD: 20% Scanned; 8% Tested Resale: 19% Tested
Failure Rate	20% (Total Pop.)	20% (Total Pop.)	Remote Sensing: 6% (Total Pop.) Resale: 4% (Total Pop.)
Waivers	$450 Limit (Phased)	$450 Limit (Phased)	$450 Limit (Phased)
Test Fees	$10 - $12	Test & Repair: $10 - $12 annual Test Only: $8 - $11 (Incentive Annual or Biennial)	Remote Sensing: No Charge Resale: (Test Only) $12 - $17
Enforcement	Safety Sticker	Safety Sticker/Title Transfer	Notice of Violation/County D.A. Title Transfer
Certified Repair Technicians	Yes	Yes	Yes

Strategy

- General Concept Development
- Stakeholders Input
- Feedback Analysis
- Emissions Inventory Credit Evaluation
- Recommendations Formulated
- Governor's Decision
- EPA Presentation
- Information Campaign
- Program Implementation

Strategy Timeline

• Stakeholders Input	28 July
• Emissions Inventory Credit Evaluation	28 July
• Recommendations Formulated	31 July
• Governor's Decision	3 August
• EPA Presentation	8 August
• Information Campaign	5 September
• Program Implementation	Variable

Texas Natural Resource Conservation Commission

I/M Program Survey

Name: _____ Organization: _____

Address: _____ City: _____ Zip: _____

Phone Number: _____ Fax Number: _____

1. Which type of group do you represent? (Circle one)

Local Government	Business	Elected Official(s)	
Repair	Inspection	Education	
Media	Environmental	Industry	
Citizen	State Agency	Health	Other _____

2. How many people do you represent? Approximately _____

3. Rank the programs in order of overall appeal...(1 best - 3 worst).

Decentralized_____ Motorists Choice_____ Low Impact____

4. Rank the three programs according to how they best utilize each element (1 best program - 3 worst program).

Element	Decentralized	Motorists Choice	Low Impact
(Example)	3	1	2
Equipment			
Test Frequency			
Convenience			
Waivers			
Test Fee			
Enforcement			

6. Comments / Recommendations

_____

_____

_____

TNRCC Policies

"A Whole Lotta Shakin' Goin' On"

Dan Pearson

Dan Pearson
Executive Director
Texas Natural Resource Conservation Commission

Dan Pearson is a native Texan. He is a graduate of Southwest Texas State University, in San Marcos, Texas. Dan was appointed Executive Director of the Texas Natural Resource Conservation Commission in October 1994.

Prior to joining the TNRCC, Mr. Pearson was Executive Vice President/Chief Operating Officer of the Texas Guaranteed Student Loan Corporation. Ninety-three percent of the loans guaranteed in 1994 were made to students attending traditional two-year, four-year, and private institutions of higher education. The outstanding loan portfolio for TGSLC is in excess of $6.3 billion, making TGSLC the seventh largest guarantor in the U.S.

To face the challenge of implementing the Student Loan Reform Act of 1993, Mr. Pearson was assigned the task of overseeing the re-engineering of the processes and systems of the TGSLC. This on-going task continues as the corporation seeks to increase and improve its service and productivity.

Mr. Pearson held various management positions in his thirteen and a half years with the Comptroller of Public Accounts, 1976 to 1989. Management positions included Deputy Comptroller for Audit and Data Processing; Associate Deputy Comptroller for Administration, overseeing Budget, Internal Audit, Support Services, and Human Resources; and Manager of the Houston South Field Office. To assist the Comptroller in administering tax law changes from legislative sessions, the Comptroller established a Tax Policy Committee and named Dan to chair this Committee. The Committee met with industry and legislators to develop the rules and regulations to implement the myriad of tax law changes forced upon the State to meet its financial challenges.

RCRA/Superfund Update

"Blue Suede SWMU'S"

Keith Hopson

Bio for Keith Hopson

Keith Hopson is a partner at the law firm Brown McCarroll & Oaks Hartline in Austin, Texas where he specializes in environmental law. He represents clients in the commercial waste disposal, waste reclamation, chemical, petroleum, petrochemical, primary and secondary metals, semiconductor, consumer products, metal plating, aerospace, and cement industries as well as commercial, municipal, lender and individual clients in environmental matters involving solid waste, hazardous waste, Superfund, environmental litigation and permitting, and international environmental law.

He is currently Vice-Chair of the Solid and Hazardous Waste Committee of the ABA's Section of Natural Resources, Energy, and Environmental Law.

Mr. Hopson earned his J.D. degree from the University of Texas School of Law, his MPA from the LBJ School of Public Affairs of the University of Texas and his B.A. from Austin College. Prior to entering private practice, Mr. Hopson served as Senior Law Clerk to the Honorable Jack Robert, U.S. District Judge in Austin, Texas.

Mr. Hopson has been a speaker at many environmental conferences on both the state and national level.

RCRA/SUPERFUND UPDATE --

Blue Suede SWMU's

Brown McCarroll & Oaks Hartline

R. Keith Hopson & Danny G. Worrell

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WHAT'S IN A DEFINITION?

Despite years of trying and intense input from a variety of sectors, EPA might appear to some not to be much closer to redefining "solid wastes" and "hazardous wastes" than it was during the late 1980s when its promises to do so were prevalent but the pressures to fulfill these promises were much milder. As legal and social incentives to recycle have intensified over the years, industry has asked EPA to rework the solid waste definition to remove regulatory disincentives to safe recycling of its secondary materials. As to the hazardous waste universe, EPA has long promised to redefine the regulatory term to exclude materials that contain de minimus levels of hazardous constituents, particularly for remediation soils and groundwater. The push to redefine hazardous waste has been more urgent since the mixture and derived-from rules were first put into question by the D.C. Circuit Court of Appeals' opinion in the Shell Oil case in December 1991.

The Agency's efforts to come up with a more reasonable and understandable framework for defining these crucial regulatory terms have been fueled as well as complicated in the last few years by several competing concerns, including but not limited to the following:

(1) environmental groups and the public have become more active in opposing any relaxation of regulatory requirements even if such changes are technically justifiable and ultimately better for the environment (e.g., many environmental groups oppose increased use of risk assessment analysis in prioritizing promulgation of new regulations, enforcement efforts and remediations, unless such risk assessments address multiple exposure pathways to both human and ecologic receptors);

(2) corrective actions required by the Resource Conservation and Recovery Act (RCRA) [greatly expanded by the Hazardous and Solid Waste Amendments of 1984 (HSWA)] are now in full swing and are beginning to generate huge volumes of listed hazardous waste-contaminated media that must currently be handled in the manner required for the hazardous waste "contained in" that media (including meeting land disposal restrictions now in full effect);

(3) EPA's "mixture" and "derived-from" rules have been under continual attack in the courts and are admittedly overly broad in terms of the volume and dangers of materials they bring within the hazardous waste system;

(4) as waste treatment and disposal costs skyrocket and technological advancements make many forms of recycling safer and more feasible, the regulated community has continued to pressure EPA to decrease regulation of recycled materials;

(5) states have widely disparate programs for regulation of non-hazardous wastes, which concerns regulators and environmentalists considering proposals to eliminate materials from hazardous waste management controls under RCRA; and

(6) the land disposal restrictions were in 1992 interpreted by the D.C. Circuit Court of Appeals as applying at the point of generation to corrosive, reactive, and most

ignitable hazardous wastes. Chemwaste Management v. EPA, 976 F.2d 2 (D.C. Cir. 1992).

Although not directly addressed by the Chemwaste court, the ruling on applicability of LDRs to wastes from the point of generation calls into question EPA's ability to revise the hazardous waste definition such that materials once deemed hazardous wastes can ever "exit" the hazardous waste system without first being treated in accordance with the strict statutory LDR treatment standard of substantially diminishing the toxicity of the waste so that short-term and long-term threats to human health and the environment are minimized. 42 U.S.C. § 6924(m).

Balancing these competing concerns, EPA is rushing to accomplish definitional changes that will simultaneously satisfy all statutory requirements, encourage remediation and recycling, simplify compliance, and be technically justified. Although the initial development of basic regulatory frameworks for each of these programs has concluded, EPA is still struggling to propose workable and effective definitional schemes that will satisfy any of the goals for which these efforts have been undertaken. This paper outlines the status of each definition, and then addresses additional developments in hazardous waste regulation at the federal and state level.

I. Solid Waste Universe

A. Agency and Judicial Interpretations of 1985 Statutory Definition

The definition of solid waste is critical to the RCRA hazardous waste program because a waste that is not a solid waste cannot be a hazardous waste. Ironically, on the federal RCRA regulatory level, a waste that is not hazardous, also cannot be a solid waste. This is not

true in Texas, however, which in addition to the hazardous waste program, recognizes and regulates three classifications of non-hazardous industrial solid waste. Nevertheless, the Texas definition of solid waste is the same for both the hazardous and non-hazardous programs, and is almost identical to the federal definition but for its encompassing non-hazardous secondary materials.

Historically, the federal debate about the definition of solid waste has centered mostly around the statutory phrase "other discarded material." 42 U.S.C. § 6903(27). EPA has interpreted this term to include most recycled materials, a position that industry has argued exceeds EPA's statutory authority and discourages an activity that helps to resolve rather than contribute to the waste management crisis in this country. EPA has countered with extremely limited regulatory exceptions for certain types of recycling, but in general continues to regulate as solid waste a large portion of the recycled material universe.

Over a three-year period, the D.C. Circuit Court of Appeals came out with a series of opinions that at first seemed to challenge EPA's position that "other discarded material" includes recycled material, but subsequently supported it. See American Mining Congress v. EPA, 824 F.2d 1177 (D.C. Cir. 1987) (AMC I), American Petroleum Institute v. EPA, 906 F.2d 729 (D.C. Cir. 1990), and AMC v. EPA, 907 F.2d 1179 (D.C. Cir. 1990) (AMC II). In recent rulemakings EPA has cited to the API and AMC II opinions as support for the Agency's discretion either to regulate or to exempt from hazardous waste regulation various forms of recycling depending on whether "the material is part of the waste management problem, as indicated by the potential for the material to pose a hazard to human health and the environment when recycled." 58 Fed. Reg. 48097 (September 14, 1993).

B. EPA Task Force Redefining Solid Waste

In response to the confusion and complaints that for ten years have undermined EPA's 1985 solid waste definition, the Agency in October 1992 created the Definition of Solid Waste Task Force within its Office of Solid Waste. This task force thereafter set up the Definition of Solid Waste Roundtable that included 16 members from industry, federal and state governments, and environmental and citizen groups. The Roundtable held several public meetings during 1993, and reviewed at least two draft ("Strawman") proposals of a solid waste redefinition in late 1993 and early 1994. In April 1994 the EPA Solid Waste Task Force issued a draft report to the Assistant Administrator for OSWER (Elliot Laws) that was very similar to the second Strawman proposal. Industry members of the Roundtable complained that several aspects of the proposed new rule as set out in the draft report would not only fail to encourage recycling, but would make much recycling even more cumbersome than it is under the current regulatory scheme. Nevertheless, on September 19 the Task Force issued its final report to OSWER with few changes from the April draft proposal (See the attached Executive Summary of the final report).

The final proposal, like Strawman II, is very complex. It sets out three broad categories of recycling activities/materials each of which would be regulated to some extent, even the first category described as "RCRA exempt/excluded" materials (some of which are statutorily required to be exempt from RCRA requirements and are already carved out of the existing rules). Under the proposal, facilities in this first category would be required to notify EPA or the state agency of their recycling activities, and to make a written determination of their RCRA-exempt status and keep it on file at their facilities. Further, they would not be eligible for exempt status if they

speculatively accumulated the exempted material (redefined to limit accumulation to 18 months on-site and 12 months off-site) or stored it on the land, in a surface impoundment, or waste pile prior to recycling. Industry objected to any such regulation of materials that were previously unregulated under RCRA. The report also suggests removing two previously unregulated wastes from the exempt category altogether -- hazardous spent material reused off-site without prior reclamation, and characteristically hazardous sludges to be reclaimed and reused. These two groups of wastes, therefore, would go from being unregulated to being regulated under the second (more heavily regulated) broad category of recycling activities under the proposal.

The recommended "RCRA recycling" category actually contains four subcategories of activities/materials that would be regulated primarily through strict management standards rather than permits. Because permits are not required, apparently not even for pre-recycling storage which is the only activity related to recycling that has previously required a permit, the statutory facility-wide corrective action that must currently be incorporated into permits is also not required (unless the facility is already subject to such requirements, under an existing pre-recycle storage permit for example). The four subcategories that make up "RCRA recycling" are: direct reuse off-site of spent material and recovery of precious metals (Category A, previously unregulated materials under the federal program); on-site recycling (Category B); captive recycling and product stewardship (Category C, basically including off-site but non-commercial recycling), and off-site commercial recycling (Category D).

For all four of these categories, the final report recommends that facilities be prohibited from speculative accumulation (as newly defined) and pre-recycle storage on the land, and be required to submit a one-time notice of their activities to the EPA or state agency, thereafter

report on recycling activities biennially, and manifest off-site shipments (although it proposes a separate recycling manifest to avoid regulatory requirements associated with the existing hazardous waste manifest). Further, for Category B, C, and D facilities, the report recommends that: (1) pre-recycle storage be restricted to tanks, containers and containment buildings that meet current RCRA regulatory standards (though they would not have to be permitted), (2) emissions from pre-recycle storage and recycle units (the latter previously unregulated) are subject to the more stringent of CAA or RCRA emission standards, (3) release response similar to RCRA requirements for releases from tank systems should be applied to recycle units, (4) closure plans providing for "clean closure" would be submitted at the time of closure of recycling units, (5) closure financial assurance estimates should be provided at time of unit start up, and (6) facilities should develop operating plans, including waste analysis, and follow the general facility standards of 40 CFR Part 264, Subpart A. No agency approval would be necessary for facility modifications, except for Category D facilities which must receive "government approval" including public participation prior to start-up or modification. Finally, Large Category C facilities would have to provide 30-days public notice prior to receiving hazardous waste shipments from off-site.

Facilities that fit within the broad "RCRA recycling" category under the proposal would apparently be relieved of permitting and full-blown corrective action requirements that currently apply to pre-recycle storage of wastes from off-site sources and to on-site pre-recycle storage of certain materials for longer than 90 days. However, RCRA recycling facilities would be much more heavily regulated in two important respects. First, some activities previously exempt from any regulation would now be considered "RCRA recycling" (e.g., spent materials directly reused

off-site, precious metal recovery, reclamation and reuse of characteristically hazardous sludges). Second, the recycling activity itself, previously exempt from regulation, would not be subject to numerous management controls and operational standards.

Probably the most controversial aspect of the Task Force's final proposal is its inclusion of any secondary material that has "toxics along for the ride" in the third broad category of recycled materials/activities, those that are to be fully regulated under Subtitle C. Activities are automatically defined as "RCRA Hazardous Waste Recycling" -- and thus would require permitting and corrective action -- if they are involve speculative accumulation (as redefined), storage on the land prior to or during recycling (although certain waste-derived products would be allowed to be placed on the land without being regulated, as under the current rules at 40 CFR 266.20(b)), recycling by being landfilled or burned for destruction, recycling of used oil or inherently waste-like materials (adding dioxins and some metals fed to halogen-acid furnaces), or produce waste-derived products that contain "toxics along for the ride" (TAR). TAR is intended to reveal "sham recycling" situations.

A product (or reused ingredient if a generator would rather test that) fails the TAR test if it contains a significantly higher amount of hazardous constituents than the same product make from virgin materials. (Note that variances might be granted from this requirement under the proposal if a recycler could demonstrate a functional need or industry specification justifying higher concentrations of specific toxics in the recycled product, or if it could demonstrate that there would be no significant risk to human health or the environment over the life of the recycled product, each of which might be costly and lengthy demonstrations.) Although the Task Force recommends allowing recyclers to certify compliance with TAR based on process

knowledge and existing data, industry finds this TAR requirement unworkable because of the expense of testing all secondary materials to evaluate their status, the difficulty in determining the appropriate number and frequency of tests, and the absence of a national virgin material baseline to compare to hazardous constituents in recycled products. Industry also has challenged EPA's statutory authority to regulate such materials, an issue that the Task Force recognizes in the final report, noting that legislation might be necessary to allow implementation of certain aspects of its proposal.

C. EPA Efforts Subsequent to the Task Force Report

The Definition of Solid Waste Task Force's September 1994 report recommending the above scheme was reviewed by Elliot Laws last fall, and he is reportedly overseeing significant revisions to and clarifications of the approach. (See the attached Dec. 27, 1994 letter from Michael Shapiro addressing Laws' efforts in response to the 1994 report.) First, Laws directed his staff to work with states to simplify and clarify the jurisdictional lines within the solid waste definition. Second, Laws is having an EPA/state team work on tailoring new regulatory management standards for the recycling of materials that remain within RCRA Subtitle C jurisdiction. Finally, a third group is looking at how a new rule should be implemented.

Leigh Ing, Special Assistant to the Deputy Director of the Office of Waste Management at the Texas Natural Resource Conservation Commission, is that agency's lead on this rulemaking effort. She says that draft language for a solid waste definition proposal should be available in late 1995 or early 1996. EPA has said it plans to propose the rule in 1996.

II. Hazardous Waste Universe

A. Historical Need for Redefinition

Primarily in response to complaints that EPA's "mixture" and "derived-from" rules have brought large volumes of low toxicity wastewaters and treatment residues within the Subtitle C system, EPA has promised the regulated community for at least 10 years that it was in the process of developing a "de minimis" rule setting minimum constituent concentrations below which wastes would not be considered hazardous wastes. As noted above, such relief has also become critical for more reasonable handling of remediation wastes - primarily soils contaminated with low levels of listed hazardous wastes - that currently must be handled the same as the wastes "contained in" them. Thus, shortly after the mixture and derived from rules were struck down by the D.C. Circuit Court of Appeals in Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991), cert. denied, 113 S.Ct. 1961 (1993), and were thereafter readopted on a temporary/emergency basis in 57 Fed. Reg. 7628 (March 3, 1992) (EPA deleted the sunset provision from the interim rule in 57 Fed. Reg. 49780 [October 30, 1992]), EPA proposed its Hazardous Waste Identification Rule (HWIR) on May 20, 1992 (57 Fed. Reg. 21450).

The rule set out two main proposals for when wastes would enter the hazardous waste regulatory system, and when wastes would exit the system. The rule was withdrawn on October 30, 1992 (57 Fed. Reg. 49280) because the extent of the comments (particularly from states) convinced EPA that all relevant factors had not yet been considered in order to proceed to a final rule.

B. HWIR Task Force

EPA's Office of Solid Waste thereafter set up a Hazardous Waste Identification Rule Committee, including representatives from outside the Agency, to act as an advisory group to EPA and assist the Agency in meeting an October 1994 congressional deadline to address the mixture and derived-from rules. This group identified two categories of material whose status needs to be changed and/or clarified in the development of a new HWIR proposal: (1) "as-generated" process wastes, especially those subject to the mixture and derived-from rules, and (2) contaminated media that are managed as part of remediation activities. 59 Fed. Reg. 47986 (September 19, 1994).

As noted, the first portion of HWIR, for "as-generated" process wastes, was subject to an October 1, 1994 statutory deadline that EPA did not meet. In fact, the HWIR advisory committee disbanned on September 26, after failing to reach a consensus on how EPA should proceed with regulating both process wastes and contaminated media. At the same time the committee was struggling to reach a last minute agreement, the D.C. Circuit Court of Appeals was issuing a decision in Mobil Oil Corp. v. EPA, CA DC, No. 92-1211, 9/23/94, in which industry had asked the Court to vacate EPA's March 1992 emergency mixture and derived-from rules. The Court found the challenge moot because Congress had included in RCRA a provision requiring the emergency mixture and derived-from rules to remain in effect until October 1, 1994, by which time new mixture and derived-from rules were to be issued (Chafee Amendment).

Thereafter, on October 3, two lawsuits were filed against EPA for missing the October 1 deadline. The Agency is currently subject to a consent decree in one of these cases that requires proposal of a rule for as-generated wastes by August 15, 1995, and finalization by the end of

1996. States, industry, environmentalists and the waste treatment industry are working closely with EPA to craft the draft rules.

The holdup on the two different portions of the rule appears to be much the same -- determining the criteria that will be used to identify those materials that are to be more heavily regulated (whether a matter of "entering" or "exiting" the system). The debate has primarily centered around determining the proper risk assessment criteria to use in setting the regulatory limits, with industry pushing for less conservative criteria that arguably achieves the original purpose of redefining the hazardous waste definition (i.e., excluding de minimis/low toxicity materials from unnecessary regulation), and environmentalists demanding a conservative, multi-pathway, indirect risk assessment approach that ensures that no wastes slip through the cracks of widely divergent state non-hazardous waste programs. In addition, some involved in drafting the rules have pushed for requiring agency approval before wastes can exit the RCRA Subtitle C system (i.e., a "delisting"), while others have favored a self-implementation approach.

C. As-Generated Hazardous Waste Proposal

The upcoming proposal for as-generated hazardous wastes exiting the Subtitle C system will reportedly be based on an extensive direct/indirect risk assessment approach that will require an analysis of from 64 to 68 potential human and ecologic exposure pathways for all Appendix VII-IX constituents. (Adequate risk data and/or analytical methods for all these constituents is not available, but EPA may reportedly resolve this problem by grouping such constituents with similar constituents for which adequate information is available.)

The exit procedure currently being considered for proposal for as-generated hazardous wastes will be self-implementing (unless the generator wants to keep its analyses confidential), but expensive. The required sampling alone could cost between $7,000 and $10,000 per wastestream, according to TNRCC estimates. Ultimately, this scheme would allow only a very small volume of hazardous waste to exit the Subtitle C system -- an estimated 18 percent of currently generated hazardous wastewaters (no dilution allowed), and 8 percent of current hazardous non-wastewaters. Primarily, only treatment residues will get out. The exit levels reportedly would serve as LDR levels as well.

If adopted, this scheme will exempt from Subtitle C only those wastes that all could agree are safe even if no subsequent waste management occurs. EPA has warned that it has not had the time and resources to include in its initial proposal a redefinition of the criteria for wastes to enter the hazardous waste universe, but has implied that entry levels might be forthcoming. Another option that may still be on the table, or that might be implemented in the future, would involve relaxing the exit levels for additional hazardous wastes that remain subject to certain reduced management standards.

Finally, note that this multi-source risk assessment scheme being considered for as-generated wastes continues to be hotly debated. Concerns about the approach center on (1) the scientific efficacy of the proposal, and (2) the resulting precedent that the use of such a conservative and expensive approach might have in other regulatory programs.

There have been recent efforts to expand the coverage of the exemption by allowing "contingent management options" to be considered. These could expand the exemption in states with strong industrial subpart D programs.

D. Contaminated Media Under HWIR

The contaminated media portion of the promised HWIR rule is even more critical than the process waste portion because of its added objective of encouraging and streamlining remediation activities, and because other aspects of RCRA regulation of contaminated media are hanging in limbo while the rule is being developed. These include finalization of cleanup standards for the Subtitle S corrective action rules proposed on July 27, 1990, 55 Fed. Reg. 30798 (see Inside EPA, p.3, June 17, 1994), the fate of the corrective action management unit (CAMU) portion of that rule adopted on February 16, 1993, 58 Fed. Reg. 6658 (challenge to the CAMU rule has been stayed pending promulgation of a final HWIR media rule, Environmental Defense Fund v. EPA, D.C. Cir. No. 93-1316), and adoption of land disposal restriction (LDR) treatment standards tailored to soils rather than the wastes that contaminate them (see 59 Fed. Reg. 47986-87).

The advisory committee on the media portion of the HWIR rule agreed that contaminated media should be divided into two categories -- highly contaminated media ("hot spots") that would be considered hazardous wastes and would be subject to mandatory treatment requirements, and low-toxicity media that would be defined as non-hazardous and would be subject to management requirements and clean-up standards of the overseeing regulatory agency, possibly on a case-by-case basis. 59 Fed. Reg. 47986. EPA has reportedly settled on a criteria for distinguishing between these two categories: contaminated media below a 10^{-3} risk range will be able to exit the Subtitle C system if a corrective action management plan addressing these materials has been approved by the implementing agency. TNRCC warns that such plans may have to include ongoing investigation and even groundwater recovery.

Contaminated media in the top tier would reportedly remain within the RCRA Subtitle C system, but might be subject to lesser LDR standards than they currently are (generally they are subject to the LDR treatment standards applicable to the wastes they contain). The new LDRs for top-tier contaminated media might allow innovative technologies to be used on a site-specific basis, or might simply require treatment that removes a certain percentage (90 percent has been considered) of the hazardous contaminants. Contaminated media remaining within the RCRA system might also be subject to streamlined permitting standards/procedures, and corrective action requirements that would not apply facility-wide for facilities that need permits only to conduct remediation.

It is likely that EPA will draft the media portion of the HWIR rule as a discretionary exception to its long-standing, yet uncodified (for soils) "contained-in" policy rather than as a regulatorily specified exception from hazardous waste management requirements. One possible problem with this approach, according to industry, is that characteristically hazardous media (e.g., ignitable) might have to be regulated as hazardous wastes even if they contain no levels of hazardous constituents "above the line" because they are hazardous under current regulations independently of the contained-in policy.

E. Ongoing Implications of Chemwaste Opinion

Another significant issue that must be addressed by EPA for both portions of the rule concerns the implications of the Chemwaste case. That case only addressed application of the statutory LDR treatment standard to certain characteristically hazardous wastes that exit the Subtitle C system through the mixture rule. However, the general reasoning in the opinion raises

the concern that once any waste is defined as a hazardous waste, it must be treated to meet the statutory LDR treatment standard of RCRA Section 3004(m) (substantially diminish toxicity to minimize short-term and long-term threats to human health and the environment) regardless of whether the waste subsequently satisfies an "exit level" or otherwise fits within a hazardous waste exclusion. Thus, EPA must consider whether the levels at which wastes exit the Subtitle C regulatory system under HWIR must also satisfy the RCRA Section 3004(m) LDR treatment standard. The upcoming as-generated portion of the rule will reportedly be drawn so narrowly the first time around, that this may not be a concern (recall that exit levels will also be revised LDRs), but any subsequent expansion of the rule to exclude more wastes from the system might have to be drafted as a redefinition of entry levels simply in order to satisfy Chemwaste. As for the contaminated media portion of the upcoming rule, couching the exit criteria in the context of the "contained-in" policy may save it from any such implications of the Chemwaste opinion.

III. Universal Waste Rule

On May 11, 1995, EPA promulgated new streamlined hazardous waste management regulations governing the collection and management of certain widely generated wastes, such as batteries, pesticides, and thermostats, known as "universal wastes." 60 Fed. Reg. 25492 (May 11, 1995). These regulations appear at 40 CFR Part 273. This rule arises out of some of the same past EPA efforts as the redefinition of solid waste initiative, and it has similar goals. Nevertheless, the two projects are not concurrent, and each is now in a different stage of development. A number of issues raised by the universal waste rule and the redefinition initiative make it important to understand the interaction between the two.

The universal waste rule was designed to accomplish three general goals: (1) encouraging resource conservation while ensuring adequate protection of human health and the environment; (2) improving implementation of the current Subtitle C hazardous waste regulatory program; and (3) providing incentives for individuals and organizations to collect the unregulated portions of these universal waste streams and manage them using the same systems developed for the regulated portion, thereby removing these wastes from the municipal waste stream. 60 Fed. Reg. at 2549. The goals of the redefinition initiative include (1) eliminating disincentives for hazardous waste recycling; (2) ensuring that hazardous waste recycling is environmentally protective; (3) addressing areas of under regulation; and (4) simplifying the definition of solid waste regulations to make them easier to comply with and to implement. The universal waste rule makes no changes to the regulations governing facilities recycling universal wastes (destination facilities); whereas the redefinition initiative very likely will involve significant changes to these regulations. Thus, facilities recycling universal wastes are currently subject to the same regulations as any other hazardous waste recycler.

Commenters to the proposed universal waste rule suggested to EPA that it lessen the regulatory requirements for universal waste recyclers to encourage recycling. EPA indicated that it agreed with these comments, but indicated that it was premature in light of efforts regarding the redefinition initiative. The Agency indicated that it would not make sense to make changes to the recycling regulations now, since the final results of the redefinition initiative are not available. Thus, when the Agency makes changes to the recycling regulations as part of its redefinition efforts, these changes will also be applied to universal waste recycling. 60 Fed. Reg. at 25494.

As noted above, the universal waste rule is essentially management standards for specific, widely generated wastes, which at this time include batteries, pesticides, mercury thermostats, and household and conditionally exempt small quantity generator wastes. The rule specifies four types of regulated persons. These categories include the transporter, destination facility, small quantity handlers of universal waste (SQHUWs), and large quantity handlers of universal waste (LQHUWs). Each type of regulated entity is subject to different regulatory requirements, such as requirements concerning notification, management requirements, labeling/marking, storage time limits, employee training, release response, off-site shipments, tracking, and export requirements. The distinction between LQHUWs and SQHUWs involves the amount of universal wastes managed at any time. LQHUWs are those defined as handling 5,000 kilograms or more total of universal waste at any time; whereas SQHUWs are defined as handling less than 5,000 kilograms total at any time. 60 Fed. Reg. at 25495.

In general, the universal waste rule reduces the management requirements for transporters, SQHUWs, and LQHUWs. Destination facilities are still subject to all Subtitle C regulations, except for manifesting requirements. EPA believed that by relaxing the standards for these handlers, the collection of universal waste would be simplified, thereby, encouraging participation in collection programs. The Agency believed that this would facilitate the development and use of safe and effective ways to recycle these waste streams.

Furthermore, because the final rule does not require that universal waste handlers count those wastes managed under Part 273 for their monthly hazardous waste quantity determination, the rule would greatly simplify procedures used to determine monthly hazardous waste generation rates. 60 Fed. Reg. at 25502. As a consequence, some generators that were formerly small

quantity generators may be able to qualify for conditionally exempt small quantity generator status as a result of removal of universal waste streams from the monthly hazardous waste quantity determination.

Finally, many universal wastes are not only generated by industrial facilities, but also by consumers in their homes, which are not regulated under RCRA Subtitle C. Thus, certain wastes generated by consumers in their homes, which would otherwise be considered hazardous wastes, are considered municipal solid wastes and may be disposed of in municipal landfills or combusters. EPA believes that this rule will encourage infrastructure development for collecting and managing all universal wastes in the same manner regardless of the source of generation.

IV. Phase II Land Disposal Restriction Rule and Universal Treatment Standards

The so-called Phase II land disposal restriction (LDR) final rule was published in the Federal Register on September 19, 1994. 59 Fed. Reg. 47982 (September 19, 1994). This rule represents a marked departure by EPA from the traditional approach the Agency used for establishment of land disposal treatment standards. The rule establishes the concept of "universal treatment standards" (UTS). The EPA traditionally promulgated treatment standards on a waste-code-by-waste-code basis. This practice many times resulted in different treatment standards for the same constituent depending on the source (and waste code) of the waste. Under the UTS scheme, the same standard applies to a constituent regardless of the source of the waste or its waste code. For example, the previously promulgated treatment standard for benzene in spent non-halogenated solvent non-wastewaters (F005) was 3.7 mg/kg. Nevertheless, for benzene in petroleum refinery primary separation sludge (F037), the non-wastewater treatment standard was

14 mg/kg. The UTS level for non-waste water forms of benzene in either waste, however, is 10 mg/kg. 40 CFR § 268.40.

The UTS levels replaced numerical treatment levels for essentially all prohibited wastes, except wastes that exhibit extraction procedure (EP) toxicity for metals. 59 Fed. Reg. at 47997. In general, the treatment methods will continue to apply where specified as the sole or alternative treatment standard.

As a result of replacing most numerical standards with UTS levels, a large number of existing treatment standards changed, effective December 19, 1994. Although most of the new treatment levels are within one order of magnitude of existing treatment levels, 106 wastewater and 219 non-wastewater standards are more stringent; whereas, 155 wastewater and 289 non-wastewater standards are less stringent. Despite these changes and potential compliance problems, EPA believes that the system overall simplifies enforcement and compliance monitoring efforts, along with treatment of wastes.

Among some of the other things the Phase II rule does is to establish treatment standards for certain toxicity characteristic (TC) organic wastes (D018-D043). Depending upon how the wastes are managed, they may be required to be treated not only to address the constituents that make them hazardous, but also to address underlying hazardous constituents. The rule also clarifies and simplifies the LDR notification, certification, and recordkeeping requirements. In addition, the rule also requires treatment (other than dilution) of ignitible liquids with high total organic carbon (TOC) content and TC pesticide wastes (D012-D017) before injection into Class I non-hazardous wells regulated by the Safe Drinking Water Act (SDWA). See 59 Fed. Reg. at 47982.

The TNRCC adopted by reference the Phase II rule, effective in Texas on March 22, 1995. See 20 Tex. Reg. 1657 (March 7, 1995); see also 30 TAC § 335.431.

V. Proposed Phase III Land Disposal Restrictions

EPA proposed the Phase III LDRs in the Federal Register on March 2, 1995. This proposed rule would set treatment standards for certain newly listed hazardous wastes generated as a result of the production of carbamate pesticides, organobromine flame-retardants and aluminum. See 60 Fed. Reg. at 11702 (March 2, 1995).

The proposed rule would also generally require treatment for ignitable, corrosive, reactive, and toxic characteristic wastes that are decharacterized (generally by dilution) and subsequently managed in Clean Water Act (CWA) or CWA-equivalent facilities or in Safe Drinking Water Act (SDWA) non-hazardous waste injection wells. Treatment standards for those wastes managed in these types of units would require decharacterization and treatment for any underlying hazardous constituents that may be present, even though they are not the cause of a characteristic property. In summary, as a result of this rule and the court's mandate in the Chemical Waste Management[1] case, dilution of characteristic hazardous wastes to remove its characteristic property in order to manage the wastes in CWA, CWA-equivalent, or Class I nonhazardous injection well systems would be prohibited without treatment of underlying hazardous constituents.

The characteristic wastes covered for these types of units include (1) ignitable wastes other than high-TOC ignitable wastes (D001) (addressed in the Phase II rule); (2) corrosive wastes;

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[1]Chemical Waste Management v. EPA, 976 F.2d 2 (D.C. Cir. 1992), cert. denied 113 S. Ct. 1961 (1993).

(3) reactive wastes; and toxicity characteristic wastes, with the exception of halogenated TC pesticide wastes (D012-D017) (addressed in the Phase II rule) and TC metal wastes (D004-D011) (to be addressed in the Phase IV rule).

Another recurring concern is the integration of the Phase III rule, which includes technology-based standards, and the risk-based RCRA limits that may be developed under the HWIR. EPA indicated in the preamble to the proposed Phase III that if the HWIR risk-based limits are determined to minimize threats to human health and the environment, when they are higher than the LDR standards (less stringent), they will satisfy RCRA § 3004(m),[2] and the waste would not have to be treated to meet the LDR technology-based limits. EPA indicated that integration of the LDRs and HWIR will be further addressed in the HWIR rulemaking process.

Another important proposal made by the rule is that UTS would not apply to hazardous constituents and decharacterized waste waters discharged by CWA facilities subject to the rule, so long as the facilities are subject to an appropriate CWA technology-based or water quality-based standard or limitation for that hazardous constituent. The Agency believes that such CWA limitations and standards satisfy RCRA § 3004(m) requirements and, as a consequence, the best means of integrating RCRA and CWA requirements is to have the CWA limitation or standard be the RCRA treatment standard as well.

The EPA is committed under a consent decree settlement to sign the final Phase III rule by January 16, 1996. The Phase IV proposal is scheduled according to the agreement to be signed no later than June 30, 1995, and the final rule is scheduled to be signed by June 30, 1996.

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[2]This is the statutory requirement to minimize threats to human health and the environment cited by the Chemical Waste Management court in determining that hazardous constituents had to be treated for decharacterized hazardous waste.

EPA has indicated that the Phase IV rule will consider leaks, sludges, and air emissions from surface impoundments; risk-based assessments of when waste are hazardous under HWIR; Paper and Pharmaceutical industries effluent limitations guidelines, which affect industries using impoundment-based treatment systems to manage decharacterized wastes; and rules for control of hazardous air pollutants issued under the Clean Air Act (CAA).

VI. Air Emission Standards for RCRA Facilities

The Hazardous and Solid Waste Amendments (HSWA) of 1984 mandated that EPA promulgate regulations for the monitoring and control of air emissions at hazardous waste treatment, storage, and disposal facilities. RCRA § 3004(n); 42 USC § 6924(n). EPA has chosen to implement § 3004(n) in three phases. The first phase involved addressing emissions from hazardous waste treatment processes that were evaluated as part of the LDR program. These requirements were promulgated on June 21, 1990, and became effective on December 21, 1990. See 55 Fed. Reg. 25454 (June 21, 1990). Those rules required controls on organic emissions vented from distillation, fractionation, thin-film evaporation, solvent-extraction, steam-stripping, and air-stripping processes in hazardous waste treatment. The regulations were codified as Subpart AA of Parts 264 and 265 and applied to process vents from units treating wastes with at least ten parts per million by weight (ppmw) of organics. In the same rule, standards were established to control emissions from equipment leaks and systems handling hazardous wastes with at least ten percent by weight organics. These standards were codified in Subpart BB of Part 264 and 265.

The second phase of the RCRA air emission control implementation program was proposed on July 22, 1991, and finalized on December 6, 1994. See 56 Fed. Reg. 33490 (July 22, 1991); 59 Fed. Reg. 62896 (December 6, 1994). This rule addresses emissions of VOCs from treatment, storage, and disposal (TSD) facility tanks, containers, surface impoundments, and miscellaneous units, in addition to 90-day storage tanks and containers. This second phase rule is designed to reduce emissions of ozone precursors and air toxics. This rule is more fully described below.

Phase three of the air emissions control program, if needed, will address specific hazardous waste operations not adequately controlled by the first and second phase rulemakings.

As noted above with respect to the second phase air rule, TSD facilities are required to control emissions of VOCs from the units described above (i.e., tanks, containers, etc.) if the hazardous waste in these units contain an average VOC concentration of greater than or equal to 100 ppmw. This rule also adds a new reference test method, Method 25E, to the regulations in order to determine the organic vapor pressure of a waste. The rule adds a new Subpart CC to Parts 264 and 265 and adds Test Method 25E to 40 CFR Part 60.

The Subpart CC air emission control standards do not apply to waste management units explicitly in seven situations:

(1) waste management units into which no hazardous wastes are added on or after June 5, 1995;

(2) tanks and surface impoundments into which hazardous waste addition has stopped and for which an approved closure plan has been implemented or completed;

(3) containers with a capacity of less than or equal to 0.1 cubic meters (approximately 26 gallons);

(4) waste management units that are used solely for on-site treatment or storage of hazardous waste generated from remediation activities;

(5) waste management units used to manage only radioactive mixed wastes;

(6) tanks and surface impoundments used for biological treatment of hazardous waste and which achieves specified performance levels; and

(7) waste management units excluded from regulation under §§ 264.1(g) and 265.1(c) (e.g. tanks used to manage hazardous wastewaters or wastewater treatment sludges regulated under the CWA or tanks, containers, or surface impoundments used for emergency or spill management activities).

Furthermore, there are two exemptions from the Subpart CC requirements that may apply. The first exemption applies where hazardous waste entering a waste management unit contains an average VOC concentration of less than 100 ppmw at the point of waste origination. The second exemption involves treating the hazardous waste to specified organic levels before the waste enters a waste management unit. If the facility is subject to the rule and does not meet either exemption, an owner or operator must implement the air emission control standards.

For most of the types of units subject to control requirements, a cover must be used. Nevertheless, additional control requirements may be imposed depending on the type of cover employed. Furthermore, the rule requires monitoring, inspection, recordkeeping, and reporting associated with the emission control requirements.

The deadline for complying with these regulations was extended until December 6, 1995 in the May, 19, 1995 Federal Register. 60 Fed. Reg. at 26829.

VII. Private Cost Recovery by RCRA Citizen Suit

Citizen suits are authorized under RCRA and allow any person to bring a civil action against any person in violation of a RCRA requirement or any person who has contributed or is contributing to a past or present situation involving solid or hazardous waste that may present an imminent and substantial endangerment to health or the environment. RCRA § 7002; 42 USC § 6972(a)(1).

Until recently, court opinions involving citizen suits for imminent and substantial endangerment according to RCRA § 7002(a)(1)(B), have generally held that there is no private right of action for damages or restitution granted under this section of the statute. See e.g., Walls v. Waste Resource Corp., 761 F.2d 311 (6th Cir. 1985); Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331 (4th Cir. 1983); Commerce Holding Co. v. Buckstone, 749 F. Supp. 441 (E.D.N.Y. 1990); Kaufman & Broad-South Bay v. Unisys Corp., 822 F. Supp. 1468 (N.D. Cal. 1993). Nevertheless, the Ninth Circuit in KFC Western Inc. v. Meghrig, 49 F.3d 518 (9th Cir. 1995), recently held that a citizen could seek restitutionary clean-up costs under RCRA § 7002.

In this case, KFC purchased property that it had no knowledge was contaminated with refined petroleum products. The contamination allegedly resulted from the prior owners' negligence in operating a gasoline station on the property. In the course of improving the property, KFC discovered the soil contamination. The City of Los Angeles Department of Health Services ordered KFC to clean-up the property. KFC spent over $200,000 to assess and remove

contaminated soil for off-site disposal. KFC completed the clean-up in 1989 and eventually filed suit in May 1992 under RCRA § 7002 for recovery of its clean-up costs.

In reaching its holding, the court reasoned that § 7002 provided authority for recovery of restitutionary costs based on language granting the court:

> jurisdiction. . .to restrain any person who has contributed or who is contributing to [an imminent and substantial endangerment], to order such person to take such other action as may be necessary, or both. . . .

42 USC § 6972(a)(2). Plus, the court rejected the defendants' contention that the statute entitled citizens to obtain only an injunction or other equitable relief, but not the equivalent of compensatory money damages.

The court also based its decision on reasoning that Congress intended citizen suits be covered by the same standards of liability as governmental actions according to § 7003. Based on a court opinion that held that the EPA may collect reimbursement after the government cleaned-up contaminated properties pursuant to § 7003, the court in KFC Western determined that these provisions are analogous. KFC Western Inc., 49 F.3d at 522.

The KFC Western case represents a significant departure from the way RCRA citizen suits have been interpreted in the past. In the KFC Western case, the contamination involved refined petroleum products, which are excluded from CERCLA pursuant to the petroleum exclusion. As a consequence, KFC's only remedy appears to have been the RCRA § 7002 citizen suit provision. Despite this factor, citizens and those persons involved in clean-up of contaminated properties, whether subject to CERCLA or not, may be able to rely on this case for recovery of their clean-up costs and possibly other damages. It should be kept in mind, however, that there is little other

authority supporting the Ninth Circuit's opinion. One other case, Bayless Investment and Trading Co. v. Chevron U.S.A., Inc., 39 Env't Rept. Cas. (BNA) 1428 (May 25, 1994), reached a similar conclusion allowing a land owner to seek reimbursement of past and future clean-up costs as a "private attorney general" from parties responsible for contamination under § 7002. Nevertheless, this is clearly the minority view on this issue, but may be the beginning of a trend, since the Ninth Circuit's opinion is one of the highest court opinions on this issue to date, and it is one of the most recent.

VIII. New CERCLA Model Consent Decree

On July 14, 1995, the U.S. Department of Justice (DOJ) and the EPA issued a new Model Consent Decree to be used in negotiating the cleanup of Superfund sites. This new settlement tool will encourage more potentially responsible parties (PRPs) to settle with the government, allow settlements to be reached quickly, and provide new protection for individuals in small businesses.

A significant feature of the revised consent decree is the elimination of a provision from the original 1991 model that required defendants to commit to performing additional remedy actions in the event that the original remedy failed. Many PRPs considered this 1991 provision to be a "blank check," holding them responsible for additional, expensive cleanup remedies, despite the fact they had completed the original remedy required by their settlement. The new model suggests that settling defendants' liability for additional response actions simply be reserved. This reservation may also be omitted from Superfund settlements in appropriate circumstances.

Another new feature of the new model contains a waiver of claims by Superfund defendants against "de micromis" parties -- parties who contributed very small amounts of hazardous substances to Superfund sites. This provision requires anyone who settles with the government to agree not to pursue such parties. This waiver responds to concerns that individuals and small businesses have been unfairly subjected to third party lawsuits by Superfund defendants.

Among some of its other features, the Model Consent Decree includes:

(1) Authorization for mediation as a tool to help resolve disputes;

(2) Limitations on the settling defendants' responsibility for paying damage claims that might be brought against the United States if cleanup activities cause damages;

(3) Recognition that a "technical impracticability" provision may be needed in situations where some aspects of the remedy may turn out to be infeasible;

(4) Elimination of some of the penalties to which settling defendants may be exposed if work is not completed on time, especially when delays are caused by EPA or courts taking too long to resolve disputes; and

(5) Clarification in expansion of settling defendants' ability to avoid penalties when events beyond their control cause unanticipated delays.

A joint cover memorandum to the new model also changes EPA policy to eliminate the requirement that EPA regions consult with EPA headquarters before agreeing to consent decrees that modify key provisions of the Model Consent Decree. This change further reduces the time needed to reach settlements and increases the flexibility of the negotiation process.

The Model Consent Decree is effective July 13, 1995. It will serve as the basis for future settlements for Superfund remedial actions negotiated with PRPs, but it will not affect Consent Decrees previously negotiated and signed by PRPs.

IX. CERCLA Reform

With the failure of the last Congress to pass new Superfund legislation, the same preeminent issues remain today. Although remedy selection, the role of states, and the liability scheme remain the subject of proposed legislation, efforts are also underway to accomplish many of the widely agreed to changes from last year's legislation by administrative means (see attached Final National Implementation Strategy -- Superfund Administrative Reforms).

EPA's efforts towards Superfund improvements are fairly significant and outlined in the above-referenced document (attached). One significant goal is the improvement of the remedy selection process. In order to reduce the cost and minimize consistencies, EPA is interested in setting up generic remedies for various fact situations. In addition, EPA has expressed interest in getting the smallest PRPs out earlier in the process to reduce costs and speed up the process.

There are also a number of efforts underway to encourage the redevelopment of contaminated sites. One of the many goals of the Brownfields program is to return property to beneficial uses. There are multiple programs underway to promote the Brownfields initiative including ones to minimize or eliminate future lender/owner liability and a series of up to 50 pilot projects to try out various redevelopment strategies.

As is readily apparent, these administrative efforts, as well as the development of caselaw in the Superfund area could be altered significantly, if not totally negated by many of the outstanding legislative proposals.

ATTACHMENTS

SEP 19 1994

REENGINEERING RCRA FOR RECYCLING

DEFINITION OF SOLID WASTE TASK FORCE: REPORT AND RECOMMENDATIONS

U.S. Environmental Protection Agency
Office of Solid Waste

ACKNOWLEDGMENTS

This report was prepared by the Definition of Solid Waste Task Force, an internal Agency group with the following members:

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Although we received advice from many different individuals and groups from both inside and outside the Agency, these recommendations are our opinions and not necessarily those of EPA management or other staff. To reach our conclusions and recommendations, we worked very closely with the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) and its Definition of Solid Waste Workgroup. We wish to thank everyone who helped us in this effort, but especially the ASTSWMO members. We are also grateful for the assistance of Ms. Nancy Bacon Brown, a former Task Force member.

Special thanks are also due to members of the Definition of Solid Waste Roundtable, who devoted many hours and much enlightenment to this initiative.

EXECUTIVE SUMMARY

THE DEFINITION OF SOLID WASTE TASK FORCE

This report presents the recommendations of the Definition of Solid Waste Task Force. The Task Force was established in October 1992 by the Director of the Office of Solid Waste to address concerns about the current solid waste definition and how it affects waste recycling.

The Environmental Protection Agency (EPA) has promulgated regulations under the Resource Conservation and Recovery Act (RCRA) that set forth extensive responsibilities for managing certain wastes. To be subject to these responsibilities, a material must generally be defined as both a solid and a hazardous waste (hazardous wastes are a subset of solid wastes). Whether a material is a solid waste, therefore, has enormous implications for the person who generates and handles it. In turn, recycling a material can affect whether it is defined as a solid waste under the RCRA regulations.

RCRA has two principal goals: (1) protecting human health and the environment and (2) reducing waste and conserving energy and natural resources. EPA's highest priority for conservation is the reduction of pollutants at their source. However, source reduction is not always technically possible or economically practical. In such cases, EPA recommends recycling waste, including hazardous waste. Many businesses find that recycling their waste makes good economic as well as environmental sense. It can conserve our virgin resources, and save time and money as well.

At the same time, unsafe recycling of hazardous waste has sometimes harmed public health and the environment. Problems with unsafe recycling have created a public demand for oversight of this activity. In particular, the environmental community believes that EPA's hazardous waste recycling regulations create loopholes that increase the likelihood of unsafe or illegitimate recycling.

Many people in industry, on the other hand, believe that EPA's hazardous waste regulations discourage the safe recycling of hazardous waste, and increase the likelihood that waste will be disposed of instead of beneficially reused. They argue that the regulations impose costs that can make recycling less profitable than disposal.

Other interested parties, such as State regulatory agencies, have asserted that EPA's hazardous waste recycling regulations are too difficult to understand, enforce, and implement. In addition, many people have pointed out that the regulations seem to be "all or nothing" - that is, recyclers are generally subject to most RCRA responsibilities, or to virtually none. They argue that a more reasonable approach would tailor management requirements to the risks involved in different types of recycling.

The Definition of Solid Waste Task Force was formed to recommend solutions to these concerns. The Task Force has three principal goals:

- o Eliminate disincentives for the safe recycling of hazardous waste;

- o Eliminate regulatory loopholes for recycling that create risks to human health and the environment;

- o Clarify and, if possible, simplify the definition of solid waste.

Through the Association of State and Territorial Solid Waste Management Officials, the Task Force asked State representatives to help us develop a workable plan to deal with hazardous waste recycling. We established a core group of State personnel whom we consulted at all stages in developing our recommendations.

We also conducted extensive meetings with individuals from industry and the environmental community. To get the best technical comments available, we formed a Definition of Solid Waste Roundtable, consisting of sixteen experts in the field of hazardous waste management and recycling. The Roundtable members provided the Task Force and the States with invaluable expertise in evaluating new options for change.

We realize that all of our recommended changes may not be achievable under the current statute. We will evaluate whether our suggested revisions can be implemented under current law, or whether legislative changes would be needed. We also emphasize that the recommendations in this report represent only the opinions of the Task Force members and are not necessarily shared by other EPA personnel. The purpose of this report is to provide specific recommendations for the consideration of senior EPA management.

TASK FORCE RECOMMENDATIONS

The principal recommendation in this report is a proposed new recycling system that recognizes both the public's need for protection of human health and the environment and industry's need for a system in which recycling can compete fairly in the marketplace. The proposed new system is based upon the following principles:

- Use of equipment designed to prevent releases to the environment, especially groundwater.

- Quick and effective response to releases that occur despite preventive measures.

- Sufficient knowledge by government regulators about recycling facilities to enforce compliance with the management standards.

- Safe transportation and tracking of recyclable materials.

- Waste-derived products that pose no more threat to human health and the environment than the virgin products they replace or compete with.

- Notification of the surrounding community if the recycler will be recycling hazardous waste generated at another facility.

Under the current regulations, recycling facilities are generally subject either to very few controls or to the full panoply of hazardous waste management requirements. Our proposal would replace this scheme with different levels of control for different types of facilities. Our scheme has three broad classes of recycling. The first class is RCRA Recycling (covered by our proposed tailored controls). The second class is recycling which would remain or become exempt from RCRA regulation (RCRA-Exempt/Excluded). The third class is recycling which would remain subject to full Subtitle C requirements (RCRA Hazardous Waste Recycling). These three classes are described in order below.

RCRA RECYCLING

New Classification Scheme

Our recommended new system divides RCRA recycling into the following categories based on the source of the recyclable materials and the recycling location:

Category A: **Direct reuse off-site of spent materials and recovery of precious metals.**

Category B: **On-site recycling.** Recycling secondary materials at the manufacturing facility that generated the materials.

Category C: **Captive (intracompany) recycling and product stewardship.** "Captive recycling" means recycling secondary materials at a facility owned by the same company that generated the materials, but at a different location. "Product stewardship" means recycling used products returned to manufacturers by their customers.

Category D: **Commercial recycling (off-site)**: Recycling secondary materials by a facility unrelated to the generating facility and located at a different site. No product stewardship relation exists.

RCRA Recycling Requirements

Recyclers within each category must comply with waste management requirements tailored to address the differences among the categories. Some requirements apply to all of the categories, and many apply to three of the four categories. Except for the notification and reporting requirement, which is new only for Category A, the requirements resemble those currently existing for all four categories. Some requirements are less stringent than the existing standards, some are more stringent.

Our suggested management requirements respond to important industry, State, and environmental concerns about the current regulation of recycling. The concern most frequently voiced by industry is the nature of the RCRA permitting process. Industry representatives reported that the delays and uncertainties involved in obtaining a RCRA permit significantly discourage hazardous waste recycling. Responding quickly to changes in demand and other market conditions is complicated by uncertainty about the timing, extent, and costs of the regulatory controls that are eventually determined to be applicable. We believe that our clarified requirements address industry's concerns without sacrificing sound environmental management.

Key Recommendations for <u>All</u> Recycling Categories

- **Recommendation #1: Speculative accumulation is prohibited.**

Currently, RCRA allows accumulation for 12 to 24 months (depending on the calendar month accumulation begins) at any facility storing exempt materials. RCRA also generally requires a permit for any off-site storage of regulated wastes and for on-site storage that exceeds 90 days. The Task Force recommends allowing secondary materials to be accumulated for 18 months on-site and 12 months off-site before a hazardous waste storage permit is required. We recommend 18 months accumulation for on-site recyclers to allow them more time to reuse their secondary materials in the most compatible product.

- **Recommendation #2: State/EPA notification and biennial reporting is required.**

The recycler would file a one-time notice, giving the location of the recycling facility and the type and quantity of wastes recycled. The reporting requirements for hazardous waste generated (currently applicable to Categories B-D) would be extended to Category A.

- **Recommendation #3: Land storage is prohibited.**

We recommend expanding the current prohibition against use constituting disposal to include **storage** before recycling in surface impoundments or waste piles. In our proposed new system, the materials must be stored in tanks, containers, or containment buildings. This change is a logical extension of the Agency's concerns about the potential environmental risks of land placement.

- **Recommendation #4: Recyclable materials manifest is required for off-site shipments.**

A new manifest for RCRA recyclable materials would accompany off-site shipments. It would resemble the current hazardous waste manifest for these materials, but could result in the elimination of stringent State requirements attached to use of that manifest. The new manifest would respond to industry concerns about the transportation costs associated with the

current manifest, and about the stigma associated with transporting hazardous recyclables, even when the environmental risk is minimal.

- **Recommendation #5: No "toxics along for the ride" are allowed.**

This requirement responds to concerns of the environmental community that EPA does not regulate most hazardous waste-derived products. We recommend that most recycling meet objective criteria that establish the recycling as legitimate. Recyclers would certify compliance, but States or EPA Regions could request more specific data if they believed that the products in question introduced significant new risks into the marketplace. A method for determining legitimacy could be the comparison of recycled products to their virgin material counterparts to ascertain whether they contain significantly higher levels of hazardous constituents ("toxics along for the ride," or "TAR" test). Variances would be available under certain circumstances. When objective criteria are developed, they will clarify existing policy. We are considering several options to reduce the overall cost of complying with this requirement.

Key Recommendations for RCRA Recycling Categories B, C, and D

The following management requirements are recommended for recycling units in Categories B, C, and D. Most of these are already required for recycling facilities that must obtain a storage permit, but the recycling unit itself is currently exempt. Under our plan, recycling units would be regulated as described below.

- **Recommendation #6: Eliminate requirement for a full RCRA permit.**

We recommend that full RCRA permits be replaced by certain management standards, discussed in the remainder of these recommendations. In lieu of applying for and obtaining a permit, facilities would certify compliance with all applicable conditions.

- **Recommendation #7: Tank, container, and containment building management standards.**

This requirement would emphasize secondary containment by requiring RCRA management standards for tanks, containers, and containment buildings.

- **Recommendation #8: Clean Air Act requirements in lieu of RCRA air emission requirements.**

In an effort to reduce regulatory redundancy, we recommend that Clean Air Act (CAA) requirements be adopted for regulating air emissions. RCRA air emission requirements would apply only if Clean Air Act standards did not apply or if the CAA standards were less stringent.

- **Recommendation #9: Unit release response rather than facility-wide corrective action.**

We recommend adopting for recycling units the RCRA requirements for responding to releases from tank systems. Other effective Federal and State cleanup authorities would address existing releases beyond the unit boundary. Existing facilities already subject to corrective action would remain subject to those obligations.

- **Recommendation #10: Facility modifications to be reported in the Biennial Report.**

Except for major modifications at Category D facilities, no facility modification would need prior approval; they would be transmitted in the Biennial Report.

- **Recommendation #11: Closure and financial assurance for closure.**

The Task Force recommends that facilities submit a financial assurance estimate for clean closing their recycling management units. The estimate would be submitted at the time of the compliance certification. Closure plans would be submitted at the time of closure. We also recommend that EPA develop guidance for closure based on the historical cost of closing different kinds of facilities.

- **Recommendation #12: Public notice for large Category C facilities.**

We recommend that Category C facilities recycling more than 12,000 kilograms per year give 30 days public notice of hazardous waste shipments received from off-site. Citizens would be free to review nonproprietary material.

- **Recommendation #13: Operations plan.**

We recommend that facilities submit an operations plan consisting of a waste analysis plan and a description of how they intend to handle and manage secondary materials.

Key Recommendation for Category D Only

For Category D (off-site commercial recycling) **all** of the above requirements apply, with one additional requirement. This is:

- **Recommendation #14: Prior government approval.**

We recommend that Category D facilities obtain government approval (with full public participation) for their operations plan, secondary containment, financial assurance estimates, and major modifications. This approval would be required before recycling operations could

begin. Prior approval of TAR tests would also be required if the State or EPA requested it.

RCRA EXEMPT/EXCLUDED

This is the second broad class of recycling activities. Below are our recommended changes to the existing exemptions and exclusions. We believe that these suggested changes will protect human health and the environment while encouraging greater reuse of materials and energy.

New Exemptions

We recommend three new exemptions involving fuel use. We are also considering another exemption for incidental processing.

- **Recommendation #1: Allow direct reuse of secondary materials containing hydrocarbons in thermal processes at petroleum refineries or petrochemical plants.**

- **Recommendation #2: Allow direct reuse of secondary materials containing hydrocarbons when returned for blending into commercial-grade gasoline at a petroleum refinery.**

The current direct-reuse exemption does not allow recycled materials to be used as fuels. However, adding secondary materials to standard commercial fuel production processes or gasoline-blending operations at petroleum refineries more closely parallels chemical production than blending hazardous wastes for direct combustion at other industrial facilities. This is because the secondary hydrocarbon-bearing materials are compatible with petroleum refining and blending processes designed to produce high-specification fuels.

- **Recommendation #3: Allow recovery of energy from "clean" waste-derived fuels (e.g., ethanol, methanol, hexane).**

This exemption responds to suggestions that materials that burn "cleanly" because of low levels of hazardous constituents should not be regulated as hazardous wastes, even if burned as fuels. We plan to define fuels that are "clean" in the future; an example would be any fuel that is low in toxic metals and halogens, and that is hazardous only because of ignitability.

- **Recommendation #4: Allow recycling that involves only simple, low-risk processes (incidental processing).**

Current EPA regulations do not allow most exempt materials to be reclaimed before reuse. Industry believes that the current definition of "reclamation" (processing to recover a

usable product, or regeneration) is too broad. The term encompasses such activities as simple filtering, screening, sorting, and grinding, which industry believes are incidental to most normal manufacturing processes, rather than being confined to recycling. Therefore, we recommend exempting recycling that involves only simple, low-risk processes, if other management requirements are met (e.g., use of RCRA tanks or containment buildings).

Exemptions Eliminated

We recommend regulating two currently unregulated activities:

- **Recommendation #5: Regulate direct reuse (without reclamation) of spent materials sent off-site.**

Some States expressed concern about lack of regulatory control over spent material transported off-site due to tracking and spill problems. Including direct reuse of spent materials off-site in the "RCRA Recycling" class (Category A) will address the current lack of controls on the transportation of these materials. Because this activity so closely resembles manufacturing, we are not recommending the management standards we recommend for other types of recycling.

- **Recommendation #6: Regulate characteristic sludges (emissions control residues).**

Current regulations exempt characteristic sludges (those which exhibit a hazardous waste characteristic) if they are reclaimed. The Agency exempted them because of the difficulty of developing a standard for distinguishing between reclamation of product-like sludges and reclamation of waste-like sludges. Environmental groups and some States have expressed concern about this exemption, believing that there is no reason these materials should not be treated as solid wastes.

The Task Force and the States believe that *most* sludges should be classified as wastes rather than products, since they are a result of treatment processes and normally resemble other waste-like materials. They also are defined as "solid waste" in the statutory definition. We recommend defining some kinds of emission-control residues as intermediate products in the primary metals industry if they have a sufficiently high metals content to make them consistently valuable as commodities.

New Criteria for Exemption

Following are suggested criteria for most RCRA Exempt/Excluded activities. The Task Force believes that the modifications suggested below will prevent the activities from becoming part of the waste disposal problem.

- **Recommendation #7: Facilities must determine their status under RCRA.**

Currently, EPA does not require a status determination for exempt facilities, except in the context of an enforcement action. The Task Force recommends requiring an exempt recycler to keep on file a brief document that states the grounds for the claimed exemption or exclusion. The document would be available for inspection if questions arose about the regulatory status of the facility under RCRA.

o **Recommendation #8: Facilities must notify EPA or the State.**

Because States do not currently receive information about many recycling facilities, they are unable to ascertain whether a facility's claimed exemption is justified. We recommend that most exempt categories of recyclers be required to notify the State or EPA of those currently exempt recycling activities (including storage) and the grounds for the claimed exemption.

o **Recommendation #9: Speculative accumulation is prohibited.**

This is the same as the criterion for the RCRA Recycling class, described above in Recommendation #1.

o **Recommendation #10: No land storage.**

This requirement is the same as that described above for RCRA Recycling in Recommendation #3.

RCRA HAZARDOUS WASTE RECYCLING: FULL SUBTITLE C

The final class of recycling is subject to full Subtitle C hazardous waste requirements. This class includes:

- **Recycling of used oil (current rules unchanged).**
- **Recycling of inherently waste-like materials** (dioxins and certain materials fed to halogen-acid furnaces).
- **Waste-derived products containing TARs** (or secondary materials containing TARs if the recycler prefers to measure toxics in ingredients).
- **Storage for recycling in excess of the speculative accumulation limits.**
- **Recycling that involves landfilling, land storage, or burning for destruction.**

The Task Force and the States believe that these activities and materials should be subject to full Subtitle C controls because they pose a significant potential for harm to human health and the environment. Furthermore, those regulatory controls give generators an

appropriate economic incentive for considering alternative practices more consistent with the goals of RCRA. For used oil recycling, we believe the Agency has already established an alternative regulatory program consistent with those goals.

STATE IMPLEMENTATION

The Task Force recommends that States should have maximum flexibility and latitude to implement the new recycling program. They should have the opportunity to develop requirements that are different from federal rules if, on balance, the same degree of environmental protection is attained.

To bring about this flexibility, we believe that any necessary State authorization applications should be evaluated by EPA to ascertain whether the entire recycling program achieves environmental results similar to the EPA program, rather than comparing each component of the State program to its federal counterpart.

We also believe that States should have the flexibility to demonstrate that alternative State requirements are as environmentally protective as EPA requirements. For example, a State may choose to work with a facility to identify less burdensome ways to prevent groundwater contamination, such as alternative frequencies of inspections or groundwater monitoring. In return, the State could choose to require more stringent design or operating procedures in other areas. We believe that EPA should work with the States to identify potential "trade-off" requirements.

States also should be able to make the final decision about which recycling category a facility is in, or whether a facility is exempt. This flexibility is particularly useful in situations where it is hard to distinguish continuous manufacturing from waste recycling. We believe that this will speed State decisionmaking, since States currently must be concerned about issues that may be raised by EPA.

Finally, States should be able to take into account the ease or difficulty of retrofitting existing facilities or units (such as recycling units) that were previously exempt under the RCRA regulations but that would be regulated under our proposed scheme. The Agency can work with the States to identify alternative requirements that ensure protection of human health and the environment.

POTENTIAL IMPACT OF OUR NEW RECYCLING SCHEME

Available data suggest that significant opportunities exist for recycling additional amounts of hazardous waste. In 1991, industry reported recycling only 2 percent of the wastes they generated (exempt wastes and RCRA wastes). It is true that many wastestreams are not amenable to recycling. However, when the wastestreams most frequently recycled are examined, it is apparent that almost 10,000 generators are not recycling an estimated 113

appropriate economic incentive for considering alternative practices more consistent with the goals of RCRA. For used oil recycling, we believe the Agency has already established an alternative regulatory program consistent with those goals.

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million tons of hazardous waste most amenable to recycling. Only 5 percent of the most commonly reported recyclable wastestreams are actually being recycled.

Similarly, available data suggest that two clusters of hazardous waste generators exist - a small number of very large generators and a large number of small to medium size firms. The smaller the generator, the higher the probability that the waste will not be handled on-site, and that it will be sent off-site for treatment and disposal. We believe that addditional opportunities exist for the smaller generators to conduct either on-site or off-site recycling.

The proposed new recycling system will eliminate disincentives for the safe recycling of hazardous waste that is today treated and disposed of. We have recommended reducing some regulatory requirements because we believe they over-regulate recycling. For example, permits would no longer be required for RCRA recycling units, the uniform hazardous waste manifest would no longer be required for shipping recyclable materials, and most facility modifications would no longer need prior approval.

We also believe that the loopholes closed by this approach are just as important as the disincentives removed. We have recommended tighter requirements in some areas where we believe safe recycling could be jeopardized. Examples are notification to States of exempt activities, prohibition of land storage before recycling, and elimination of the recycling unit exemption. If the limited increases in oversight that we have recommended would disqualify much recycling that currently takes place, we would be forced to doubt the benefits of such recycling.

On balance, we believe that our system will increase both the quantity of waste recycled and the number of recyclers, particularly if the States are allowed flexibility and latitude to implement the program. The new approach could also encourage firms to incorporate recyclability into their process and product designs, since under product stewardship more of their spent or used products could be returned for reprocessing.

In the final analysis, the new recycling system will require us to manage change effectively. Although the recommended plan is not without its critics, we believe that our scheme is the right starting point for triggering reform of the regulations governing hazardous waste recycling. Interacting with interested parties in refining the system should produce further gains in effectiveness. We hope to work with these parties to test and validate all parts of our system, and to provide industry and the States with guidance and user-friendly implementation tools. This cooperation is essential to avoid confusion and disruption.

If our plan encourages more safe recycling, we can improve the environment and save resources at the same time. In the end, what could be more important?

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 27 1994

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

Mr. Harvey Alter
U.S. Chamber of Commerce
1615 H Street, N.W.
Washington, D.C. 20062

Dear Harvey,

I want to outline for you the recent decisions Elliott Laws, the Assistant Administrator for the Office of Solid Waste and Emergency Response, has made in moving forward to address the current problems with the definition of solid waste and hazardous waste recycling. As a former Roundtable member involved closely in the deliberations of the Definition of Solid Waste Task Force, I know you would be interested in this issue.

As you know, Elliott Laws has always supported the goals of the Task Force in addressing the problems with the definition of solid waste, and in working with various groups in the Task Force process. More specifically, these goals include: eliminating the disincentives to safe recycling of hazardous waste; closing existing regulatory loopholes that pose a risk to human health and the environment; and developing user-friendly regulations that the regulated community can understand and regulators can effectively implement.

In reviewing the Task Force recommendations and input from our various stakeholders, he found both useful elements and shortcomings to the Task Force's approach to achieving these goals. Many parties expressed concern that the proposal did not fully reduce the complexity of the current regulatory framework, or address the legal issues associated with RCRA jurisdiction (i.e., distinguishing those recycling processes that are inherently manufacturing from those practices that can contribute to the waste management problem).

To address these concerns, we also discussed other recommended approaches, and examined whether the different approaches could be combined to fulfill our goals more effectively. The result of these discussions was a recommendation by Elliott to develop a mixed or hybrid approach, in partnership with the States, that will combine Task Force recommendations with other suggestions designed to address concerns not fully dealt with by the Task Force. While we have to develop this idea and work through many issues, the broad outline of an approach is taking shape.

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In particular, to address RCRA jurisdictional concerns, we will examine ways to resolve outstanding legal issues derived from a series of court cases referred to as AMC I, API I and AMC II. We will accomplish this by assessing the practices of a few specific industries that pose particular difficulties in distinguishing recycling practices that are inherently manufacturing from recycling practices that can contribute to the waste management problem. As part of this effort, the Agency also will strive to develop a definition for commodity-like materials that should not be covered under RCRA -- whether recycled on-site or off-site.

With respect to on-site recycling, the Agency will carefully consider an alternative approach developed by the National Environmental Development Association (NEDA). The proposed NEDA framework appears to be a simpler, more streamlined approach than the one outlined by the Task Force. The main objective of the NEDA proposal is to describe a minimal set of basic management requirements for on-site recycling operations that would be largely self-implementing. We believe this approach has merit primarily because it relies on fewer and less prescriptive conditions than the Task Force proposal for on-site recycling while maintaining provisions to ensure protection of human health and the environment.

A third area to be addressed will be materials recycled by commercial recyclers and manufacturing facilities conducting product stewardship operations. In this area, the Agency will utilize the framework established in the Task Force recommendations, but modify those recommendations, where necessary, to achieve our stated goals. We will look closely at what flexibility may exist within the current statute to encourage sound recycling under protective management standards, including another evaluation of existing industry standards.

Last, I recognize that some Roundtable participants were critical of the Task Force recommendations to implement a toxics-along-for-the-ride (TAR) test. The States and EPA believe, however, that the issue of treatment and disposal of hazardous waste under the guise of recycling is simply too important to ignore. We therefore will continue to explore options for ensuring that legitimate recycling occurs, including a TAR test. Our goal here is to develop a mechanism that both enables us to effectively address the critical issue of sham recycling, while remaining responsive to industry concerns regarding its ultimate scope and implementability. We encourage you to consider this issue with us and provide your ideas for how we might best address it.

By early 1995 my office will produce a program plan in partnership with the States for this hybrid approach, including where possible, coordination with the Administrator's Common Sense Initiative, the Permits Improvement Project and the waste

Information Needs Initiative. This plan will describe the steps EPA and the States will undertake to develop this hybrid approach.

The Task Force has now completed its objectives. Jim Berlow, the Task Force Director, has moved on to become Deputy Division Director within my Waste Management Division. Lead responsibility for completing this new phase of the definition of solid waste effort will take place in my Characterization and Assessment Division (CAD). Michael Petruska, Chief of the Regulatory Development Branch in CAD, will manage the overall EPA efforts. Leigh Ing of Texas will coordinate the States efforts in this joint partnership. They can be reached at (202) 260-8551 and (512) 239-2553, respectively.

On behalf of EPA, I want to thank you once again for your efforts on the Task Force to address the problems with the definition of solid waste. Your contribution was important to our process and as we move forward with this approach, we will strive to keep you informed of our progress in trying to resolve the complex issues associated with this subject.

Sincerely,

Michael Shapiro, Director
Office of Solid Waste

cc: David Bussard
Michael Flynn
Jim Berlow
Michael Petruska
Tom Kennedy, ASTSWMO
Don Schregardus, Ohio EPA
Leigh Ing, Texas NRCC
Roy Brower, Oregon DEQ
Ed Kitchen, Ohio EPA
Definition of Solid Waste Team Members
Beth Ginsberg

PART 265—INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

3. The authority citation for part 265 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6924, 6925, and 6935.

Subpart CC—Air Emission Standards for Tanks, Surface Impoundments, and Containers

4. Section 265.1080 is amended by revising paragraph (b)(1) and paragraph (c) introductory text to read as follows:

§ 265.1080 Applicability.

* * * * *

(b) * * *

(1) A waste management unit that holds hazardous waste placed in the unit before December 6, 1995, and in which no hazardous waste is added to the unit on or after this date.

* * * * *

(c) For the owner and operator of a facility subject to this subpart who has received a final permit under RCRA section 3005 prior to December 6, 1995, the following requirements apply:

* * * * *

5. Section 265.1082 is amended by revising paragraphs (a) introductory text, paragraph (a)(1), (a)(2), introductory text, (a)(2)(iii), and (a)(2)(iv) to read as follows:

§ 265.1082 Schedule for implementation of air emission standards.

(a) Owners or operators of facilities existing on December 6, 1995, and subject to subparts I, J, and K of this part shall meet the following requirements:

(1) Install and begin operation of all control equipment required by this subpart by December 6, 1995, except as provided for in paragraph (a)(2) of this section.

(2) When control equipment required by this subpart cannot be installed and in operation by December 6, 1995, the owner or operator shall:

(i) * * *

(ii) * * *

(iii) For facilities subject to the recordkeeping requirements of § 265.73 of this part, the owner or operator shall enter the implementation schedule specified in paragraph (a)(2)(ii) of this section in the operating record no later than December 6, 1995.

(iv) For facilities not subject to § 265.73 of this part, the owner or operator shall enter the implementation schedule specified in paragraph (a)(2)(ii) of this section in a permanent, readily available file located at the facility no later than December 6, 1995.

* * * * *

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

6. The authority citation for part 271 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), and 6926.

Subpart A—Requirements for Final Authorization

7. Section 271.1(j) is amended by adding the promulgation date, **Federal Register** reference, and effective date to the following entry in Table 1 to read as follows:

§ 271.1 Purpose and scope.

* * * * *

(j) * * *

TABLE 1.—REGULATIONS IMPLEMENTING THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

Promulgation date	Title of regulation	Federal Register reference	Effective date
*	*	*	*
Dec. 6, 1994	Air Emission Standards for Tanks, Surface Impoundments, and Containers ...	59 FR 62896–62953	Dec. 6, 1995.

8. Section 271.1(j) is amended by revising the effective date and adding the **Federal Register** reference to the following entry in Table 2 to read as follows:

§ 271.1 Purpose and scope.

* * * * *

(j) * * *

TABLE 2.—SELF-IMPLEMENTING PROVISIONS OF THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

Effective date	Self-implementing provision	RCRA citation	Federal Register reference
*	*	*	*
Dec. 6, 1995	Air Emission Standards for Tanks, Surface Impoundments, and Containers	3004(n)	59 FR 62896–62953.

[FR Doc. 95–12367 Filed 5–18–95; 8:45 am]
BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Parts 1355 and 1356

RIN 0970–AB38

Statewide Automated Child Welfare Information Systems

AGENCY: Office of Information Systems Management (OISM), ACF, HHS.

ACTION: Final rule.

SUMMARY: These final rules implement section 13713 of the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103–66). Under section 13713, funding is made available for the planning, design, development and installation of statewide automated child welfare information systems. Such systems must be comprehensive in that they must meet the requirements for an Adoption and Foster Care Analysis and Reporting

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 14 1995

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Final National Implementation Strategy -- Superfund Administrative Reforms

FROM: Timothy Fields, Jr.
Deputy Assistant Administrator

TO: Addressees

I would like to take this opportunity to thank all those who participated and made the Special Waste Division Directors' and Regional Counsels' meeting so successful. Much effort was expended by personnel from EPA Headquarters, EPA Regions and from other Federal agencies (i.e., the Department of Justice, the Agency for Toxic Substances and Disease Registry).

One commitment resulting from this meeting required Headquarters to complete and issue the final national strategy for implementing Superfund administrative reforms. Minor revisions and additions have been made to the strategy since its inclusion in the meeting materials. As detailed in the memorandum to the Regional Administrators from Elliott Laws and Steve Herman, Regional implementation plans are due to Headquarters by March 15, 1995. We hope that the detailed national strategy will assist you in formulating your plans and give you a holistic picture of the national efforts being undertaken.

Region 7, in their role as Superfund lead Region, has developed a model format for use in developing your Regional plans. This format was also included in the memorandum issued to the Regional Administrators on February 13, 1995. We expect that a biannual reporting process will serve as adequate documentation of the accomplishments. We anticipate that this undertaking will prove to be even more successful than the implementation of the June 1993 Administrative Improvements. Again, I would like to thank you for your continued support of these efforts.

Attachment

Addressees: Lois Schiffer (DOJ)
Bruce Gelber (DOJ)

Printed on Recycled Paper

Barry Johnson (ATSDR)
George Buynoski (ATSDR)
Waste Management Division Directors (Regions 1-10)
Regional Counsels (Regions 1-10)
Public Affairs Directors (Regions 1-10)
Superfund Branch Chiefs (Regions 1-10)
OSWER Office Directors
Mike Stahl (OECA)
Scott Fulton (OECA)
Bruce Diamond (OECA)
Jerry Clifford (OSWER)
The Association of State and Territorial Solid Waste Management Officials

cc:

Elliott Laws (OSWER)
Steve Herman (OECA)
Mark Badalamente (Special Assistant to the Administrator)
OERR Divison Directors
OSRE Division Directors
Lisa Friedman (OGC)
Parker Brugge (OSWER)
Linda Garczynski (OSWER)
William Ross (OSWER)
Lori Boughton (OSRE)
Steve Rollins (OSRE)
Denise Ergener (OSRE)
Patricia Mott (OSRE)
Gayle Padgett (Region 7)

NATIONAL IMPLEMENTATION STRATEGY FOR SUPERFUND ADMINISTRATIVE REFORMS

I. NEW INITIATIVES

A. Enforcement

INITIATIVE 1: FACILITATE PRP SEARCHES

EPA will pilot PRP search procedures resembling those outlined in the proposed SRA. The proposed SRA would have set out several requirements respecting the enforcement process and the conduct of PRP searches. SRA required that PRP search procedures include the early release of PRP information and publication of PRP search results for public comment. Under SRA EPA would have needed to conduct PRP searches at all sites early enough to meet SRA's requirement of identifying de minimis parties within 12 months after the start of the RI and notify all other parties no later than 18 months after the start of the RI. EPA would also have needed to investigate parties nominated by PRPs, and would be required to identify non-viable parties for the allocations process.

EPA is conducting a national workgroup and will hold a national conference on PRP search procedures to share information and brainstorm ways to obtain and document high quality evidence earlier in the process and reorient the process to facilitate expedited settlements. As a result of this effort and experience with the Regional pilots, EPA will establish new PRP search guidance.

The Agency further plans to apply ideas for streamlining the PRP search process to a set of pilot sites in an attempt to meet the SRA requirements that the Agency have sufficient information within twelve months of initiation of the RI to notify de minimis parties and that all other PRPs be noticed within 18 months after the initiation of the RI. Because the focus will be on obtaining detailed information early, the pilots will focus primarily on the period beginning at approximately 180 days before the expected initiation of the RI to twelve months after initiation of the RI. Pilot site selection will take place during February and March, and pilots will be launched around the first of April.

Headquarters Lead Office for Monitoring: Office of Site Remediation Enforcement

Major Milestones: Regional Lead

Form expert national work group to develop recommendations that address EPA-PRP information sharing procedures, the PRP nomination process, search completion, and general streamlining procedures to meet time-frames for expedited settlements	OSRE lead with Reg'l particpn.	1/95
Identify sites for PRP search pilots	Joint OSRE & Regions	Early 2/95
Develop measure(s) of success/method of evaluation for pilots	OSRE lead with Reg'l particpn.	Late 2/95
Survey Regions to solicit suggested improvements to PRP search procedures	OSRE lead with Reg'l. particpn.	1/95
Form expert national work group to develop recommendations that address EPA-PRP information sharing procedures, the PRP nomination process, search completion, and general streamlining procedures to meet time-frames for expedited settlements	OSRE lead with Reg'l particpn.	1/95
Hold PRP Search National Conference	OSRE (with Reg'l. partic)	3/95
Start PRP search pilots	Regions	early 4/95
Complete PRP search	Regions	Approx. 18mo from start

Major Milestones: OSRE Lead

Identify sites for PRP search pilots	Joint OSRE & Regions	Early 2/95
Develop measure(s) of success/method of evaluation for pilots	OSRE lead with Reg'l particpn.	Late 2/95
Issue work group's proposal for internal OSRE review and comment and reach consensus at national conference	OSRE	3/95
Hold PRP Search National Conference	OSRE (with Reg'l. partic)	3/95
Conduct training on early PRP search procedures for SAMs, contractors and states	OSRE	3/95
Develop fact, sheets, bulletins and/or protocols needs to support pilots, track developments, and facilitate info. sharing between Regions	OSRE	ongoing
Issue comprehensive PRP Search Guidance	OSRE	9/96

INITIATIVE 2: FOSTER EXPEDITED SETTLEMENTS

Under this reform, EPA will select sites which are appropriate for testing expedited settlement procedures. In addition, in these pilots PRPs will be permitted to nominate other parties as PRPs. Although not a new initiative, the Agency's efforts to resolve the liability concerns of small waste contributors will continue.

The pilots sites will be sites where the PRP search is substantially complete and a region is already contemplating an early de minimis (prior to the ROD) settlement. At these sites Regions will consider the ability of the PRPs to pay response costs. If identified, Regions would potentially offer such limited ability to pay parties a settlement. EPA will generate response cost estimates and premium guidance to facilitate early de minimis settlements. To expedite settlements with parties with limited ability to pay response costs, EPA will develop uniform criteria and procedures for making determinations about PRPs' ability to pay. Where appropriate, EPA will develop model information request clauses, consent decree language, or other tools to expedite such settlements.

At each pilot site, EPA will allow the PRPs the opportunity to nominate (with the PRPs providing supporting documentation) other parties as PRPs. The Agency will then make findings as to the status of the newly-identified parties. Where appropriate, (e.g., for newly identified de minimis parties) EPA will then provide an opportunity for an expedited settlement to these newly-identified parties.

Once the activities for the expedited settlement pilots are complete, EPA will evaluate these sites for the later performance of an allocation, similar to the allocation pilots in this Administrative Reform package.

Headquarters Lead Office for Monitoring: Office of Site Remediation Enforcement

Major Milestones for the Pilots: Regional Lead

Identify pilot sites	OSRE/Regions	3/95
Offer/Complete De Minimis Settlements	Regions	ongoing
Offer/Complete Ability to Pay Settlements (if identified)	Regions	ongoing
Decide whether to continue pilot as an allocation pilot	OSRE/Region	TBD

Major Milestones for the Pilots: OSRE Lead

Identify pilot sites	OSRE/Regions	3/95
Develop guidance, protocols, and/or procedures to support pilots and exchange information (104(e), municipality ATP, individual ATP, de minimis premiums, and remedial cost estimates)	OSRE	ongoing
Monitor progress of pilots sites	OSRE	ongoing
Evaluate pilots	OSRE	ongoing
Decide whether to continue pilot as an allocation pilot	OSRE/Region	TBD

Major Milestones for Nomination of Additional Parties: Regional Lead

Provide PRPs with an opportunity to nominate other PRPs	Regions	TBD
Review information submitted by PRPs	Regions	TBD
Make determinations as to status of PRP-nominated parties	Regions	TBD

Major Milestones for Nomination of Additional Parties: OSRE Lead

Establish procedures for providing an opportunity to nominate other PRPs	OSRE	TBD
Establish procedures for review of informations submitted by PRPs	OSRE	TBD

INITIATIVE 3: PILOT ALLOCATIONS

EPA intends to pilot an allocations process similar to that envisioned by the proposed Superfund Reform Act at several sites nationally. In these pilots, a neutral allocator will be selected by the parties at the site, and assign shares of responsibility to all PRPs. Shares of insolvent or defunct parties would be assigned to the government, and parties who agree to settle based on their "fair" share would, among other things, relinquish their right to contribution actions.

As part of this initiative, EPA Headquarters, in cooperation with the Regions, will first select a variety of pilot sites. Once the potential pilot sites have been named, the Regions will notify the PRPs at the site of the possibility of conducting a pilot allocation at the site, and invite their participation. If EPA believes enough PRPs indicate an interest in participating, the site will be named as a pilot site. EPA will issue a statement of intent to the PRPs, indicating the Agency's expectations regarding the allocation process.

The Regions will then enter into an abbreviated participation agreement with each of the PRPs at the pilot site. This agreement will deal with such issues as information exchange, confidentiality, disclosure obligations, and a moratorium on litigation. A model "participation agreement" will be furnished by Headquarters for the Regions' use.

After agreeing to participate, the PRPs will be afforded an opportunity to identify other PRPs, not named by EPA. If this process results in any newly identified PRPs, the Region will offer such parties an opportunity to participate in the allocation process. Once this opportunity is closed, all the PRPs who have agreed to participate in the allocations pilot (including the U.S., on behalf of the orphan parties) will vote on which third-party neutral allocator should conduct the process.

Once the allocator is selected, the allocation will commence. The Region will be responsible for transferring all available 104(e) information to the allocator for her use in conducting the allocation. If there are further information requests the allocator wishes to make, she will inform the designated Headquarters office, which will issue the request. Given the Regional office's role as a participant in the process, it is necessary for Headquarters to issue these requests to avoid any potential perception of a conflict of interest.

The allocator will be given 180 days to complete her report. For good cause shown, this period may be extended to 270 days. EPA anticipates the completed allocation report will assist in facilitating settlements with participating PRPs at the site.

In order to effectively measure the success of the pilot, Headquarters will monitor the progress of the initiative at several stages, and conduct an overall evaluation of the success of the pilot at its completion.

Headquarters Lead Office for Monitoring: Office of Site Remediation Enforcement

Major Milestones for the Pilots: Regional Lead

Select Pilot Sites	OSRE/Regions	3/95
Invite PRPs to participate	Regions	3/95
Enter Into Participation Agreements with PRPs	Regions	3/95
Allocation Process Begins	OSRE/Regions	6/95
Transfer available 104(e) info. to allocator	Regions	6/95
Serve as advocate for orphan share, incl. written or oral arguments as necessary during allocation	Regions	ongoing
Issuance of Allocator Report	Allocator	3/96
Monitor the progress of pilots	OSRE/Regions	ongoing
Conduct overall evaluation of pilots	OSRE/Regions	3/96

Major Milestones for the Pilots: OSRE Lead

Select Pilot Sites	OSRE/Regions	3/95
Develop guidance, procedures, and models as needed	OSRE	ongoing
Select Allocator	OSRE	6/95
Allocation Process Begins	OSRE/Regions	6/95
Issue 104(d) info requests as requested by allocator during allocation	OSRE	ongoing
Issuance of Allocator Report	Allocator	3/96

Monitor the progress of pilots	OSRE/Regions	ongoing
Conduct overall evaluation of pilots	OSRE/Regions	6/96

B. Economic Redevelopment

INITIATIVE 4: BROWNFIELDS INITIATIVES

The Brownfields Initiative is an umbrella label for the Agency's efforts to encourage the safe and sustainable reuse of idled and underutilized industrial and commercial facilities where redevelopment and expansion are complicated by actual or perceived environmental contamination.

Initiative 4(a): Brownfields Pilot Projects

The Agency is committed to fielding up to 50 pilots (both Regionally and Headquarters funded) through which we will explore the development of a variety of local Brownfields redevelopment strategies. These pilots will provide an opportunity to test-drive and witness the impact of some of the above actions at a local level.

Headquarters Lead Office for Monitoring: Office of Solid Waste and Emergency Response, Outreach and Special Projects Staff

Headquarters/Regions Milestones		
Select up to 22 new HQ and Regional Brownfields Pilot Projects	OSWER/Regions	12/95
Solidify Federal partnerships to better serve local communities (e.g. Depts. of Commerce, Labor, Energy)	OSWER/Regions	9/95
Coordinate with CSI industry sectors on developing specific Brownfields pilot projets	OSWER/Regions	12/95
Coordinate with HUD/USDA to ensure EC/EZ community participation	OSWER	12/95
Select 25 additional Brownfields Pilot Projects	OSWER/Regions	7/96
Develop community college job training linkages with brownfields pilot cities	OSWER/OSPS	as pilots selected
Manage HQ and Regionally funded Pilot Projects	Regions	FY97

Initiative 4(b): Community Outreach

OSWER/OERR and OECA are working with state, tribes and municipalities to help build strong and effective state and local cleanup programs to prevent the need for federal involvement at many brownfields. This will include limited financial assistance and data collection. Also, EPA will issue Agency guidance on land-use and soil screening levels. (See Initiative 8.)

Headquarters Lead Office for Monitoring: Office of Solid Waste and Emergency Response, Outreach and Special Projects Staff

Headquarters Milestones

Begin outreach to stakeholders on Brownfields involvement	OSWER/OERR OSWER/OSPS	4/95
Begin research to quantify Brownfields universe	OSWER/Regions	5/95
Develop partnerships with large national community-based organizations for information dissemination	OSWER/OSPS OSWER/OERR	9/95

Regional Milestone

Designate Brownfields Coordinator in every Region	Regions	4/95
Brownfields IPAs to Cities/States/ tribes in every Region	Regions	12/95

Initiative 4(c): Refining CERCLIS

As a part of its economic redevelopment efforts, EPA will refine the types of sites contained in CERCLIS. Currently, the CERCLIS inventory contains sites on which EPA is working or plans studies or other actions, sites deferred to other authorities for action, sites deleted from the NPL, and sites at which EPA has made a determination of "No Further Remedial Action Planned" (NFRAP). The latter category is the single largest number of sites -- approximately 25,000. Providing information to the public that there is currently no Federal interest in sites, may foster economic redevelopment, permit more informed decisions on land use, and foster consideration of property determined to contain little or no contamination. Clarifying for the public the proper interpretation of the approximately 25,000 CERCLIS sites deferred, deleted or designated NFRAP, considering changes to the criteria for placing sites in CERCLIS, and possibly removing appropriate sites from CERCLIS and the attendant stigma, could increase consideration of these properties for redevelopment.

Headquarters Lead Office for Monitoring: Office of Emergency and Remedial Response

HEADQUARTERS MILESTONES

Begin outreach to stakeholders on removing approx. 25,000 NFRAP and other sites from CERCLIS	OERR	1/95 (ongoing)
Implement CD-ROM system	OERR	ongoing
Establish system to improve PA/SI data access	OERR	12/95
Incorporate site inventory decision into CERCLIS 3	OERR	12/95

REGIONAL MILESTONES

Outreach to stakeholders	Regions	ongoing
Provide input to CERCLIS 3 design	Regions	12/95
Implement CD-ROM system	Regions	ongoing

Initiative 4(d): Clarifying NPL Sites

Listing property on the National Priorities List (NPL) may have an impact on the value of that property and the surrounding area -- whether or not all of the property or adjacent property is contaminated. In order to facilitate the transfer, development or redevelopment of property or portions of property determined to be uncontaminated, EPA, as a part of its Economic Redevelopment initiative, will develop a program which provides its Regions with the flexibility to clarify the areas of sites determined to be contaminated or uncontaminated.

The product of this initiative will be guidance which describes the factual basis on which EPA may issue assurances and the appropriate consultation and coordination. As part of this initiative, EPA will also develop a tool (i.e., Soil Screening Guidance) to identify portions of sites that do not warrant Federal attention. In addition, EPA is considering, on a pilot basis, deletion of remediated parcels of a closing military base that is listed on the NPL. Complementing this effort is the next initiative which would clarify Federal liability for prospective purchasers.

Headquarters Lead Office for Monitoring: Office of Emergency and Remedial Response

HEADQUARTERS MILESTONES

Publish FR Notice which extends RCRA-C deferrals to current NPL sites	OERR	3/95
Issue Soil Screening Levels Guidance	OERR	6/95
HQ, Reg. 6, 8, and 10 convene work-group on "area deletion" from NPL	OERR	6/95
Clarify policy on uncontaminated parcels	OERR/OSRE	7/95
Either issue a directive and/or	OERR/FFRRO	8/95
Publish FR Notice re: partial deletion pilots for closing bases	OERR/FFRRO	11/95
Evaluate available data re: redevelopment efforts at partial deletion pilots for closing bases	OERR/FFRRO	12/96

REGIONAL MILESTONES

Submit to OERR/FFRRO potential base closure pilot candidates for partial deletion	Regions	12/95

Initiative 4(e) Removing Liability Barriers

EPA is in the process of identifying options and developing tools to remove liability barriers and encourage the cleanup and redevelopment of contaminated properties. EPA will be identifying situations where EPA can facilitate redevelopment by providing some assurance that the new owner or developer does not need to be fearful of Superfund liability. Over the next year, EPA will be issuing policies which seek to define the appropriate Federal, tribal and State roles at sites with redevelopment potential and explore the use of tools such as comfort letters, and status letters at sites where there is no realistic prospect of Superfund involvement. Additionally, EPA is considering the use of comfort letters for the uncontaminated parcels of a closing military installation that is listed on the National Priorities List.

EPA also intends to develop and issue guidance addressing the liability of specific parties associated with contaminated property. Specifically, EPA is developing guidance which will supersede existing Agency policy and expand the circumstances under which the Agency provides covenants not to sue to prospective purchasers of contaminated property. Guidance will also be developed to clarify the liability of municipalities who acquire contaminated property and owners of property situated above contaminated aquifers. Finally, EPA plans to re-issue the Lender Liability Rule as a guidance document.

Headquarters Lead Office for Monitoring: Office of Site Remediation Enforcement

Major Milestones - Headquarters

Fact Sheet summarizing new prospective purchaser guidance	OSRE	3/95
White paper describing options and tools to remove liability barriers at sites with economic redevelopment potential	OSRE	3/95
Issue model comfort letter for the uncontaminated parcels at closing Federal Facility bases	FFRRO	5/95
Issue Lender Liability Rule as guidance	OSRE	6/95
Policy regarding municipal acquisition liability	OSRE	6/95

Policy regarding owners of property situated above contaminated aquifers	OSRE	6/95
Issue final prospective purchaser guidance	OSRE	6/95
Issue guidance regarding options and tools to remove liability barriers at sites with economic redevelopment potential	OSRE	9/95

C. Community Involvement and Outreach

INITIATIVE 5: COMMUNITY ADVISORY GROUPS AND TECHNICAL ASSISTANCE GRANTS

Under this initiative, EPA would explore the implications of Community Advisory Groups (CAGs) at NPL and Federal facility sites composed of representatives identified in previous reform legislation, evaluate how the articulated roles and responsibilities would function at actual sites, and assess the impact of involvement on the types, pace and cost of cleanups. EPA would issue guidance promoting and supporting CAGs, and encouraging the Regions to establish CAGs or convert existing community advisory organizations into CAGs. At all Superfund sites, we would encourage the Regions to consider other means to increase citizen involvement such as advance funding of TAGs, and the authorization of training for TAG recipients.

Headquarters Lead Office for Monitoring: Office of Emergency and Remedial Response

Headquarters Milestones

Issue guidance encouraging Regions to establish CAGs	OERR	2/95
Provide tools to enhance early community involvement	OERR	9/95
Amend TAG rule to facilitate community involvement (e.g., authorize training and earlier funding to community groups	OERR	9/96

Regional Milestones

Establish CAGs pilots at sites	Regions	3/95

INITIATIVE 6: COMMUNITY INVOLVEMENT IN THE ENFORCEMENT PROCESS

For this initiative, EPA will either implement the relevant provisions of last year's CERCLA reform legislation regarding enhanced public participation (the SRA approach)[1] at pilot sites or develop and implement innovative alternative approaches for enhanced community involvement at pilot sites. Under the SRA approach, EPA would implement those provisions that would have required EPA to invite communities to participate in technical workplan discussions related to RD/RA negotiations. EPA would provide reasonable notice of an invitation to participate (e.g., publish notice of technical meetings in newspaper of general circulation 30 days in advance of a meeting date) and provide public participation in technical meetings. Under the alternative approach, EPA would propose methods of community involvement at pilot sites and implement these methods provided that the communities view them as "meaningful participation."

In addition to piloting such methods, EPA will catalogue various methods which have already successfully been implemented. Some approaches already in use include: 1) inviting communities to review and comment on a draft Statement of Work; 2) disseminating information via a local radio station; and 3)inviting communities into negotiations.

Headquarters Lead Office for Monitoring: Office of Site Remediation Enforcement

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[1] The bill known as the Superfund Reform Act ("SRA"), S. 1834, would have added a new subsection (f) to CERCLA §117. This section reads, in part:

> "(2) The President also shall provide reasonable notice of an opportunity for public participation in meetings in which --
> (A) the participants include Federal officials, ..., with authority to make significant decisions affecting a response action, and any other person or persons, ...; and
> (B) the subject of the meeting involves discussions directly affecting either
> (i) a legally enforceable work plan document, or any amendment to the document, for a removal, remedial investigation, feasibility study, remedial design, or remedial action, for a facility on the National Priorities List..."

This language would cover, at a minimum, EPA-PRP discussions of draft Statements of Work related to RD/RA settlement negotiations.

Major Milestones for the Pilots: Regional Lead

Select Innovative approaches and pilot sites.	Regions/OSRE	3/95
Develop measure of success/ method of evaluation for pilots.	Regions/OSRE	3/95
Track developments and evaluate methods at pilot sites.	Regions/OSRE	ongoing
Develop catalogue of approaches	OSRE	ongoing

Major Milestones for the Pilots: OSRE Lead

Select Innovative approaches and pilot sites.	Regions/OSRE	3/95
Develop measure of success/ method of evaluation for pilots.	Regions/OSRE	3/95
Track developments and evaluate methods at pilot sites.	Regions/OSRE	ongoing
Develop catalogue of approaches	OSRE	ongoing

D. Environmental Justice

INITIATIVE 7: TRAINING AND HEALTH SERVICES ASSISTANCE TO COMMUNITIES

In coordination with other Federal agencies, OSWER has developed a pilot program that provides health services to communities. OSWER has also developed several initiatives that provide communities with the training and other empowerment tools to allow citizens to more fully participate in the Superfund cleanup process.

A. The Medical Assistance Plan (MAP)

In the summer of 1994, EPA requested assistance from the Public Health Service (PHS) to respond to health concerns of communities living near hazardous waste sites by improving delivery of medical services to communities with potential exposures to hazardous substances, and by building environmental health expertise in communities through physician training and placement. In response to this request, the Superfund Medical Assistance Work Group (SMAWG) was established and a plan was developed. The MAP, Medical Assistance Plan, consists of six elements, and is implemented in three phases. The utilization of these elements will vary according to a community's need for assistance and the availability of budget and personnel resources. The first phase will assess the health care needs and concerns of the community and evaluate the primary care capacities in that community. The second phase consists of five components including technical assistance to local agencies and health care providers; environmental health education for health care providers; medical testing for residents assessing any health effects possibly related to hazardous substance exposure; referral to specialty clinics or specialists; and medical follow-up of persons with documented exposures to hazardous substances or with adverse health conditions related to possible exposures. A third phase will include the evaluation of the effectiveness of the services. Currently, HHS, EPA and ATSDR are working on the medical assistance pilots in three communities. In FY 1996, we may add up to five more sites.

Headquarters Lead Office for Monitoring: Office of Solid Waste and Emergency Response

Headquarters Milestones

Open first medical assistance facility	OSWER	3/95
Three MAP Pilots operating	OSWER	9/95
Add up to five more pilots in FY 1996	OSWER	9/96

B. Community Outreach and Training Initiatives

Communities have made it clear to EPA that to fully participate in the Superfund process they need training and other tools to allow them to more effectively participate in the process. OSWER has developed several pilots that provide communities with training and other empowerment tools. Some of these involve working through other federal agency programs such as HUD, HHS and DOL labor training programs and HUD and USDA Community Empowerment programs. OSWER has also gone directly to communities and non-profit organizations to provide tools and outreach. Some of these programs include:

EPA and NIEHS Minority Worker Training Grant Program

The last Congress appropriated $3 million for a minority worker training program to test a range of strategies for the recruitment and training of young persons, who live near hazardous waste sites, for work in the environmental field. The program was prescribed to include pre-employment training, including literacy and life skills, as well as environmental worker training, including hazardous waste, asbestos, lead abatement training and health and safety training. The grant application was piggy-backed on the existing NIEHS grant application process for CERCLA, DOE and DOT training. Grant applicants may apply to do all the training or just the minority worker training.

Headquarters Lead Office for Monitoring: Office of Solid Waste and Emergency Response, Outreach and Special Projects Staff

Headquarters Milestones

Award grants to initiate minority worker training pilots	NIEHS	9/95

Environmental Curriculum Development and Propagation

An Environmental Work Force Training program is being developed at Cuyahoga Community College (Tri-C) under a grant awarded by OSWER. Tri-C is not only developing an environmental science program to train local citizens for jobs in the environmental field, but is also designing teacher trining activities to help Cleveland's public school students in developing an interest in environmental careers. The Hazardous Materials Training and Research Institute (HMTRI) will increase the number of community colleges offering environmental work force training programs. HMTRI, a consortium of community colleges, will conduct national workshops and provide training and curricula for community colleges which are located near the 50 brownfield pilot sites. These colleges must also demonstrate

a commitment to developing community outreach and environmental justice initiatives. Rio Hondo Community College jobs-training pilot (to be awarded in February 1995) will build a partnership with a large state-of-the-art landfill. The pilot will provide job training opportunities in landfill management and a wide range of solid waste management technologies. Rio Hondo serves a predominantly a minority and low-income community. Special emphasis will be given to recruiting community members into the jobs-training pilot.

Headquarters Lead Office for Monitoring: Office of Solid Waste and Emergency Response, Special Projects Staff

Headquarters Milestones

Develop a long-range environmental workforce equity education plan	OSWER	9/95
Identify and implement outreach and recruitment activities	OSWER	9/95
Provide training curriculum and assistance to ten community colleges, including three Brownfields projects	OSWER	9/95

E. Consistent Program Implementation

INITIATIVE 8: GUIDANCE FOR REMEDY SELECTION

Consistent implementation of the remedial program is critical to the fairness and effectivenss of the Superfund program. In order to improve consistency and to take advantage of streamlining opportunities in site characterization and remedy selection in the program, three initiatives will be completed.

One: Under this initiative, EPA will complete the development of an important screening tool to expedite and streamline the investigation of NPL sites. The soil screening guidance will help identify portions of contaminated sites that do not require further attention. These screening levels complement the ongoing initiative of SACM. They also provide a framework for evaluating contaminated soils that may be used in other cleanup efforts, such as RCRA corrective action, voluntary cleanup programs, and State/tribal programs. The screening levels will also be useful in streamlining the baseline risk assessment.

Two: EPA will complete the land use directive which will focus the development of remedial alternatives on those that will be consistent with reasonably anticipated future land uses at sites. The guidance will recommend the kinds of information appropriate to consider in formulating assumptions about future land use, including community input and how assumptions about land use can be used in the development of remedial alternatives.

Three: EPA will continue the development of presumptive remedies. Presumptive remedies are standardized remedies for certain types of sites and are based on scientific and engineering analyses performed at similar Superfund sites. Presumptive remedies will be developed for ground water contaminated sites, wood treater sites, PCB sites, manufactured gas plants, and grain storage sites. In addition, the technical requirements for additional presumptive remedies will be developed, which will provide the framework for the development of subsequent presumptive remedies.

Headquarters Lead Office for Monitoring: Office of Emergency and Remedial Response

<u>Headquarters Milestones:</u>

Complete of public comment period for Soil Screening Guidance	OERR	3/95
Issue Soil Screening Guidance	OERR	6/95
Issue Land Use Guidance	OERR	4/95

Issue Presumptive Remedies Guidance for:		
Ground Water	OERR	9/95
Wood Treaters	OERR	9/95
PCB sites	OERR	12/95
Manufactured Gas Plants:	OERR	12/95
Grain Storage:	OERR	12/95
Technical Criteria Document	OERR	12/95

INITIATIVE 9: RISK SHARING IN IMPLEMENTING INNOVATIVE TECHNOLOGY

PRPs have responded to EPA's question, "What is holding you back from using innovative treatment technologies?" by asking government to share some of the risk associated with early use of new technologies. The prospect of paying for a remedy twice discourages use of innovation, and encourages selection of lower risk, established technologies. This initiative will encourage PRPs to assume a more active role in technology development. Projects would include leading-edge environmental technologies and early application of units with significant potential for lowering costs or improving performance. EPA will agree to share the risk for a limited number of approved projects by 'underwriting' the use of certain promising innovative approaches. If the innovative remedy fails to perform as expected/required, EPA would contribute up to 50% of the cost of the failed remedy if additional remedial action is required, up to a specified maximum amount. This approach will also be considered for innovative technologies included in pilot studies to demonstrate procurement with performance specifications.

Headquarters Lead Office for Monitoring: Technology Innovation Office

Headquarters Milestones

Establish operating principles for pilots	TIO	7/95
Develop implementation procedures	TIO	11/95
Implement risk sharing for FY 96, choose eligible projects		

Risk sharing was identified by the Response Action Contractor (RAC) community as an impediment to using innovative technologies. EPA will meet with representatives from the contractor community to identify and document liability concerns, and work with the representatives to develop risk sharing methods that promote the use of innovative technologies.

Headquarters Lead Office for Monitoring: Office of Solid Waste and Emergency Response, Office of Program Management

Headquarters Milestones

Meet with the RAC community to identify risk sharing issues	OPM/AS	2/95

Gather data and conduct analysis and review of issues raised in risk meeting	OPM/AS	4/95
Identify options and recommendations for addressing risk concerns	OPM/AS	6/95
Implement recommendations	OPM/AS	7/95

F. State/Tribal Empowerment

INITIATIVE 10: VOLUNTARY CLEANUP PROGRAM

Approximately 20 States are at various stages of developing their own Voluntary Cleanup Programs. Effective State and tribal Voluntary Cleanup programs can be important contributors to the success of the Agency's Brownfields initiative, while also advancing the States'/Tribes' and our own interest in promoting State/tribal empowerment. EPA has begun discussing with the States the kind and extent of Federal involvement that they would like, but preliminary indications are that the States vary in their preferences. Consequently, Initiative 10 would begin with a joint EPA/State/tribal effort to define our respective roles in promoting the development and operation of State/Tribal Voluntary Cleanup Programs. It anticipates two parallel sets of issues: deciding whether and under what circumstances EPA might "endorse" a States/Tribes Voluntary Cleanup Program; and, deciding the amount, distribution, and vehicle for any financial support EPA may offer to such programs.

Headquarters Lead Office for Monitoring: Office of Emergency and Remedial Response

Headquarters Milestones

Consult with States/Tribes on respective roles; identify State(s) interested in working with EPA on issue.	OERR	2/95
Develop, in consultation with interested State(s), tribes, draft approach and criteria for EPA "endorsement" of State VC Programs.	OERR	5/95
Identify preferred funding bases and vehicles for supporting State/tribal VC programs.	OERR	5/95
Establish funding and/or "endorsement" pilots with selected State(s)/tribes.	OERR	9/95

INITIATIVE 11: INTEGRATED FEDERAL STATE SITE MANAGEMENT PROGRAM

The Superfund Administrative Initiative on State Deferral provided EPA and States with opportunity to develop a pilot program under which States, Territories, Commonwealths, and Federally-recognized Tribes would oversee and compel potentially responsible party (PRP) actions at selected NPL-caliber sites. The pilot program considered criteria for selecting candidates for deferral and established provisions for establishing agreements between EPA and States/tribes, cleanup standards, and providing for community involvement. Based on insights gained from its experience in piloting the deferral concept at 22 sites in 7 States, EPA will soon fully implement this program as a model for integrated Federal/State/tribal site management of NPL-caliber sites.

In addition to deferral, EPA will explore options for expanding State authority at NPL sites. This will allow States and EPA together to structure and test their relationship in ways to maximize the State's autonomy, while complying with the NCP's requirement for ultimate EPA concurrence in the ROD.

Headquarters Lead Office for Monitoring: Office of Emergency and Remedial Response

Headquarters Milestones

Consult with Regions on lessons learned implementing deferral pilots	OERR	2/95
Input from States on Deferral Guidance	OERR	2/95
Issue Deferral Guidance	OERR	3/95
Evaluate deferral program	OERR	9/95
Consider revisions to guidance, including eligibility of Federal facilities; issue revised guidance if appropriate	OERR	12/95

INITIATIVE 12: STATE SUPERFUND BLOCK FUNDING OPTIONS

Under current regulations and policies, EPA may enter into several types of site- and non-site-specific cooperative agreements with States/Tribes to implement the Superfund program and conduct or assist Superfund response actions. While each type of cooperative agreement is intended to address a unique purpose, the award and administration of multiple cooperative agreements to a State/tribe for Superfund-related activity is a cumbersome and time-consuming process. To provide administrative relief and improve the timeliness of State/tribal involvement in the Superfund program, the Agency will work with States/tribes to identify options and opportunities to consolidate the Superfund award process through block funding.

Headquarters Lead Office for Monitoring: Office of Emergency and Remedial Response

Headquarters Milestones

Establish HQ/Regional work group with State/tribal input to identify issues and options regarding State/tribal Superfund awards	OERR	3/95
Prepare preliminary report identifying issues and options	OERR	12/95
Prepare final report for the Assistant Administrator, including recommendations for improving the State/tribal Superfund award process	OERR	6/96

Regional Milestones

Identify and consult with States/tribes regarding improvements to the State Superfund award process	Regions	3/95

II. ENHANCED AND CONTINUING INITIATIVES

De Minimis Settlements - FY 95

In cooperation with the Department of Justice, the Regions are continuing to seek and obtain settlements with de minimis parties at Superfund Sites. The Agency is attempting to maintain the successful momentum which was achieved in FY 94 when we achieved 43 de minimis settlements involving over 4,000 parties. The current FY 95 de minimis SCAP target is 28 completed settlements -- signed administrative orders or lodged consent decrees. To date, 4 de minimis settlements have been completed this fiscal year, and all ten Regions have targeted de minimis settlements for completion.

Alternative Dispute Resolution

EPA will continue to enhance the routine and knowledgeable consideration and appropriate use of ADR techniques to the point where such consideration (and use) are as standard operating procedure for all Superfund actions. EPA will develop guidance on the effective consideration and use of ADR by regional enforcement offices, publish information on ADR and a status report on enforcement uses of ADR, and hold a national conference to explore potential uses of ADR with business leaders. Each Region will develop an ADR implementation plan.

Enforcement First and Cost Recovery

EPA will maintain its commitment to "Enforcement First" and cost recovery by continuing to use its enforcement authorities to encourage PRPs to conduct investigations and cleanups to actively recover Federal money spent in the Superfund program.

Environmental Justice Initiative

(a): OSWER-Wide Activities

The Outreach and Special Projects Staff (OSPS/OSWER) provides support to the Waste and Facility Siting Subcommittee of the National Environmental Justice Advisory Council (NEJAC). The subcommittee has reviewed OSWER's draft final EJ strategy and continues to advise OSWER on ways to further advance EJ objectives. OSPS is currently reviewing the Subcommittee's comments and finalizing the OSWER EJ strategy. The OSWER EJ Steering Committee meets monthly and minutes are available. Finally, development of the first OSWER EJ accomplishments report is underway.

Headquarters Milestones:

Final OSWER EJ Strategy	OSWER/OSPS	Spring '95
OSWER EJ Accomplishments Report	OSWER/OSPS	4/95

Regional Milestones:

Regional EJ Accomplishments Reports due to Headquarters	10 Regs.	2/95

(b): Superfund-Specific Activities

Superfund has moved forward to implement EJ initiatives in Headquarters and the Regions. Many of the initiatives are proactive and forward looking and have the clear purpose of letting everyone know that fairness in the delivery of response actions is the only way to do business.

In Community Involvement and Outreach, Superfund is establishing 10 Regional Community Advisory Groups (CAGs) at sites with potential EJ concerns; and interagency working groups to help meet the needs of local communities in instances where these needs are beyond the mandate of the Superfund program.

In the area of Site Assessment, Superfund is conducting a pilot site assessment program to ensure that sites in areas with minority or low income populations that warrant Federal action are identified.

Risk Assessment initiatives include developing supplemental guidance for considering sensitive populations; and examining the existing guidance to incorporate exposure factors unique to areas

with minority or low income populations. There is also an effort to work with HUD in lead paint survey/lead abatement project.

Several training initiatives underway include incorporating information on EJ concerns into all site assessment training courses; and making the courses more widely available through the Environmental Response Team's training program. Efforts are also underway to heighten the awareness of the workforce to EJ and diversity related issues.

Superfund is developing a pilot worker training program in coordination with HUD, HHS, and other agencies to train low-income and/or minority workers in the hazardous waste cleanup field.

The Oil Pollution Program has underway an effort to develop an education and outreach strategy for all storage facilities in poor or minority areas.

Headquarters Milestones

Memo to Regions recognizing 10 proposed sites for Community Advisory Groups	OERR	1/95
Conduct a pilot proactive site assessment program	OERR	11/95
Issue guidance to address indoor lead paint cleanups	OERR	9/95
Develop matrix for exposure and risk factors for low-income and minority populations	OERR	9/95
Selection of a pilot site(s) for the minority worker training program	OERR	3/95

Construction Completions

We continue to monitor and support efforts reaching our FY 2000 goal of completing construction at 650 Superfund sites. We have four (4) construction completions thus far for FY95 for a total of 282. The goal for FY95 is to attain a total 330 construction completions. Current projections from the regions indicate that we can attain this target. Projections for subsequent years lead us to believe we will reach our FY 2000 goal, provided we complete at least 65 sites per year (i.e., FY 1996 - 395 sites, FY 1997 - 460 sites, etc.).

Superfund Accelerated Cleanup Model

The EPA continues to maintain momentum implementing the Superfund Accelerated Cleanup Model (SACM). We are taking a number of steps to better integrate the SACM and the "one program" approach into the evaluation and cleanup of hazardous waste sites. These steps include 1) designating a pool of money to fund "early actions" at Superfund sites; 2) continuing to implement the long-term contracting strategy integrating our contract vehicles to reflect the goals of SACM; 3) undertaking integrated assessment efforts between site assessment, removal and remedial programs and prioritizing site activities through Regional Decision Teams, and 4) developing a new Headquarters organizational structure to better support SACM. We also plan to evaluate SACM implementation and identify opportunities to further refine our approach.

Military Base Closure Initiative

President Clinton's Five Point Plan to speed the economic recovery of communities where military bases are slated for closure is built on a partnership including EPA, DOD and the states. The Fast Track Cleanup program focuses cleanup efforts to facilitate reuse of closing bases. The program includes clean parcel identification, accelerating cleanup, facilitating leasing agreements, encouraging removal actions, technical assistance at non-NPL bases, enhanced community involvement and integration of cleanup with economic development

The President's program called for an "empowered" cleanup team that can make decisions locally and quickly. EPA, DOD and the States have responded be establishing dedicated cleanup teams addressing closing and realigning installations.

EPA will continue to be an active participant in DOD's efforts to develop policies to implement the President's program. In addition to establishing BRAC cleanup teams, EPA is working

closely with DOD to enhance the role of communities in the cleanup of federal facilities. DOD has directed the military services to establish Restoration Advisory Boards at installations where the public demonstrates an interest in the cleanup. RABs were originally focused on closing bases, but are now being established at active installations as well. EPA will participate in RABs at NPL installations and closing bases.

Strengthening Contracts Management

EPA continues to strive to improve contract management in the Superfund program. We are currently implementing the Long Term Contracting Strategy (LTCS), the portfolio of contracts to meet Superfund Regional contracts needs through the year 2000. The LTCS decentralized contracting to the Regions to increase flexibility and strengthen oversight, management and accountability.

During 1993 and 1994, a significant review of Superfund contracting resources was undertaken focusing especially on regional project officer and contracting officer resources. As a result, the Base Review of Superfund Resources for 1995/1996 recommended additional resources for regional contracting officer positions. The individual regions are continuing to appraise the resource balance between RPM, OSC, SAM and PO/CO positions in their regions.

OSWER and OARM continue to work with the regions in the following significant areas:

- Assuring that cost control remains a strong focus in the regions with emphasis on adequate monitoring and control over contractor invoice costs, including program management and subcontractor costs.

- Conducting regional reviews to identify areas for improvement and promote quality contract management.

- Improving operation of some regions' Regional Management Teams, to facilitate discussion and resolution of contract management issues.

- Promoting reengineering and streamlining of the regional work assignment process, especially for the ARCS contracts, (e.g., Regional Work Assignment Process Workgroup and SF Contracts Delegations Workgroup.)

- Review of OSC contract authorities to ensure adequate procedures are in place (SF Contracts Delegations Workgroup.)

Waste Classification and Recycling

"Return To Sender"

Catriona Bartlett

Catriona V. Bartlett

Chemist, Waste Evaluation Section
Industrial & Hazardous Waste Division

Catriona V. Bartlett received a B.S. degree (with Honors) in Marine and Environmental Biology from the University of St. Andrews, Scotland, U.K. in 1988. She then went on to receive a M.S. degree in Aquaculture from the University College of N. Wales, Bangor, U.K. in 1990. After a period of work in the Philippines she came to the U.S. to teach with Tx. A & M University as a laboratory instructor in their annual shrimp farming short course. This was followed by work in several Central American counties and then a return to the U.S. as an analytical chemist in a laboratory in Brownsville, Tx., where she performed analyses on a variety of organic and inorganic samples.

She joined the Commission in November 1994 as a member of the Waste Analysis Team, where she reviewed waste classification notifications. She has also worked on the rule writing team for the Subchapter R rules. In addition to this, her duties included providing technical assistance to the commission and the regulated community concerning the Texas Industrial and Hazardous Waste program, evaluation of requests for variances, recycling activities and evaluating treatability study exemptions. She is now a member of the Special Waste Team, as an International Waste Specialist, where she works with the Maquiladora program, coordinating waste shipments and reporting requirements for Maquiladoras in conjunction with the EPA.

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WASTE CLASSIFICATION PRESENTATION SUMMARY

Catriona V. Bartlett
Special Waste Team
Industrial & Hazardous Waste Division
Texas Natural Resouce Conservation Commission

1. HAZARDOUS WASTE DETERMINATION

A hazardous waste is defined by the Resource Conservation and Recovery Act, as found in Title 40 Code of Federal Regulations Part 261. All generators of solid waste must complete a hazardous waste determination and manage their waste accordingly.

(a) Listed Hazardous Waste - if your waste is found on one of the four lists in 40 CFR §261 Subpart D

K wastes from specific industrial processes - for example organic chemical pesticides, explosives, veterinary pharmaceuticals

F wastes from non-specific processes - for example spent solvents, leachate from landfills

P + U commercial chemical products which are to be discarded - for example off specification chemicals or contaminated residues as a result of a spill

(b) Mixed with or Derived from Rule - if your waste is mixed with or derived from a listed hazardous waste, then it is also considered a listed hazardous waste

(c) Characteristic Hazardous Waste - **ignitable** EPA Hazard # D001
flashpoint $< 140\ ^\circ F$
flammable solid or semi-solid

corrosive EPA Hazard # D002
pH ≤ 2.0 or ≥ 12.5
liquid/aqueous wastes

reactive EPA Hazard # D003
explosive/unstable
react violently with water

toxic EPA Hazard # D004 - D043
toxicity shown by TCLP

2. NONHAZARDOUS INDUSTRIAL WASTE

(a) 30 TAC §335 : Subchapter R

(b) Class 1

toxic by TCLP ; Appendix 1 Table 1 constituents

specifically identified wastes
- RACM materials
- some empty containers
- PCBs $\geq$ 50ppm
- TPH $\geq$ 1500 ppm (unless specifically excluded from definition)
- new chemical substance
- out of state wastes

ignitable liquid with flashpoint $<$ 150 °F
soild/semi-solid capable of causing fires

corrosive solid/semi-solid which will produce a solution with water of pH $\leq$ 2.0 or $\geq$ 12.5

lack of information or without evaluation

(c) Class 2

empty containers (inc. aerosol cans)
medical waste
other waste not Class 1 or Class 3

(d) Class 3

inert
insoluble (not a liquid)
not readily decomposable (not 900 series form codes)
poses no threat to human health and the environment
non-detect for TPH and PCBs

3. CLASSIFYING WASTE / DOCUMENTATION

(a) Process Knowledge	complete description of waste generation, inc. all constituents of waste before and after processing MSDS sheets manufacturers literature
(b) Chemical Analysis	SW 846 methods (or other similar/approved) laboratory analysis report copy of chain of custody copy of QA/QC data from laboratory detailed description of sampling plan and rationale for said plan and site description/conditions description of sampling methods and equipment used description of preservation methods

4. CODING REQUIREMENTS

(a) Building an 8-digit Texas Waste Code - sequence # + form code + classification code

(b) Sequence Numbers	assigned by the generator assigned by the TNRCC (one-time shipments) OUTS (out of state wastes) CESQ (conditionally exempt small quantity gens.) TSDF (certain treatment, storage & disposal facilities)

5. FORM CODES

(a) 30 TAC §335, subchapter R, Appendix 3

(b) General Indicator of Waste Type

Lab Packs		001-009
Liquids	Inorganic	100 series
	Organic	200 series
Solids	Inorganic	300 series
	Organic	400 series
Sludges	Inorganic	500 series
	Organic	600 series
Gases	Inorganic	700 series
	Organic	800 series
Plant Trash		900 series

6. CLASSIFICATION CODES

H	Hazardous
1	Class 1
2	Class 2
3	Class 3

A TNRCC Publication, # RG 22
Guidelines for the Classification and Coding of Industrial and Hazardous Wastes
can be obtained by calling Publications at (512) 238 0028

The Waste Analysis Team can be reached at (512) 239 6832 for questions
or Fax (512) 239 6410

Mailing Address
Waste Evaluation Section
Industrial and Hazardous Waste Division
MC 129
TNRCC
P.O. Box 13087
Austin, TX 78711-3087

WHY RECYCLE?

- Materials which are recycled do not have to be disposed of.
- Recycling of materials is often more cost effective
- Recycling reduces the rate at which we exploit and use up valuable and increasingly scarce natural resources and land disposal capacity.
- Many materials that are recycled are exempt, or at least partially exempt, from state and federal regulations such as notification requirements, annual reporting requirements and the need to manifest

The first step is to determine whether you or someone else can use or reuse the material.

The next step is to examine what, if any, regulations apply to the material.

The most important determination that needs to be made is whether or not your material is even a waste in the first place.

If you use your generated waste in any of the following ways, then it **is considered** a Solid Waste and so must be managed accordingly;

- used in a manner constituting disposal (i.e. applied to the land)
- burned for energy recovery
- reclaimed (i.e. processed to recover a usable product)
- accumulated speculatively

or;

- if it is an inherently waste-like material (i.e. F020, F021)

However, if your material is recycled by being;

- used or reused in an industrial process **without** reclamation;
- used or reused as an **effective substitute** for a commercial product;

or;

- returned to the original process that generated it without being reclaimed (as a substitute for raw material feedstock)

then it is **not considered a solid waste** and so is not subject to regulation by the Industrial and Hazardous Waste Division of TNRCC.

There are also some specific exclusions from the definition of a Solid Waste;

for example;
- domestic sewage
- industrial wastewaters regulated under the Clean Water Act
- houshold wastes

There are also some "blanket exemptions" which exempt from the definition of a solid waste materials which are recycled. These apply if the material is reclaimed and is:

- A **characteristically** hazardous or non-hazardous sludge
- A **characteristically** hazardous or non-hazardous by-product;
- A **commercial chemical product**;
- The material is **returned to the original process which generated it**; and

  1. only tank storage is involved and the entire process is closed
  2. the reclamation does **not** involve flame combustion;
  3. the materials are never accumulated in such tanks for longer than twelve (12) months without being reclaimed; and
  4. the reclaimed material is not used to produce a fuel or a product which is used in a manner constituting disposal.

Exemptions from the definition of a Hazardous Waste also are defined in 40 CFR §261.6, and include;

- spent lead-acid batteries being reclaimed
- industrial ethyl alcohol being reclaimed
- used oil that is hazardous **solely for a characteristic** and that is being recycled (however it is still subject to to 40 CFR §279 - BUT, under Texas regulations, if the characteristically hazardous used oil is being burned for energy recovery, it still needs to be manifested - in other words, Texas has not yet fully adopted 40 CFR §279 - and will be trying for an adoption date sometime between now and January 96).

Now, as far as the Texas Regulations are concerned, 30 TAC §335.6, §335.17, §335.24, and §335.211- §335.308, deal with the requirements for generators of Hazardous or Industrial Solid Wastes which are to be recycled.

The requirements include:

90-day prior notification ;
- the type(s) of waste to be recycled;
- the method of storage prior to recycling;

and;

- the nature of the recycling activity.

NOTE:

- The recycling activity itself is not subject to permitting requirements although activities associated with it such as storage facilities may meet the permitting requirements;

If, after doing a thorough evaluation of your material, the process by which it is to be recycled and the rules just cited, you conclude that the material is exempt from being regulated as a waste, the next step is to properly document how you arrived at your conclusion. It cannot be emphasized enough that it is the responsibility of the generator of a material to be able to defend their determination that a material is exempt from being regulated as a waste. (See 30 TAC §335.1 (Definition of Solid Waste)(H)).

Recycling is a very challenging (and often confusing) part of our regulations. Deciding if your material is a waste and finding the applicable requirements if the material remains a waste may require guidance from the TNRCC. Recycling processes are usually sometimes rather complex and involve many stages, so keep in mind that answering recycling questions over the telephone is sometimes difficult. It is very helpful if you can examine your process closely and ask specific questions about particular regulations. Inquires about recycling may be directed to the Waste Analysis Team of the Waste Evaluation Section at (512) 239-6832.

Key Issues In Water Quality

"Treat Me Nice"

Jim Davenport

JIM DAVENPORT

Jim Davenport was born in Plainview, Texas.

He received a B.A. in Biology from Trinity University, and an M.A. and a Ph.D. in Aquatic Biology from the University of Texas at Austin. Educational background and research interests include aquatic biology, limnology, water quality evaluation and modeling, aquatic chemistry, statistical analysis, mathematical simulation of aquatic systems, environmental management, ecology, physiology, invertebrate biology, and botany.

He initially joined the Texas Department of Water Resources in 1982 as a member of the Water Quality Modeling Team, where he evaluated environmental impacts to Texas streams and reservoirs.

Since 1985, he has been the leader of the Water Quality Standards Team of the Texas Natural Resource Conservation Commission. This group develops and implements water quality standards and goals for the surface waters of Texas, evaluates pollutant impacts on aquatic ecosystems, and participates in a variety of water-quality management programs.

UPDATE ON WATER QUALITY MANAGEMENT

NEW STANDARDS REVISIONS AND OTHER CHANGES

June 30, 1995

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ATTACHMENTS:

- TNRCC Rules in Progress: Water and Water Quality
- Excerpt from EPA Water Quality Handbook: Applicability of Water Quality Standards to Nonpoint Sources Versus Enforceability of Controls
- EPA Watershed Protection: TMDL Note #1, An Introduction to the TMDL Note Series
- EPA Watershed Protection: TMDL Note #2, Bioassessment and TMDLs

INTRODUCTION

The Texas Surface Water Quality Standards (Title 30, Chapter 307 of the Texas Administrative Code) establish explicit water quality goals throughout the state. The adoption and revision of the standards by the Texas Natural Resource Conservation Commission is a very public and sometimes controversial process. Diverse sources have shaped standards development - including cities, industries, environmental interests, and the U.S. Environmental Protection Agency, which has approval authority over state water quality standards.

Regional hydrologic and geologic diversity is given consideration by dividing major river basins, bays and estuaries into defined segments (referred to as classified or designated segments). The standards rule contains (1) general standards which apply to all surface water in the state, and (2) segment-specific standards which identify appropriate uses (aquatic life, contact or noncontact recreation, drinking water, etc.) and list upper and lower limits for common indicators (criteria) of water quality - such as dissolved oxygen, temperature, pH, dissolved minerals, and fecal coliform bacteria.

The Texas Surface Water Quality Standards include several key sections which are essential to their overall effectiveness. The General Criteria (307.4) contain a variety of narrative statewide provisions which define the general goals to be attained by all waters in the state. These provisions are particularly important in dealing with those pollutants which are not addressed by specific numerical criteria. The General Criteria also specify procedures which are used to develop site-specific standards for small unclassified waterbodies.

The Antidegradation Policy (307.5) establishes extra protection for high quality waterbodies. In accordance with EPA requirements, this policy stipulates that no degradation will be allowed in high quality waters, unless the resulting degradation is demonstrated to be economically and socially justified. The antidegradation policy also provides for establishing Outstanding National Resource Waters, in which no degradation is allowed under any circumstances.

Standards for Toxic Materials (307.6) include numerical criteria (as maximum instream concentrations) for 39 toxic pollutants in order to protect aquatic life. Human consumption of fish and drinking water is protected by numerical criteria for 64 toxic pollutants. This section also requires larger wastewater dischargers to conduct biomonitoring, which involves exposing selected aquatic organisms to samples of the discharge effluent. Any significant toxicity observed during biomonitoring must then be evaluated and eliminated.

Appropriate numerical criteria needed to support various water-quality related uses are defined in Section 307.7. Conditions under which portions of the standards do not apply, such as in mixing zones near discharge points or at unusually low streamflows, are noted in Section 307.8. Sampling and analytical procedures to assess standards attainment are described in Section 307.9. Site-specific standards for designated waterbodies are individually listed in Section 307.10 (Appendices A,B,C,D,E).

Procedures for implementing the Texas Surface Water Quality Standards are described in "Implementation of the TNRCC Standards Via Permitting."

Water quality standards are publicly revised at least every three years in order to incorporate new information on potential pollutants and additional data about water quality conditions in specific waterbodies, and to address new state and federal regulatory requirements.

The current standards were revised during 1994/1995 and adopted by the Commission on June 14, 1995. The presumed standard for unclassified, perennial streams in East Texas was changed from high quality aquatic life to intermediate quality aquatic life. New criteria were added for eight toxicants, and criteria for silver were revised to be less stringent. Based on new drinking water standards, criteria for eight toxicants were revised to be more stringent, and criteria for four toxicants were revised to be less stringent. A provision was added to allow control of diazinon toxicity through measures other than whole-effluent toxicity limits. More protective standards were adopted for the Colorado River below Austin and for the San Marcos River. Thirty-seven new waterbodies were added for partial classification in Appendix D - most of which were site-specific downgrades from presumed standards. New Appendix E was added for site-specific toxic criteria.

STEPS FOR THE 1994/1995 STANDARDS REVISIONS

* Feb 1994 - Circulate draft proposals for comment.
* March-May 1994 - Review draft with Task Force 21 workgroup.
* May 25, 1994 - Present revised proposals at TNRCC agenda.
* Nov 30, 1994 - Present additional recommendations at agenda.
* Dec 16, 1994 - Notice of hearing in Texas Register
* Dec 30, 1994 - Publication of draft in Texas Register
* Jan 31, 1995 - Hearing (10:30 AM, Travis Bldg, Austin)
* Jun 14, 1995 - Adopt revised rule at TNRCC agenda.
* Tx. Attorney General submits adopted rule to EPA.
* EPA approves within 60 days, or disapproves within 90 days.

SUMMARY OF NEW STANDARDS REVISIONS

Revision: **Allow an interim permit limit to be extended beyond 3 years, if this is essential to allow time for a standards change in response to a site-specific study.** [307.2(f)]

Why?: Under the previous rule, most of the time allowed for a site-specific study under a variance is used for the study itself. In some cases, there has not been sufficient time to change the standards rule after the study is completed. This revision allows time to incorporate site-specific standards changes at once - preferably during the triennial standards revisions.

Revision: **Clarify the exclusion of dissolved salts from the definition of toxicity by (1) listing applicable substances, and by (2) allowing this exclusion only in cases where any adverse effects are due to natural salt concentrations.** [307.3(a)(42)]

Why?: The previous exemption was intended to prevent a permittee from failing biomonitoring tests due to elevations of dissolved salts in water supplies. Interpretation has been difficult, however, and the

exemption was sometimes considered to be broader than intended.

Revision: **Change the presumed standard for small, perennial streams in East Texas from high quality aquatic life to intermediate quality aquatic life.** [307.4(h)]

Why?: EPA requires that smaller waterbodies, which do not have site-specific standards as designated segments, be protected by presumed standards in the general criteria. In the current standards, perennial freshwater streams have a relatively stringent presumed standard of high quality aquatic life use and a dissolved oxygen criterion of 5.0 milligrams per liter. For sites where the presumed standard is inappropriately stringent, a site-specific standard must be individually obtained by amending the standards rule. This process has required substantial effort by TNRCC staff and an affected permittee, and this change is adopted in order to reduce the need for site-specific standards revisions when the presumed standard are overly stringent.

Revision: **Add and revise numerical toxic criteria based on additional data.** For aquatic life protection, criteria are added for dicofol and diuron. Endosulfan is divided into three congeners, each with the same criteria as before. Chronic criteria for silver are deleted and the marine acute criterion for silver is made more stringent. [307.6(c)]

For human health protection, criteria are added for benzo(a)anthracene, benzo(a)pyrene, chrysene, and cyanide; and deleted for silver. Human health criteria are lowered (made more stringent) for cadmium, 2,4-D, dibromochloromethane, dieldrin, lindane, heptachlor, heptachlor epoxide, and methoxychlor. Criteria are raised (made less stringent) for barium, chloroform, selenium, and silvex. [307.6(d)]

Why?: The new criteria are added because of potential occurrences of these substances in Texas waters, and because there are now adequate data to develop additional numerical criteria. Silver criteria are changed partially in accordance with the EPA "National Toxics Rule" of 1992, which indicated that chronic criteria for silver are no longer required. Human health criteria are revised primarily to incorporate new maximum contaminant levels for drinking water.

Revision: **Allow use of "water-effects ratio" tests to adjust aquatic life criteria for toxic metals.** This procedure is based on measuring the toxicity of a metal in water

from a particular site, so that the effects of local water chemistry on toxicity can be accounted for. In some cases, this can result in a less-stringent toxic criterion for that site. This provision still requires a revision of the standards rule in order to implement each new site-specific criterion. [307.6(c)(10)(G)]

Why?: EPA and TNRCC staff have developed procedures for water-effects tests, and a few permittees are already conducting these tests to support site-specific standards. Water-effects tests provide a defined, reasonable approach to evaluate criteria for toxic metals on a site-specific basis.

Revision: **Exempt effluent toxicity due to the pesticide diazinon from some of the provisions of the biomonitoring section.** Dischargers who fail biomonitoring tests due solely to diazinon are allowed to control diazinon by measures other than permit limits for whole effluent toxicity. [307.6(d)]

Why?: Diazinon is a ubiquitous pesticide which can be present in the effluent from municipal discharges. The Texas Water Commission previously passed a resolution which exempted toxicity due to diazinon from some of the requirements of the biomonitoring section. The resolution was designed to facilitate economically feasible controls for diazinon. This revision incorporates parts of the resolution.

Revision: **Adjust the presumed dissolved oxygen criteria for (1) unclassified streams, and (2) small "partially classified" streams in Appendix D.** The presumption of high quality aquatic life for perennial streams [307.4(h)] is not changed, but the dissolved oxygen criteria required to attain this use are adjusted for east Texas (roughly east of I35).

Under this change, dissolved oxygen criteria vary with streamflow and with "bedslope" (the steepness of the downhill slope that the stream follows). In practical terms, this revision will primarily affect the dissolved oxygen criteria only in small sluggish streams, and then only at low stream flows. Even for these streams, higher dissolved oxygen criteria apply during higher streamflows. [307.7(b)(3)(A) and Table 5.]

Why?: Smaller waterbodies, which do not have site-specific standards as designated segments, are protected by presumed standards in the general criteria. Perennial streams, for example, have the following standards assigned as a minimum presumption: (1) a high quality

aquatic life use and a dissolved oxygen criterion of 5.0 milligrams per liter (for freshwaters), (2) a contact recreational use and a fecal coliform criterion of 200 per 100 milliliters, and (3) chronic (more stringent) aquatic life toxic criteria. A change to the standards rule is required to obtain a lower standard than the minimum presumption, and this change requires substantial effort by TNRCC staff and an affected permittee.

This change incorporates the results of extensive TNRCC studies of over 70 small streams around the state. Statistical evaluations were designed to be environmentally protective, so that dissolved oxygen criteria will be lowered (become less stringent) only as appropriate.

Revision: **Add a new provision to indicate that effluent limits are not required in permits for discharges of once-through cooling water, for substances which may be present in the intake water but which are not added by the facility.** [307.8(d)]

Why?: Under existing TNRCC and EPA permitting procedures, permit limits are required for any toxicant which could potentially violate stream standards. Previously, permit limits could be imposed even if the discharge concentrations are identical to the intake concentrations. This revision only applies to public electrical generating facilities.

Revision: **Revise site-specific standards for designated segments, to include 19 boundary corrections, 4 changes in designated uses, 9 name corrections, and 1 new segment.** [307.10, Appendices A,C]. **Major site-specific changes include the following:**

*** Add new Cooper Lake as classified segment 0307.**

*** Downgrade some of the uses and criteria for Rita Blanca Lake (Segment 0105), in order to note that this reservoir is now used primarily as a waterfowl management area.**

*** Lower the "critical low-flow" for headwaters of the San Marcos River.** In effect, this lowers the amount of instream dilution allowed for discharges to the river, and will result in a more stringent standard. This is appropriate for a spring-fed river with small variations in flow, but it is different from usual procedure - which bases "critical low-flows" on "7Q2" conditions.

*** Change the indicator bacteria for the Houston Ship Channel (Segments 1006, 1007) from fecal coliform to *Enterococcus*, as a pilot test for this new indicator.** EPA now recommends diffent bacterial indicators to replace fecal coliform as an indicator of recreational suitability. Correlation with incidence of water-borne disease is better with these new indicators. *Enteroccoccus* is recommended for marine waters and *E. coli* is recommended as an indicator for fresh waters. TNRCC staff will evaluate this change for all state waters in future standards revision - after additional data from Texas waters can be collected and evaluated. Data indicate that many of the "fecal coliform" bacteria originate from non-fecal sources, and that switching to alternative indicators will reduce spurious counts from non-fecal sources.

*** For the Colorado River from Austin to La Grange, elevate the designated use from high to exceptional aquatic life.** This changes the dissolved oxygen criterion from 5.0 to 6.0 mg/l. The new standard applies when the river flow from Longhorn Dam is greater than 150 cubic feet per second.

Revision: **Add 37 small streams for "partial classification,"** [307.10, Appendix D]; assign a category for aquatic life use (**H**igh, **I**ntermediate, or **L**imited) and a dissolved oxygen criterion. These partial classifications are added for small waterbodies as sufficient information becomes available.

Revision: **Add new Appendix E in order to list site-specific standards for specific toxic pollutants.** Initially, the aquatic life criteria for copper are revised for three waterbodies (Ragsdale Creek and One-eyed Creek in Cherokee County, and Johnson Creek in Marion County), and the standard for lead is revised for Big Cypress Creek (Segment 404).

STANDARDS ISSUES FOR FUTURE DEVELOPMENT

Several kinds of innovative standards remain under national and state development. These will be considered in future standards revisions, and in other avenues for water qualilty management.

Nutrients

The current Texas standards do not specify numerical concentration criteria for nutrients. Narrative provisions in the General Criteria indicate that nutrients shall not "cause excessive gtrowth of aquatic vegetation which impairs an existing, attainable, or designated use" and "site-specific nutrient criteria, nutrient permit limitations, and/or separate rules to control nutrients in individual watersheds will be established where appropriate..." There are regulatory advantages to having numerical nutrient criteria, but they are difficult to develop and implement.

Other regulatory approaches also address nutrient reduction. TNRCC watershed rules, for example, prohibit discharges or require effluent phosphorus reduction in the watersheds of Lakes Travis and Austin, Lakes Inks and Buchanan, Tributaries to the Colorado River from Austin To Smithville, and Lakes LBJ and Marble Falls.

Development of numerical nutrient criteria and implementation procedures is beyond the present scope of the 1994/1995 triennial revision. TNRCC staff are reviewing regulatory options and other incentives to control nutrients, however, and nutrient criteria will remain an important issue for standards and water quality management.

Salinity

For classified freshwater segments, the standards contain site-specific criteria for various dissolved salts such as chlorides, sulfates, and total dissolved solids. The General Criteria prohibit adverse saline impacts on both fresh and estuarine waters, but there are no numerical criteria for salts in estuarine waters. There are also no numerical criteria that specifically apply to small, unclassified freshwater streams and lakes.

The site-specific development of numerical salinity criteria for estuaries continues to be hindered by the complexity of estuarine salinity gradients. For freshwater streams, additional general criteria for dissolved salts are being evaluated.

Nonpoint Sources and Watershed Management

Theoretically, instream standards apply to wet-weather conditions, but a variety of practical constraints limit the applicability of traditional water-quality based management of nonpoint sources. Many of the existing standards are not applicable to conditions that occur during periods of rainfall, since these conditions are of shorter duration than the applicable period of exposure for most of the criteria. In addition, data on appropriate ambient instream water quality during wet weather is limited. Traditional water-quality based permitting requires an estimate of instream concentrations from pollutant loadings, and predictions of pollutant impacts during rainy conditions are complicated and uncertain.

As NPDES stormwater permitting and nonpoint source programs progress, however, there will be an increasing need to reasonably address wet-weather flows and nonpoint source pollution. One of the priorities of the Clean Rivers Program is to acquire additional data to measure nonpoint source impacts, and to develop realistic water-quality goals for existing nonpoint source programs on a watershed basis.

Biocriteria

Biocriteria are based on quantitative measures of the health of indigenous aquatic communities. These measures include various indices of diversity, species number, proportion of sensitive species, etc. Potentially, biocriteria can be utilized as a direct indicator of pollutant impacts on aquatic organisms. TNRCC has already developed quantitative biological indices to define aquatic life categories, and for many purposes these indices are equivalent to biocriteria. EPA is in the process of formulating new policies and future requirements for biocriteria in state standards.

Sediment Criteria

Existing numerical criteria for toxicants in water do not necessarily preclude accumulation of toxic substances in bottom sediments. Sediment criteria to protect bottom-dwelling aquatic life are under development by EPA, and the states of Washington and Florida have established limited-purpose sediment criteria. Additional development is needed to (1) establish technically adequate criteria, and to (2) define realistic implementation procedures.

Indicators of Potential Pathogens

The bacterial indicator for recreational suitability is fecal coliform; an average concentration of 200 fecal coliform per 100 milliliters of water is the criterion for contact recreaction. Fecal coliform are supposed to indicate contamination by human sewage, but there are also numerous other sources for fecal coliform in natural waters that obscure results. An additional problem is the lack of a strong link between fecal coliform concentration and incidence of disease.

EPA now recommends other bacterial indicators, such as E. coli for freshwaters and Enterococcus for marine waters. These new indicators do have a somewhat better correlation with the occurrence of respiratory illness and gastroenteritis. There are still problems from non-human sources of these indicators, however, and separate fecal coliform criteria would be necessary for oyster-harvesting waters. Instream data is needed to see if this change would be advantageous for the Texas standards. TNRCC is conducting some comparative tests of the various indicators, and several local monitoring programs in the state will also provide data.

Wildlife Criteria

The standards have narrative provisions to protect wildlife and livestock from exposure to toxic substances via the consumption of water and aquatic organisms. Additionally, the numerical toxic criteria for human health also provide substantial protection to wildlife. There are concerns, however, that some species of wildlife may be unusually sensitive to particular toxicants. Research is continuing at the national level to develop guidance for wildlife protection criteria.

TNRCC RULES IN PROGRESS: WATER AND WATER QUALITY

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION
OFFICE OF POLICY AND REGULATORY DEVELOPMENT
RULES IN PROGRESS - RULES TRACKING LOG
PROJECT DESCRIPTIONS [SELECTED EXCERPTS]

JUNE 8, 1995

95006-312-WT Sewage Sludge & Water Treatment Requirements
Establishes requirements consistent with corresponding federal rules for the beneficial use of sewage sludge and for the disposal of sewage sludge generated by a domestic wastewater treatment facility. Chapter 312, Subchapters A-D. (Paul Curtis/Watershed Management Div./239-4580) [Hearing 5/30/95]

95010-335-WS Railroad Commission Memorandum of Understanding
Updates Railroad Commission Memorandum of Understanding (MOU) at the end of Chapter 335, Subchapter A. Chapter 335.28. (H. Reynolds/239-6825)

95012-285-WT On-site Sewage Facilities
This proposal was withdrawn from the Texas Register, effective June 1, 1994. A new proposal draft is underway (see Rule Log No. 95122-285-WT). Chapter 285 [285.101-285.109] (L. Johnson/Field Operations Division/239-0400)

95019-297-WT Water Rights
Provides definition and clarification for terms and provisions used in rules relating to review and action on applications for new and amended water rights. This is being done in connection with the development of a Regulatory Guidance Document for water rights, will assist the Trans-Texas Water Program, will facilitate implementation of the State Water Bank, Senate Bill 1031 (1993), and will complement the State Water Planning process. Chapter 297. (Bruce Moulton/Water Policy Div./239-4809)

95020-324-WS Standards for Wastewater Tank Management
These rules will govern specific waste (water and associated phase-separated petroleum) derived from petroleum tanks regulated by the TNRCC. These rules encompass generators and tank wastewater management facilities across several divisions. New subchapter in new Chapter 324.1-324.18 (C. Chandler/239-2245)

95039-307-WT Water Quality Standards
Provides for the triennial review and revision of the state surface water quality standards as required by the Federal Clean Water Act. Chapter 307. [307.2-307.10] (Jim Davenport/Water Planning and Assessments Div./239-4585) [Adopted 6/14/95]

95040-279-WT WQ Certification
Amends rules relating to state water quality certification of

federal permitting activities pursuant to 401 of the federal Clean Water Act (CWA). The proposed amendments would not add any additional regulatory requirements. Instead, they would provide procedures and compliance guidelines similar to 404(b)(1) CWA "dredge and fill" permits to provide state consistency with federal review of impacts to wetlands. Chapter 279. [279.1-279.13] (Mark Fisher/Water Planning and Assessments Div./239-4586) [Adopted 6/14/95]

95049-290-WT Rules/Regulations for Public Water Systems
Modifies elevated storage requirements and strengthens cross-connection protection by incorporating tools established by Senate Bills 812, 813, and 815 (1993). The rules would also require water conservation plans as a condition of approval for a utility to receive a "superior" rating for its water supply system. Chapter 290. [290.38-290.39, 290.41-290.47, and 290.121] (Steve Walden/Water Utilities Div./239-6020)

95091-327-WS Spill Rules/Spill Prevention and Control
Pursuant to Chapter 26 of the Texas Water Code and Chapter 361 et seq of the Texas Health and Safety Code, addresses the prevention, control, and management of discharges and spills, establishing a comprehensive reporting and response program. Chapter 327.1-327.9 (C. Talkington/239-6731)

95094-321-WT Permit-By-Rule Wastewater Activities
Authorizes certain activities by rule relating to concrete production, livestock trailer washing, motor vehicle cleaning, and petroleum bulk stations, and aquaculture. Chapter 321, Subchapters C, L, M, N, and O. (Tom Weber/Watershed Management Div./239-4554)

95096-286-WT On-Site Wastewater Treatment Research Council
The new sections are proposed to clarify the structure of the Council and to clarify the process for application and awards of grants that support applied research and demonstration projects and/or enhance technology transfer regarding on-site sewage treatment. [286.1-286.14, 286.31-286.34, 286.51-286.53, 286.76, and 296.91-286.98] (Warren Samuelson/239-4799) [Proposal published 3/28/95; public comment period ended 4/28/95]

95097-321-WT AG Permit Consolidation CAFO
Provides a streamlined permitting process for Confined Animal Feeding Operations (CAFOs) and offers a single permit for qualified CAFO type facilities. Chapter 321. [321.34, 321.141-321.149] (James Kowis/Agriculture and Rural Assistance Div./239-4700) [Adopted 6/14/95]

95099-317-WT Design Criteria -- Phase I
The goals of these rules are to respond to proposed legislative changes to Texas Water Code 26.034 which will grant the TNRCC the discretion to determine whether or not plans need to be reviewed. Chapter 317 (Louis Herrin/ Watershed Management/ 239-4552)

95100-317-WT Design Criteria -- Phase II
These rules update guidelines for the design and construction of wastewater treatment facilities to reflect new technological advances. Revisions also address water reuse projects and provide design guidelines for wastewater treatment facility upgrade projects undertaken to comply with other TNRCC rules. Chapter 317. (Louis Herrin/Watershed Management Div./239-4552)

95107-281-WT Coastal Management Program
The sections are proposed to comply with certain requirements of the Coastal Management Program (CMP), under rules adopted by the Coastal Coordination Council, 31 TAC 505.26. The CMP seeks to make more effective and efficient use of public funds and to more effectively and efficiently manage coastal natural resource areas and the activities that may adversely affect them. Chapter 281 (B. Mouton/239-4808)

95108-331-WS Reinjection of Groundwater
In order to no longer be more stringent than the federal regulations in this area, this rule would allow injection of treated contaminated groundwater into the same formation from which it was drawn, as part of approved RCRA or CERCLA cleanups, and would authorize such injection by rule. Chapter 331 [331.6] (R. Austin/239-6814)6814)

95121-310-WT Wastewater Reuse and Request
The proposed revisions to 30 TAC 310 (Use of Reclaimed Water) is to ensure that water reuse projects are implemented in accordance with commonly accepted engineering practices while continuing to protect public health and the environment. The revisions are intended to clarify the technical requirements for such projects. The proposed modifications will also allow the provider to be a user of the reclaimed water. Finally, the revisions will include requirements for the uniform practice of marking pipes carrying reclaimed water. Chapter 310. (Louis Herrin/239-4552)

95122-285-WT On-site Sewage Facilities
These proposed rules would amend Chapter 285 relating to On-Site Sewage Facilities to revise technical standards in response to changing technology, provide minimum acceptable design criteria, expand the levels of installer certification and training, increase permit fees for homeowners who install their own system, increase installer registration and certification fees in response to SB 1042 (1993), and provide for inspector training and certification as well as civil and administrative penalties for violations in accordance with SB 1042. Chapter 285. (Lemarcus Johnson/Field Operations Division/239-0400)

4.6 Applicability of Water Quality Standards to Nonpoint Sources Versus Enforceability of Controls

The requirement in Section 131.21(a)(2) to implement existing nonpoint source controls before allowing degradation of a high quality water, is a subset of the broader issue of the applicability of water quality standards versus the enforceability of controls designed to implement standards. A discussion of the broader issue is included here with the intent of further clarifying the nonpoint source antidegradation question. In the following discussion, the central message is that water quality standards apply broadly and it is inappropriate to exempt whole classes of activities from standards and thereby invalidate that broader, intended purpose of adopted State water quality standards.

Water quality standards serve the dual function of establishing water quality goals for a specific waterbody and providing the basis for regulatory controls. Water quality standards apply to both point and nonpoint sources. There is a direct Federal implementation mechanism to regulate point sources of pollution but no parallel Federal regulatory process for nonpoint sources. Under State law, however, States can and do adopt mandatory nonpoint source controls.

State water quality standards play the central role in a State's water quality management program, which identifies the overall mechanism States use to integrate the various Clean Water Act water quality control elements into a coherent management framework. This includes, for example: (1) setting and revising water quality standards for all surface waterbodies, (2) monitoring water quality to provide information upon which water quality-based decisions will be made, progress evaluated, and success measured, (3) preparing a water quality inventory report under section 305(b) which documents the status of the States's water quality, (4) developing a water quality management plan which lists the standards, and prescribes the regulatory and construction activities necessary to meet the standards, (5) calculating total maximum daily loads and wasteload allocations for point sources of pollution and load allocations for nonpoint sources of pollution in the implementation of standards,(6) implementing the section 319 management plan which outlines the State's control strategy for nonpoint sources of pollution, and (7) developing permits under Section 402.

Water quality standards describe the desired condition of the aquatic environment, and, as such, reflect any activity that affects water quality. Water quality standards have broad application and use in evaluating potential impacts of water quality from a broad range of causes and sources and are not limited to evaluation of effects caused by the discharge of pollutants from point sources. In this regard, States should have in place methods by which the State can determine whether or not their standards have been achieved (including uses, criteria, and implementation of an antidegradation policy). Evaluating attainment of standards is basic to successful application of a State's water quality standards program. In the broad application of standards, these evaluations are not limited to those activities which are directly controlled through a mandatory process. Rather, these evaluations are an important component of a State's water quality management program regardless of whether or not an enforcement procedure is in place for the activity under review.

Water quality standards are implemented through State or EPA-issued water quality-based permits and through State nonpoint source control programs. Water quality standards are implemented through enforceable NPDES permits for point sources and through the installation and maintenance of BMPs for nonpoint sources. Water quality standards usually are not considered self-enforcing except where they are established as enforceable under State law. Application of water quality standards in the overall context of a water

quality management program, however, is not limited to activities for which there are enforceable implementation mechanisms.

In simple terms, applicability and enforceability are two distinctly separate functions in the water quality standards program. Water quality standards are applicable to all waters and in all situations, regardless of activity or source of degradation. Implementation of those standards may not be possible in all circumstances; in such cases, the use attainability analysis may be employed. In describing the desired condition of the environment, standards establish a benchmark against which all activities which might affect that desired condition are, at a minimum, evaluated. Standards serve as the basis for water quality monitoring and there is value in identifying the source and cause of a exceedance even if, at present, those sources of impact are not regulated otherwise controlled.

It is acceptable for a State to specify particular classes of activities for which no control requirements have been established in State law. It is not acceptable, however, to specify that standards do not apply to particular classes of activities (e.g. for purposes of monitoring and assessment). To do so would abrogate one of the primary functions of water quality standards.

United States Environmental Protection Agency | Office of Water (4503F) | EPA841-K-94-005 September 1994

EPA

Watershed Protection: TMDL Note #1

An Introduction to the TMDL Note Series

Background

EPA headquarters provides information and support to its Regions and state and local agencies implementing the Total Maximum Daily Load (TMDL) process through a variety of projects and initiatives. The TMDL Case Study series provides successful real-world applications of the water quality-based watershed approach to state and local governments, showing them how to implement the TMDL process more fully using available technical tools and administrative approaches. The TMDL Technical Assistance (SWAT) Team provides short-term technical support to the Regions, states, and local governments that are developing and implementing TMDLs. The Watershed Screening & Targeting Tool (WSTT), which is a personal computer application, facilitates the preliminary, screening-level evaluations that are essential for water resource managers in federal, state, and local agencies who want to assess, compare, and prioritize the water resource issues within their jurisdictions. P-Route, a screening-level pollutant routing model that can take nonpoint source load estimates from the watershed screening model, which is part of WSTT, and combine them with point source loading estimates on a watershed scale, can be useful for conducting TMDL analyses. Several other modeling tools are also available to analyze receiving water impacts when developing a TMDL. Finally, the TMDL Special Interest Group (SIG) on the Nonpoint Source Bulletin Board System (NPS BBS) provides immediate access to all of the TMDL program documents—the Case Study Series, the TMDL guidance—and EPA water quality models, in addition to encouraging candid discussion and the exchange of information on TMDL issues.

What is the purpose of the *TMDL Note* series?

Information gathered during the completion of TMDLs, from papers on continuing technical and program issues, and from responses to SWAT Team requests might be useful to many people involved in developing TMDLs. Consequently, the Watershed Branch of EPA's Office of Water would like to initiate the *TMDL Note* series as a forum for summarizing and quickly distributing this useful information, which might not be disseminated easily through other TMDL outreach activities. The purpose of the notes is to facilitate the transfer of information among engineers and scientists, TMDL program staff at EPA headquarters, TMDL program staff at EPA Regions, and state and local agency personnel.

Any Questions or Comments? Please contact Theresa Tuaño, Watershed Branch, Office of Water, U.S. Environmental Protection Agency, 401 M Street SW (4305F), Washington, DC 20460, phone 202/260-7059, fax 202/260-7024.

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EPA

Watershed Protection: TMDL Note #2

Bioassessment and TMDLs

Background

Total Maximum Daily Loads (TMDLs) allocate allowable loads among different pollution sources so that appropriate control actions can be taken, water quality standards achieved, and human health and aquatic resources protected. To attain applicable water quality standards effectively, all sources of pollution to surface waters must be considered, including nonchemical stresses such as habitat alteration and hydromodification. This requires incorporating evaluations of the physical and biological components of aquatic ecosystems. Biological assessments (bioassessments) are well-suited to identifying aquatic life use impairments and evaluating their relative magnitude.

Bioassessment is the evaluation of ecosystem condition using integrated assessments of habitat and biological communities and comparing the results of the assessments to empirically defined reference conditions. Once an impairment is identified, other techniques, such as chemical sampling and toxicity testing might be needed to determine the cause(s) of impairment and sources of stress so that appropriate mitigation strategies can be designed and implemented. Bioassessments performed through time provide information about the ecological integrity (i.e., the condition of an unimpaired ecosystem as measured by combined chemical, physical, and biological attributes [Barbour et al., 1992]) of the waterbody and can indicate whether pollution control actions are achieving the biological endpoints that might be specified by a TMDL. They are particularly valuable for assessing the effects of physical habitat degradation on biological resources. Bioassessments can lead to substantially more accurate water resources assessments by explicitly linking biological and physical habitat evaluations with chemical water quality determinations.

Why is ecological regionalization important?

The TMDL process is a geographically-based approach to preparing load and wasteload allocations for sources of stress that might impair waterbody integrity. The geographic nature of this process can be complemented and enhanced by using ecological regionalization as part of bioassessment activities.

Ecosystems with similar spatial patterns can be grouped into ecoregions, which can be developed using mapped variables, such as hydrologic units, land-surface form, soil type, potential natural vegetation, and land use. Naturally occurring biotic assemblages would be expected to differ among ecoregions but to be relatively similar within a given region. One of the key tests for determining the validity of ecoregions is to establish that variability within regions is less than between regions. The ecoregion concept provides a geographic framework for more efficient aquatic resource management. A logical result of applying regionalization is that similar water quality standards, criteria, and monitoring strategies are likely to be valid throughout a particular ecoregion, but should be modified to accommodate differences between regions (Gallant et al., 1989). Ecoregionalization provides a means of identifying sites that represent valid reference conditions for an entire region for biosurveys and assessments. This

can obviate the need to identify site-specific reference (i.e., minimally impaired) locations. These might not exist in many watersheds affected by urbanization and agriculture.

How can bioassessment be used in the TMDL process?

1. Identification of Water Quality-Limited Waters that Require TMDLs

The first step in the water quality-based approach is to identify waterbodies that do not meet water quality standards after required controls have been installed. See Figure 1. This requires reviewing water quality standards, evaluating monitoring data, and determining whether adequate controls are in place. Biological community and habitat impairments are identified by comparing biological monitoring data from waters of concern against a reference condition (i.e.,"pristine" or minimally impaired waters) (Plafkin et al., 1989). The ability to complete bioassessments relatively rapidly enables states to meet the biennial reporting requirement for a list of waters still needing TMDLs and priority waterbodies.

2. Priority Ranking and Targeting Listed Waters

For the second step, a state prioritizes its list of waters needing TMDLs and targets those waters for development of TMDLs within a specified period. While individual states define their own ranking process, the Environmental Protection Agency (USEPA) has encouraged the adoption of ranking processes that integrate the pollution control activities in a state with other resource management programs and activities that directly or indirectly relate to water quality. Bioassessment data can be used in the ranking and targeting process to determine the relative vulnerability or fragility of particular waterbodies as aquatic habitat. USEPA guidance (1991) lists this as a factor states might consider.

Ecoregionalization in Ohio

Ecoregionalization has been effectively used in Ohio to increase the utility of bioassessments for reporting under Clean Water Act §305(b). The development of ecoregions has allowed Ohio to identify previously undetected water quality impairment using biocriteria and bioassessments. A comparison of the waterbody impairments identified using biocriteria with waterbody chemical exceedances based on the Ohio Water Quality Standards was performed as part of Ohio's 1990 305(b) reporting. It showed that biological impairment was evident in 49.8 percent of the waterbody segments where no ambient chemical water quality exceedances were observed (Yoder, 1991). Biological and chemical assessments both indicated impairment (or lack of impairment) in slightly greater than 47 percent of the waterbody segments. The development of ecoregions and subecoregions was fundamental to the ability of biological assessments, in concert with biocriteria, to generate these results (Yoder, 1991; Shepard, 1993).

3. TMDL Development

This third step of the TMDL process involves the compilation and analysis of all available data, as well as any modeling that might be needed to prepare a TMDL for the stressor of concern. TMDLs can and should be developed for nonchemical stressors that are identified through biosurveys and habitat assessments. For example, biosurveys and habitat assessments are excellent tools for identifying where damaged riparian zones should be repaired in order to reduce stream temperature and bank erosion in cool and cold-water streams. These techniques can be useful for indicating where sediment loadings should be reduced to reduce stream channel embeddedness in trout and salmon spawning reaches. They can also indicate the size of impacted habitat.

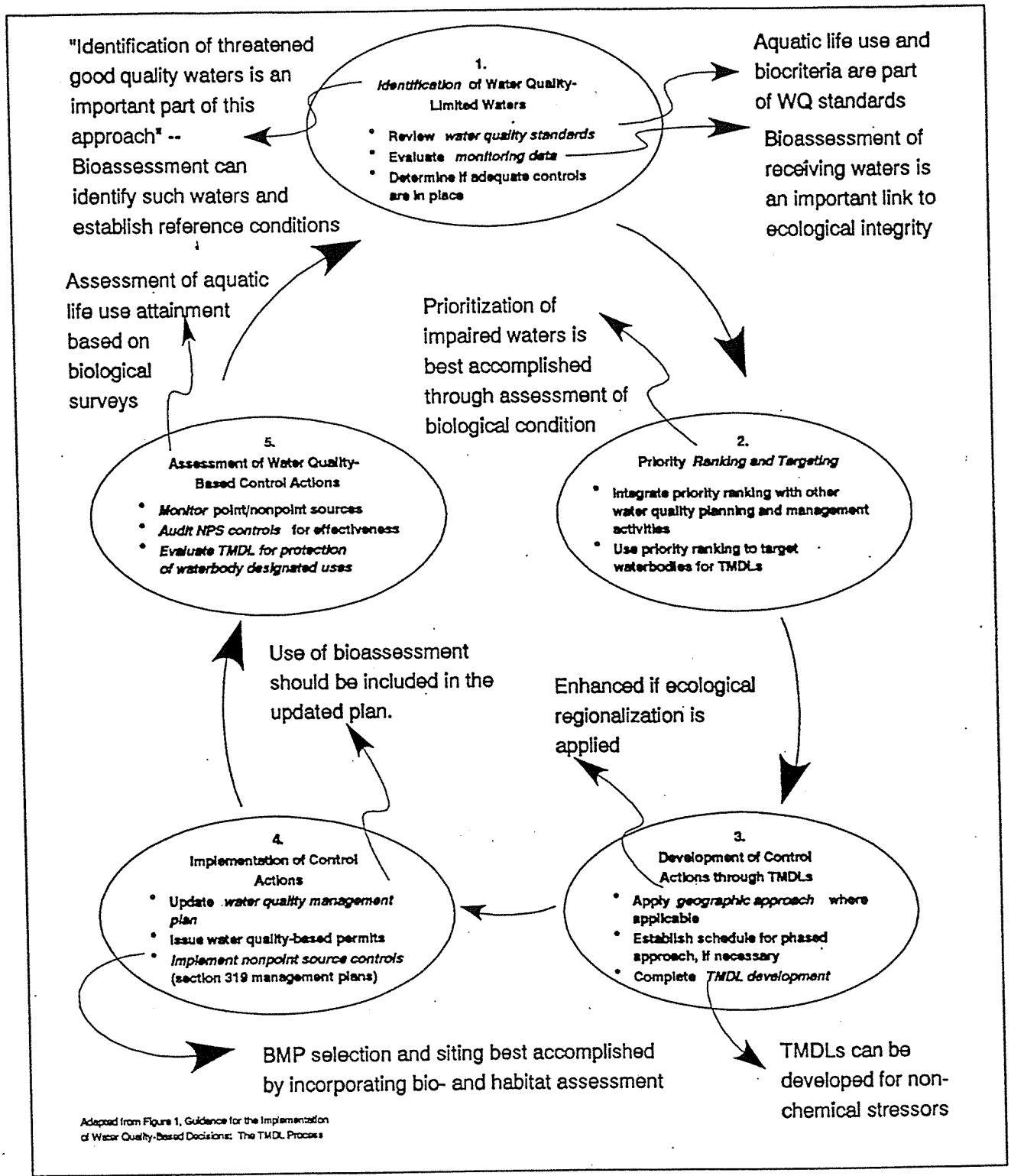


Figure 1. Using bioassessment in the TMDL process

4. *Implementation of Control Actions*

After TMDLs are developed, states must choose appropriate control actions, then site and implement them so that specific sources of stress can meet the allocations specified by the TMDL. Bioassessment and habitat data can be useful for selecting and siting required controls. For example, bioassessment and

habitat data might show that a particular stream reach is impaired due, in part, to poor habitat conditions and that those conditions are caused by sediment originating from streambank erosion upstream. Reestablishing vegetated riparian buffer zones would be a reasonable control action for this case, which would have the additional benefits of reducing stream temperature as the vegetation matured and increasing the food base for macroinvertebrates because allochthonous material would be added to the stream.

5. Assessment of Water Quality-Based Control Actions

Bioassessment can be used as one component of an integrated monitoring approach to measure pollutant inputs from point and nonpoint sources following implementation of control actions. For example, bioassessment can be used to determine the biological and habitat effects of a streambank fencing program to reduce streambank erosion in agricultural areas or the effects of controls applied to combined sewer overflows. Collection of monitoring data is essential for evaluating whether the TMDL that is developed for a waterbody is successful at protecting designated use(s).

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Any Questions or Comments? Please, contact Theresa Tuaño, Watershed Branch, Office of Water, U.S. Environmental Protection Agency, 401 M Street SW, Washington, DC 20460, phone 202/260-7079, fax 202/260-7024.

Spill Reporting

"It's Now or Never"

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Marianne Baker joined the Texas Water Commission in 1993 after receiving her J.D. from the University of Texas at Austin. She obtained her undergraduate degree in 1985 from Trinity University in San Antonio.

In addition to the Spill Rules, Ms. Baker is also working on the new TNRCC procedural rules, as well as EPA authorization for Texas' Underground Injection Control program. She currently works on industrial and hazardous waste permitting cases and Superfund matters. While at the agency, she has also handled industrial and hazardous waste enforcement cases, as well as a variety of water utility cases.

Outside work, Ms. Baker is in her second year as a director of Austin Young Lawyers, as well as the chair of the Travis County Bar Association mentor committee. In her copious free time, she grows cucumbers, eggplant, peppers, fish, herbs and a rainbow of yellow, orange & red and striped tomatoes. She is also active in the Bar & Grill committee and has served as a coach for several U.T. moot court teams.

TNRCC Spill Reporting and Response Rules

7th Annual
Texas Environmental Superconference
August 3-4, 1995

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Texas Natural Resource Conservation Commission
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TNRCC Spill Reporting and Response Rules

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TNRCC Spill Reporting and Response Rules

1. Introduction

The Texas Natural Resource Conservation Commission (TNRCC) is in the process of promulgating rules that will direct the regulated community on how to report spills. On August 9, 1994, the Texas Natural Resource Conservation Commission (TNRCC or Commission) proposed new Spill Prevention and Control Rules in the Texas Register. 19 Tex. Reg. 6204 (1994). The TNRCC withdrew the proposed rules on January 27, 1995. 20 Tex. Reg. 433 (1995). Due to the volume of oral and written comments (nearly 700 pages), the agency opted to withdraw the proposed rules to allow additional time to consider the comments. The TNRCC continued to work on the rules and a new proposal is almost ready for publication in the Texas Register.

For many years, the Texas Water Code has required spill reporting and response under section 26.039 and section 26.268. These statutes provide little guidance on the details of reporting and responding to spills. The Spill Rules were created an effort to clarify the Texas Water Code's statutory requirements for spill reporting.[1] Comments on the earlier version of the rules indicated that the rules did not fully achieve that objective. Thus, they have been substantially revised to provide a simple framework that should give greater certainty in determining the proper actions.

The Commission hopes these rules will clarify the decision making of the responsible persons, inform potentially affected persons of regulatory expectations, and assure consistency and cost effectiveness of agency response. Moreover, compliance with statutory mandates should be easier because of improved clarity of expectations. In short, these rules should provide greater certainty for everyone with regard to how spill response should occur, and what can be expected from TNRCC staff in spill situations.

If the new draft rules are adopted, they will be codified in Chapter 327 of Volume 30 of the Texas Administrative Code. The new draft will be cited throughout this paper as *Spill Rules § 327.xx*. This paper will review each section of the new draft and give a brief overview of some of the comments to the prior proposal. It will then explain how the new draft rules have changed in response to those comments. The information in this paper is current as of July 30, 1995. Some changes are possible before the proposal goes to the Texas Register.

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[1] The word "spill," when used in this paper, is intended to encompass "discharge or spill" as defined in § 327.2 of the new rules.

2. Applicability

One of the purposes of the proposed Spill Rules is to establish a comprehensive reporting and response program applicable to all spills under the TNRCC's jurisdiction. The rule defines this as all spills "that result in a release to the environment within the territorial limits of the State of Texas, including the coastal waters of this state." *Spill Rules* § *327.1(a).* The definition of "discharge" and "spill" is essentially the same definition used in the Texas Water Code §§ 26.039 and 26.263:

> Discharge or spill - An act or omission by which oil, hazardous substances in harmful quantities, or other substances, are spilled, leaked, pumped, poured, emitted, entered, or dumped onto or into waters in the State of Texas or by which those substances are deposited where, unless controlled or removed, they may drain, seep, run, or otherwise enter water in the State of Texas.

Spill Rules § *327.2.* The Spill Rules do not apply to the following spills:

a. oil spills in or near coastal waters, which are under the exclusive jurisdiction of the Texas General Land Office, *Spill Rules* § *327.1(b)(1)*;

b. spills under the exclusive jurisdiction of the Railroad Commission of Texas - usually from activities associated with oil and gas exploration and production, *Id. at* § *327.1(b)(2)*;

c. air releases, *Id. at* § *327.1(b)(3)*;

d. lawful placement of waste or accidental discharge of material into solid waste management units, *Id. at* § *327.1(b)(4)*;

e. spills from underground and aboveground storage tanks, *Id. at* § *327.1(b)(5)*;

f. lawful use of fertilizers and pesticides, *Id. at* § *327.1(b)(6)*;

g. permitted discharges, including exceedances of permit limits if reported under the permit, *Id. at* § *327.1(b)(7)*;

h. continuous, stable discharges reported to EPA under 40 CFR § 302.8, *Id. at* § *327.1(b)(8)*;

i. transportation spills if reported under 49 CFR §§ 171.5 and 171.16, *Id. at* § *327.1(b)(9).*

All of these exemptions are listed in section 327.1. In the earlier version of the rules, they were listed in two different places. In response to comments, they were consolidated and a specific exemption for air releases was added. Clarification was also added that permitted discharges do not have to be reported if they are reported under the permit.

3. Initial Notifictation

The agency's practice has been to require reporting of all spills, no matter what or how much was spilled, or where it was spilled. The implication embedded in this approach is that all quantities, no matter how minute, will be harmful. While that concept was viable when the statutes were first enacted, the improvement in risk assessment methodologies in recent years merited a re-examination of agency policy.

Along those lines, many commenters expressed the concern that reporting all spills, regardless of the potential harm, was very costly. Moreover, the resources that both the agency and the regulated community expend on reporting and tracking spills that are unlikely to be harmful could be more effectively used for remediation. To that end, the new draft rules adopt the concept of "reportable quantities" that are already part of the federal spill reporting requirements established under the Comprehensive Environmental Response, Cleanup and Liability Act (CERCLA). Thus, a "reportable discharge or spill" is:

> a discharge or spill of oil, hazardous substances or other substances into the environment in a quantity equal to or greater than the reportable quantity in any twenty-four (24) hour period.

a. Reportable Quantities

Reportable quantities (RQ's) are based on the type of substance spilled and whether the spill was to land or water. *Spill Rules* § *327.4.* Spills are divided into hazardous substances, oil, and other substances.

i. Hazardous substances. The reportable quantities are different for spills to land and water. The RQ's for hazardous substance spills are:

(1) to land - the reportable quantity is the quantity designated as the "Final RQ" in Table 302.4 in 40 CFR § 302.4;[2] and

(2) to water -
- (a) the reportable quantity is the quantity designated as the "Final RQ" in Table 302.4 in 40 CFR Section 302.4 for those hazardous substances with Table 302.4 RQs equal to or less than one hundred (100) pounds;
- (b) for substances with RQs greater than 100 pounds, the reportable quantity is 100 pounds.

Spill Rules § *327.4(a).*

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[2] This is the likely final reportable quantity for hazardous substance spills to land. During the rulemaking process, the agency has considered setting different RQ's for on-site and off-site spills or adopting a separate RQ for publicly accessible areas. Be sure to check the final rule on this point.

ii. **Oil.** The rules use the Clean Water Act definition for oil - oil of any kind or in any form, including but not limited to petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil. *Spill Rules* § *327.2*; Clean Water Act, 33 U.S.C. § 1321(a)(1). The reportable quantities for oil spills are:

(1) to land - five (5) barrels for spills or discharges of oil onto land; or
(2) to water - any discharge or spill of oil directly into water in the state of a quantity sufficient to create a sheen.

Spill Rules § *327.4(b)*.

iii. **Other substances.** The reportable quantity for a spill into water in the state is one hundred (100) pounds. There is no requirement to report spills to land. *Spill Rules* § *327.4(c)*. Other substances are substances other than hazardous substances or oil that may be useful or valuable and therefore are not ordinarily considered to be waste, but that will cause pollution if discharged into water in the state. *Spill Rules* § *327.2*.

Discharges directly to water present a greater likelihood for negative impacts to human health and the environment than do releases to the land. The 100 pound RQ should strike an appropriate balance between the competing concerns of (a) avoiding unnecessary overreporting of spills that are less likely to impose negative impacts on human health and the environment and (b) allowing the Commission to know about, and track cleanup of, larger discharges that are more likely to be harmful. Further, this amount, like CERCLA RQ's generally, provides the regulated community with certainty as to when a spill or discharge is reportable.

It is important to distinguish between reporting obligations and cleanup obligations. The proposed RQ's do not provide an exemption from remediation requirements. Therefore, releases that are either exempt from these reporting rules or are not reportable because they fall below the applicable RQ are still subject to all applicable cleanup requirements provided by Commission rules or statutes. Failure to remediate spills or discharges according to Commission rules can result in enforcement and penalties.

b. Who Reports

The Spill Rules require "responsible persons" to report spills. *Spill Rules* § *327.3(b)*. Section 327.2 defines responsible person as:

i. the owner, operator, or demise charterer of a vessel from which a discharge or spill emanates; or
ii. the owner or operator of a facility or unit from which a discharge or spill emanates; or
iii. any other person who causes, suffers, allows, or permits a discharge or spill.

c. When Should the Report be Made?

The responsible person must report a spill as soon as possible, but no later than 24 hours after discovery of the spill. *Spill Rules § 327.3(b).* This allows time to determine, for example, whether a spill of petroleum products exceeded 25 gallons. However, the responsible person must always report the spill within 24 hours. Thus, if, at 24 hours, the determination of whether a reportable quantity has been spilled is not complete, the spill must be reported.

The prior proposal required reporting within one hour after the determination that a reportable spill had occurred but not later than twenty-four hours after discovery. Numerous commenters wanted the one hour period lengthened and others wanted longer than 24 hours to determine whether a reportable spill occurred. Instead, the new language tracks Texas Water Code § 26.039. Requiring reporting "as soon as possible" emphasizes immediate reporting while allowing greater flexibility for spills in remote locations.

d. How to Report

The responsible person may notify the agency in any reasonable manner including by telephone, by facsimile, in person, or by any other method approved by the commission. *Spill Rules § 327.3(c).*

e. During normal business hours, the responsible person may notify the regional office for the TNRCC region where spill occurred; or
f. after normal business hours, the responsible person may call the TNRCC 24 hour number, the Texas Emergency Response Center, or the TNRCC designated toll free number.

Task Force 21 and several commenters asked about establishing a 1-800 number for simplified spill reporting. Currently, an inter-agency effort is underway to establish such a system. When the project is complete, calling the 1-800 number will comply with § 327.3 as currently drafted.

g. Information to Include in the Report

The initial notification is intended to provide the agency with the information necessary to establish that an effective response to the spill or discharge is taking place. The report must provide, to the extent known, the information in the following list:

h. the names, addresses and telephone numbers of the person making the telephone report, the responsible person and the contact person at the site;
i. the date, time, and location;
j. a specific description of the spilled substance;
k. an estimate of the quantity spilled;
l. the duration of the incident;

m. the name or description of the waters or soil affected or threatened by the spill;
n. the source of the spill;
o. a description of the extent of actual or potential water pollution or harmful impacts to the environment;
p. a description of any actions that have been taken, are being taken and will be taken to contain and cleanup the site of the spill;
q. any known or anticipated health risks;
r. the identity of any governmental representatives, including local authorities, or third parties responding to the spill; and
s. any other information that may be significant to the response action.

The new draft specifically allows responsible persons to submit reports prepared for other agencies if they contain, or are supplemented to contain, all the required information.

4. Follow-Up Notification

The responsible person must immediately notify the agency whenever necessary to provide information that would trigger a change in the response to the spill. *Spill Rules § 327.3(e).* The earlier proposal required both a 24 hour update and an update whenever there was a significant change in the quantity, quality or location of the spill. It also included a mandatory report 10 days after the initial spill report, even if circumstances had not changed. Several commenters questioned the necessity of the 24 hour update and others found the term "significant change" unclear. Commenters on the 10 day followup thought that it would not be worthwhile because it was not premised on changed circumstances and would not be long enough to receive any useful laboratory data. The new draft removes the 24 hour and 10 day updates and clarifies that the important issue in a follow-up notification is to alert the agency of changes that might require different equipment, personnel, safety precautions or a speedier response.

5. Other Notifications

Currently, the Spill Rules do not replace reporting requirements in any other rule or statute. *Spill Rules § 327.3(i).* Sometime in the future, the Commission intends to consolidate all state reporting requirements into Chapter 327. Until then, duplicative reporting may be required under other rules or statutes. However, in this rulemaking, the Commission has tried to eliminate duplicative reporting wherever possible. For example, in the earlier proposal, continuous and stable spills reported to the EPA under 40 CFR § 302.8 also had to be reported to the Commission. The new draft rules specifically do not apply to spills reported to EPA under § 302.8. *Spill Rules § 327.1(b)(8).*

a. Local Governmental Authorities - Imminent Health Threat

If the spill creates an imminent health threat, the responsible person must immediately notify and cooperate with appropriate local emergency authorities, such as the fire department, fire marshall, police, health authority, or Local Emergency Planning Committee (LEPC). *Spill Rules* § *327.3(g)*. This subsection contemplates reliance upon the local emergency management plan for notification and evacuation of affected persons when circumstances indicate an imminent health threat. In the absence of such a plan, however, responsible persons would be required to notify potentially affected persons of the threat.

b. Property Owners and Residents

As soon as possible, but no later than two weeks after discovery of the spill, the responsible person must reasonably attempt to notify the owner (if identifiable) or occupant of the property where the spill occurred as well as the occupants of any property that the responsible person reasonably believes is adversely affected. *Spill Rules* § *327.3(h)*. This is required in all situations, not just when an imminent health threat exists.

6. Alternative Reporting Plans

Responsible persons may submit alternate notification plans for Commission approval. *Spill Rules* § *327.3(b)(j)*. This may allow businesses to tailor their reporting requirements to individual facilities.

7. Response Actions Required

a. Response

Under the Spill Rules, responsible persons must immediately begin reasonable response actions and cooperate fully with the executive director and the local incident command system. *Spill Rules* § *327.5(a)*. The response actions may include, but are not limited to:

i. arrival of the responsible person or response personnel who have been hired by the responsible person at the site of the discharge or spill;
ii. initiation of efforts to stop the discharge or spill;
iii. minimization of the impact to the public health and the environment;
iv. containment of the spill;
v. neutralization of the effects of the incident;
vi. removal of the material and substances spilled; and
vii. management of the wastes.

The earlier proposal required the responsible person to ensure that properly trained personnel respond to the discharge or spill and that they are provided with proper protective equipment. Several commenters noted that it would be difficult for a responsible person to be responsible for training and equipment for personnel from contract responders. The Commission recognized that these matters were more properly addressed by agencies with direct responsibility for occupational health and safety. Thus, the new draft has been revised to remove that requirement.

b. Response Description

Upon request of the local government responders or the executive director, the responsible person must provide a verbal or written description, or both, of the planned response actions and all actions taken before the arrival of the local governmental responders or the executive director. *Spill Rules* § *327.5(b)*. When the commission on-scene coordinator requests this information, the responsible person is subject to possible additional response action requirements by the executive director. *Id.*.

The information will serve as a basis for the executive director to determine the need for:

i. further remedial actions by the responsible person;
ii. initiation of state funded actions for which the responsible person may be held liable; and
iii. subsequent reports on the response actions. *Spill Rules* § *327.5(b)*.

c. Post-Response Information

Within 30 working days after discovering the spill, the responsible person must submit written information to the appropriate TNRCC regional manager describing the details of the event and the response action. *Spill Rules* § *327.5(c)*. The regional manager has discretion to extend the 30 day deadline. The documentation must contain one of the following items:

i. a statement that the discharge or spill cleanup has been completed and a description of how the cleanup was conducted. The executive director may request additional information;
ii. a request for an extension of time to complete the response action, along with the reasons that necessitate the request. The request must include a projected work schedule outlining the time required to complete the cleanup. The executive director may grant an extension up to 180 days. Unless otherwise notified by the appropriate regional manager or the Emergency Response Team, the responsible person shall proceed according to the terms of the projected work schedule; or
iii. a statement that the discharge or spill cleanup has not been completed nor is a complete cleanup expected within a 180 day extension. The statement

must explain why a complete cleanup is not feasible and include a projected work schedule outlining the remaining tasks to complete the cleanup. This information will also serve as notification of remediation under the Risk Reduction Rules in § 335.8 and Chapter 335 Subchapter S, and will trigger the applicability of those rules.

8. Record Correction

Many industry representatives have been concerned about creating permanent agency records and possible adverse publicity if they report a spill and then later find out that it did not have to be reported. To avoid creating a situation where businesses hesitate to report a spill, the new draft addresses those concerns in several ways. First, notifying the agency that a spill has occurred will not be construed as an admission that pollution has occurred.

Second, if, after reporting a spill, the responsible person determines that a reportable spill did not occur, the responsible person may send a letter to the agency documenting that determination. If the executive director agrees, the notification and all supporting documentation will be removed from the agency's records within thirty days and returned to the responsible person. If the executive director disagrees with that determination, the responsible person will be notified within thirty days.

9. Historical Contamination, Emergency Planning Forms and Other Extinct Requirements

Based on the comments received, many requirements were removed from the earlier proposal. Some were removed because they were unclear, others because the possible benefit did not justify the cost. It is possible that future rulemakings may incorporate some elements of the removed requirements.

a. Historical Contamination

Historical contamination was one of the most controversial concepts in the earlier proposal. Rules on historical contamination were proposed to clarify obligations for contamination that is not attributable to any known source. The Commission has received an increasing number of reports of contamination discovered during property transfer site assessments as well as many requests for information about contamination by adjacent or prospective property owners. In response to these concerns, the Commission defined a reporting obligation for "historical contamination."

While some commenters were in favor of a reporting obligation, several others objected vehemently, calling the requirement overbroad, vague, oppressive, burdensome and probably

unconstitutional. Many felt that it was not related to "spill prevention and control" or that the TNRCC does not have authority
to promulgate rules related to historical contamination.

One of the most controversial parts of the rule was the requirement that historical contamination had to be reported by a broad class of people rather than just the responsible person. The historical contamination rule required any "person or entity discovering" the contamination to submit a written report. A few commenters felt that this was a valuable part of the rule, since it would help prevent situations where contaminated soils might be improperly handled or where a building is built on top of a contaminated site. They also thought that it would give consultants the freedom to report contamination without having to worry about employers or landowners who might want to conceal the problem.

The majority of the commenters, however, did not share this point of view. They expressed a wide range of concerns about the reporting obligation. They worried about conflicts with confidentiality and contractual obligations, and about the unrealistic burden that might fall on members of the general public. Generally, most commenters felt that if historical contamination was to be reported at all, the discoverer should be required to report it to the responsible person and the responsible person should have the burden of reporting it to the TNRCC. Many commenters also believed that requiring consultants to report historical contamination would critically reduce the incentive to conduct environmental site assessments.

While the Commission did not necessarily agree with all of these concerns, several do have merit. Upon review, the agency determined that circumstances that indicated an imminent or substantial threat to human health or the environment generally arise either at facilities already subject to regulations adequate to address the discovered contamination, or in real estate transactions. For real estate transactions, current laws requiring disclosure of property conditions should be adequate to protect the public from contamination threats. In the final analysis, the ever present concern about superfund liability is sufficient incentive for property owners and facility operators to clean up known areas of contamination. Where responsible persons are unwilling or unable appropriately cleanup a site, the superfund process is already available. Thus, the historical contamination reporting and remediation requirements were removed from the current draft.

b. Emergency Planning Form and Emergency Coordinator

Likewise, the requirement for "Emergency Planning Forms" and "Emergency Coordinators" for most facilities and vessels was removed from the current draft. These requirements were originally proposed as a means to ensure that all members of the regulated community, particularly those without contingency plans, gave some advance thought to responding to a spill.

However, most industry representatives felt that these requirements were unnecessary and burdensome. Some thought that they were duplicative of other spill prevention and control

requirements and that contingency plans should be sufficient. Others had problems applying the requirements to trucks or railroad cars, or to equipment such as electrical transformers.

c. Records of Unreported Spills

The earlier proposal required registered facilities to maintain for three years records of all spills that they determined were not subject to the notification requirements of the Spill Rules. Several commenters wanted a de minimis level below which spills were not subject to recordkeeping requirements. Others wanted the agency to specify the goal for requiring facilities to keep records of non-reportable spills. Upon adopting reportable quantities, the Commission decided this requirement was unnecessary.

d. Access

While not extinct, the provision allowing Commission personnel access to property were taken out of the current draft of the Spill Rules. Although the provision was taken almost verbatim from statute, numerous commenters thought that it was vague, overbroad and possibly unconstitutional. Others wanted to require the agency to give 24 hour notice before going onto private property. Since the right of access is already granted by statute, the Commission opted to remove the language from the current draft.

OIL AND HAZARDOUS SUBSTANCE SPILL REPORTING AND RESPONSE*

Robert Pressley
Kelly, Hart & Hallman

I. Introduction

The focus of this paper is on Texas environmental laws and regulations pertaining to spill notification and response requirements. A brief overview of the federal regulatory scheme is set out in Section II below. The purpose of this paper is to clarify under which circumstances notification should be given to various state, and to a lesser extent, federal agencies.

There are three Texas agencies with authority over the reporting and remediation of spills and releases of oil and hazardous substances.

A. Texas Natural Resource Conservation Commission ("TNRCC" -- formerly the Texas Water Commission)

The TNRCC has authority over discharges of substances into or that threaten the waters of the state, other than coastal oil spills. The TNRCC also has authority over spills of solid waste and releases from petroleum storage tanks.

B. Railroad Commission of Texas ("RCT")

The RCT has authority over spills relating to the production and transportation of oil and gas, and geothermal resources. The RCT also has authority over discharges resulting from the transportation of certain other substances.

C. General Land Office ("GLO")

The GLO has authority over spills of oil into or adjacent to Texas' coastal waters.

II. Federal Spill Reporting Requirements

A number of federal statutes impose reporting requirements and other duties on persons responsible for releases and spills. The United States Environmental Protection Agency ("EPA") is the federal agency with primary responsibility over spill regulation. However, other federal agencies also are charged with regulatory authority over certain types of spills. A discussion of the full spectrum of federal spill authority is beyond the scope of this paper. The federal spill reporting statutes of primary interest are listed below.

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A. Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")[1]

CERCLA requires that any person in charge of a facility must, as soon as he or she has knowledge of any release (except a federally permitted release) of a hazardous substance in excess of the "reportable quantity" (established under Section 102 of CERCLA), immediately report the release to the National Response Center.[2] There are civil and criminal penalties for failing to comply with the notice requirements.[3] The current telephone number for the National Response Center is 1-800-424-8802.

B. Emergency Planning and Community Right to Know Act ("EPCRA")[4]

EPCRA has a number of reporting requirements. Under Subtitle A, the owners or operators of facilities at which a hazardous chemical is produced, used, or stored must, in certain circumstances, provide notice of the release of specified hazardous materials.[5] Subtitle B has three additional reporting requirements. Section 311 of EPCRA[6] requires facilities at which hazardous chemicals are present in excess of specified thresholds to submit emergency planning and response authorities with copies of the material safety data sheets ("MSDS"), or a list of the substances for which they maintain MSDS documents. Under Section 312 of the Act,[7] the owners or operators of facilities required to submit a MSDS or list of MSDS chemicals under Section 311 also are required to submit to the state emergency response commission, local emergency planning committees, and local fire departments an annual inventory form detailing the amount and location of hazardous chemicals at the facility. Section 313[8] requires regulated facilities to report annually to EPA and the state on all environmental releases of specified toxic chemicals in excess of certain threshold quantities that are manufactured, processed, or otherwise used at the facility.

C. Resource Conservation and Recovery Act ("RCRA")[9]

A central purpose of RCRA is to require all persons who manage hazardous wastes to maintain reports and records related to their activities. RCRA requires the owner or operator of a facility that generates, stores, treats, processes or disposes of hazardous waste to:

(1) orally report any noncompliance, such as a spill, that may endanger health or the environment within 24 hours of becoming aware of the incident; and

(2) submit a written report describing the incident within five days.[10]

D. Clean Water Act ("CWA")[11]

Under Section 311 of the CWA, any person in charge of a vessel or facility must notify the National Response Center as soon as he or she has knowledge of any harmful discharge of oil or hazardous substance into waters of the United States.

E. Toxic Substances Control Act ("TSCA")[12]

1. Section 8(e)

Section 8(e) of TSCA requires chemical manufacturers and others to report to EPA any indication of adverse health effects caused by a chemical. Specifically, EPA must be informed whenever information is obtained that "reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment."

2. Polychlorinated biphenyls ("PCBs")

Section 6(e) of TSCA and the accompanying regulations set out special rules for spills involving PCBs. All spills involving 10 or more pounds of PCBs must be reported immediately to the National Response Center.[13] There are detailed regulations setting out cleanup and disposal requirements as well.[14]

III. Texas Spill Reporting Requirements

The Texas Water Code, Health and Safety Code, and Natural Resources Code provide the primary statutory authority for spill regulation in Texas. Regulatory authority is divided between the three state agencies as described below.

A. Texas Natural Resource Conservation Commission

The TNRCC is the state's lead agency for general spill reporting and response.[15] The TNRCC has drafted new rules concerning the reporting of discharges or spills pursuant to the Texas Water Code and the Texas Hazardous Substance Spill Prevention and Control Act. The agency envisions publishing the proposed rules in the Texas Register in the near future.

1. Statutory Provisions

a. Texas Water Code - Chapter 26

Generally speaking, unless authorized, the Texas Water Code prohibits any discharge or release of any pollutant, waste or other hazardous substance into or adjacent to the waters of the state.[16] The Water Code requires that any accidental discharge or spill of waste or other substances that may cause pollution must be reported to the TNRCC as soon as possible and no later than 24 hours after the occurrence.[17] The statute relies on the following definitions to aid in determining whether a spill must be reported.

(i) "Accidental Discharge" means an act or omission through which waste or other substances are inadvertently discharged into water in the state.

(ii) "Spill" means an act or omission through which waste or other substances are deposited where, unless controlled or removed, they will drain, seep, run, or otherwise enter water in the state.

(iii) "Other substances" means substances which may be useful or valuable and therefore are not ordinarily considered to be waste, but which cause pollution if discharged into water in the state.[18]

(iv) "Pollution" means the alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property or to the public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose.

A significant shortcoming of the statute is that it is difficult to identify all the substances that are regulated, and to calculate the amount of some substances that would create a state of pollution if allowed to enter waters of the state. The Texas statute does not rely on reportable quantities to trigger the reporting requirement. A reportable quantity refers to a threshold numerical value that, if met or exceeded, would trigger a requirement to report. The current draft of the TNRCC spill reporting rules indicates that the state will implement a reportable quantity program similar to the federal scheme. This is a significant departure from the agency's previous practice of relying on a qualitative analysis to determine when a spill must be reported and should be a significant aid in determining when reporting is required.

b. Health & Safety Code - Chapter 361

Subchapter I of the Solid Waste Disposal Act (as codified in the Texas Health and Safety Code) authorizes the TNRCC to order a person responsible for solid waste to prevent a release or to require the responsible person to take any action necessary to provide and implement a cost-effective and environmentally sound remedial action plan designed to eliminate substantial endangerment to the public health or safety, or the environment.[19] "A person responsible for solid waste" includes an owner or operator of a solid waste facility, a person who owned or operated a facility at the time of processing, storage or disposal of any solid waste, a person who arranged for the processing, storing or disposal of solid waste, or a transporter of solid waste.[20]

2. Regulatory Provisions

Solid waste spill regulations promulgated by the TNRCC are contained in Title 30 of the Texas Administrative Code ("T.A.C.").

a. Reporting Releases/Discharges at a Permitted Facility.

Section 305.145 of Title 30 of the Texas Administrative Code requires reporting of releases or discharges of solid waste from facilities operating under a solid waste storage,

processing or disposal permit. This section does not apply to solid waste spills unrelated to a permit. The following information must be reported within 24 hours pursuant to the standard solid waste permit conditions contained in 30 T.A.C. Section 305.125(9):

(i) the name, address and telephone number of the facility;

(ii) the name, address and telephone number of the owner or operator;

(iii) the date, time and type of the occurrence;

(iv) the name and quantity of material(s) involved;

(v) the extent of injuries, if any;

(vi) actual or threatened harm to the environment; and

(vii) estimated quantity and disposition of recovered material that resulted from the incident.[21]

b. Texas Oil and Hazardous Substances Contingency Plan

Chapter 26, Subchapter G of the Texas Water Code contains the Texas Hazardous Substance Spill Prevention and Control Act ("Act").[22] The Act sets forth the state's policy "to prevent the spill or discharge of hazardous substances into the waters of the state and cause the removal of such spills and discharges without undue delay."[23] The Act provides for the promulgation of rules necessary to prevent the spill or discharge of hazardous substances into waters of the state, and to conduct a spill response program.[24] To partially implement the Act, the state developed the Texas Oil and Hazardous Substances Contingency Plan (the "Plan").[25] This plan, drafted in 1988, currently exists as a guidance document, and will be supplemented by the agency's spill reporting rules when promulgated. Because the agency has not yet adopted final spill rules, a detailed description of the Plan is provided below.

The Plan requires that the Texas Emergency Response Center must be notified upon discovery of any spill of a harmful quantity of oil, hazardous substance, or other substance, or of a release or threatened release of a solid or hazardous waste.[26] The telephone number for the Texas Emergency Response Center is 512/463-7727. Under the Plan, the following definitions apply:

(i) "Discharge or Spill" occurs when a hazardous substance, oil, or other substance reaches waters of the state or (unless controlled or removed) will reach waters of the state. The terms do not include discharges authorized by permit or discharges regulated by the Railroad Commission or the General Land Office.[27]

(ii) "Harmful Quantity" means any quantity of a hazardous substance or other substance determined to be harmful to the environment or public health or welfare, or that may be reasonably anticipated to present imminent and substantial danger. Depending on the substance or where the spill occurs, the amount of a substance constituting a "harmful quantity" may be assigned a numerical value by EPA, or the TNRCC. Alternatively, a harmful quantity might simply be an amount that will "cause pollution" as defined in the Plan.[28]

(iii) "Hazardous Substance" means a substance designated as such pursuant to CERCLA or the Clean Water Act, or designated as such by the TNRCC.[29]

(iv) "Other Substance" is any substance, not necessarily a waste, that will cause pollution if discharged into waters of the state.[30]

(v) "Pollution" means alteration of the quality of, or contamination of, any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property, or to public health, safety or welfare, or impairs the usefulness or public enjoyment of the water.[31]

(vi) There is no definition of a "Threatened Release" in the Plan or guidance indicating when the agency should be notified absent an actual spill.

Part 2 of the Plan sets out the reporting requirements. Notice of a reportable spill should be made immediately by telephone and should include:

(i) the date and time of the release;

(ii) the type and quantity of material released and whether the substance is an extremely hazardous substance;

(iii) the exact location of the release, including the name of the waters involved or threatened, and the extent of actual and potential water pollution;

(iv) the source of the release;

(v) the name, address, and telephone number of the party responsible for the activity associated with the release;

(vi) the name and telephone number of the party in charge of operations at the site;

(vii) steps taken to contain and clean up the release and precautions taken to minimize impact;

(viii) the extent of injuries, if any;

(ix) any known or anticipated health risks associated with the incident and , where appropriate, advice regarding medical attention necessary for exposed individuals;

(x) possible hazards to the environment; and

(xi) identity of governmental and private sector representatives responding to the spill.[32]

A written report must be submitted within 15 days after the spill is detected and should include:

(i) the date and time of the release;

(ii) actions taken in containment of or response to the release;

(iii) any known or anticipated acute or chronic health risks associated with the release; and

(iv) where appropriate, advice regarding medical attention necessary for exposed individuals.[33]

As noted above, the Plan suffers from the same shortcomings found in the Water Code. It is difficult to determine when, for example, there has been a spill of an "other substance" in a quantity that creates "pollution" in a water body. The cautious approach is to report any spill that, in the manager's professional judgment, could contaminate surface or ground water. Presumably, the agency's proposed use of reportable quantities in the draft rules should enable the regulated community to better determine when the reporting requirements have been triggered.

c. Proposed Spill Rules

The new rules are designed to fill some of the gaps in Texas spill reporting rules by clarifying when a release must be reported to the TNRCC. The definitions found in the draft rules include:

(i) "Discharge or spill" -- an act or omission by which oil, hazardous substances in harmful quantities, or other substances, are spilled, leaked, pumped, poured, emitted, entered, or dumped onto or into waters in the State of Texas or by which those substances are deposited where, unless controlled or removed, they may drain, seep, run, or otherwise enter water in the State of Texas.[34]

(ii) "Environment" -- waters in the state, land surface or subsurface strata.[35]

(iii) "Hazardous substance" -- any substance designated as such by the EPA under CERCLA or the federal Clean Water Act, or designated as such by the TNRCC.[36]

(iv) "Other substance" -- substances other than hazardous substances or oil that may be useful or valuable and therefore are not ordinarily considered to be waste, but that will cause pollution if discharged into water in the state.[37]

(v) "Pollution" -- the alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property or to public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose.[38]

A person responsible for a facility must notify TNRCC as soon as possible, and no later than twenty-four hours, after discovering a spill of a regulated substance in a reportable quantity ("RQ").[39] This reporting requirement is more stringent than the rule for permitted facilities that allows an operator to report a spill within 24 hours of its discovery. Reportable quantities are determined based on the nature of the substance, and the location of the spill. The following chart identifies reportable quantities based on those criteria.[40]

Hazardous Substances

Spills on land

The RQ is the same as RQs listed on 40 CFR Table 302.4

Spills into waters in the state

The RQ is the same as RQs listed on 40 CFR Table 302.4 except for those substances on Table 302.4 with an RQ of greater than 100 pounds, in which case the RQ is 100 pounds.

Oil

Spills onto land

The RQ is five barrels

Spills into waters in the state

The RQ is whatever quantity is sufficient to form a sheen

Other Substances

Spills onto land

No Requirement to Report

Spills into waters in the state

The RQ is 100 pounds

One of the shortcomings of the proposed rules is that the regulated community still can not determine in all circumstances whether notice is required. By relying on RQs, the agency has made substantial gains in clarifying when notice must be given. However, notice must be given to local authorities if the spill creates an "imminent health threat," a term which is not defined in the rules. Because the rules are still unclear with respect to certain spills, it appears that taking a conservative approach to interpreting the rules could lead to unnecessary reporting.

It appears as though TNRCC understood that the proposed rules could lead to over-reporting. The rules would reward persons who, in an abundance of caution, submit notice when it is not required. Given that there are substantial sanctions available for failure to timely report, managers might rather risk over-reporting than failing to submit notice when it is not certain whether the reporting rules have been triggered. The proposed rules contain a provision that allows a person to rescind the notice if the person subsequently learns that notice was not required. If the TNRCC agrees that notice was not required, the agency will remove the notice form and supporting documentation from its files and return it to the person who submitted the report.[41]

A party who must submit notice may do so by telephone, facsimile, in person or by some other method approved by the TNRCC. The notice must include:

(1) name, address and telephone number of the person making the report;

(2) date, time, and location of spill;

(3) specific description or identification of the oil, hazardous substance or other substance discharged or spilled;

(4) estimate of the quantity discharged or spilled;

(5) duration of the spill incident;

(6) name of the surface water or description of the waters in the state or the soil affected or threatened by the discharge or spill;

(7) source of the discharge or spill;

(8) description of the extent of actual or potential water pollution or harmful impacts to the environment;

(9) if different from paragraph (1) above, the name, address, and telephone number of the responsible person and contact person at the location of the discharge or spill;

(10) description of any actions that have been taken, are being taken and will be taken to contain and cleanup the site of the discharge or spill;

(11) any known or anticipated health risks;

(12) the identity of any governmental representatives, including local authorities, or third parties responding to the discharge or spill; and

(13) any other information that may be significant to the response action.[42]

Follow-up notice is required within thirty days after the initial notice is submitted.[43] The follow-up notice should detail what actions were taken to remediate the spill. Finally, notice must be given as soon as possible to all property owners whose property was adversely affected by the spill.[44]

Absent from the proposed rules is a requirement that notification be made upon discovering historical contamination. That requirement was included in TNRCC's previous version of proposed rules.[45] Under certain circumstances, other TNRCC programs arguably require reporting of historical contamination. Under recently enacted legislation regarding voluntary cleanups, the person desiring to remediate contaminated property must submit, among other things, information regarding the operational history and the nature and extent of contamination or releases at the site.[46] That information could include historical contamination. Persons implementing remediation of contaminated sites under the agency's risk reduction rules also must provide general information regarding the nature of contaminants, which could include information regarding historical contamination.[47]

It is important to keep in mind what the rules do not cover. A release into the air does not constitute a release into the "environment" under the proposed spill rules. Reporting potentially would be required under Clean Air Act provisions, however. Furthermore, these rules address some, but not all, oil spills. For example, a release from a petroleum storage tank does not trigger the reporting rules.[48] It should be noted that spills qualifying for an exemption could be covered under some other program that requires reporting.

d. Spill Response

The person responsible for the activity or facility from which the spill occurs also is responsible for the containment and cleanup of the spill.[49] The Water Code defines "Responsible Person" as:

(i) the owner, operator or demise charterer of a vessel from which a spill emanates;

(ii) the owner or operator of a facility from which a spill emanates; or

(iii) any other person who causes, suffers, allows or permits a spill or discharge.[50]

The TNRCC is responsible for monitoring all removal operations and coordinating all state activities.[51] The TNRCC will ultimately determine whether containment and cleanup are adequate.[52]

e. Penalties

Under the Water Code, any person who violates any provision of the Texas Hazardous Substance Spill Prevention and Control Act, or a rule or order issued pursuant to Subchapter G of Chapter 26 of the Water Code or fails to undertake all reasonable actions to abate and remove the discharge or spill is subject to a civil penalty of not less than $100 nor more than $10,000 for each act of violation and for each day of violation.[53] Any person who knowingly falsifies records or reports concerning the prevention or cleanup of a discharge as provided in Subchapter G is guilty of a third degree felony.[54] Penalties also may be assessed under the Solid Waste Disposal Act.[55]

f. Cost Recovery

A person responsible for a spill or discharge is liable to the state for expenditures out of the Texas Spill Response Fund and for costs that would have been incurred by the responsible person if that person had fully carried out the duties mandated in Section 26.266 of the Water Code. The legislature has established a priority by which the state shall attempt to recover costs of a cleanup. First, direct reimbursement from the federal government is sought. If that proves insufficient or unavailable, the total or remaining costs are sought from the responsible person. Any responsible person who, after reasonable notice has been given by the Executive Director of the TNRCC, has failed fully to undertake all reasonable actions to halt and remove the discharge in accordance with state and federal requirements is liable to the state for twice the costs incurred by the state in responding to the discharge or spill.[56]

An immediate removal action by the TNRCC may be necessary whenever there exists a release or threatened release of hazardous wastes from a site listed on the state priority list for hazardous waste facilities that may cause irreversible or irreparable harm to the public health or the environment.[57] Upon alleviation of the immediate threat or danger, any additional activity

will be addressed as determined by the TNRCC through a remedial action program.[58] Reimbursement may be sought from the responsible party in accordance with the Solid Waste Disposal Act.[59] Cleanup and restoration activities will be considered complete when approved by the TNRCC, unless responsibility has been delegated to the Railroad Commission.[60]

g. Deed Recordation

Under Section 335.5 of the TNRCC's rules, if a spill of industrial solid waste, hazardous or non-hazardous, is closed in-place without removing contaminants to background or risk-based standards, the following information must be included in the county deed records of the county or counties in which the waste will be left in-place:

(i) a metes and bounds description of the portion or portions of land on which disposal of industrial solid waste or municipal hazardous waste will take place;

(ii) the class or classes of these wastes to be disposed of; and

(iii) the name and permanent address of the person or persons operating the facility where more specific information can be obtained.[61]

h. Leaking Storage Tanks

Regulations concerning releases from storage tanks are found at 30 T.A.C. Chapter 334. The reporting requirements are set forth below. Owners and operators of storage tanks must report a suspected release to the TNRCC within 24 hours if any of the following conditions are observed:

(i) discovery of a released regulated substance at the site;

(ii) unusual operating conditions;

(iii) monitoring results show a release; or

(iv) there is a breach in containment.[62]

Unless corrective action is initiated, an owner or operator must immediately investigate and confirm all suspected releases within 30 days.[63] An owner or operator is required either to conduct a system test (to detect leakage) or a site check (to detect contamination).[64] In the event that there is no evidence of a release after performing these tests, a report must be filed with the TNRCC detailing the investigative procedures and the results obtained.[65]

Owners and operators of storage tanks must contain and immediately clean up a spill or overflow within 24 hours and begin appropriate corrective action if there is:

(i) a release of petroleum that exceeds 25 gallons or that causes a sheen on nearby surface water, or

(ii) a release of a hazardous substance that equals its reportable quantity under CERCLA (See 40 CFR Part 302).[66]

If a petroleum spill is less than 25 gallons or a hazardous substance spill is less than its reportable quantity under CERCLA, the spill must be immediately contained and cleaned up. If cleanup cannot be accomplished within 24 hours, the TNRCC must be immediately notified.[67]

i. Corrective Actions

Sections 334.76 through 334.81 of the TNRCC rules identify corrective actions to be taken in the event of a release from an underground storage tank. These sections generally deal with:

(i) initial response to release;

(ii) initial abatement measures;

(iii) site check;

(iv) initial site characterization;

(v) free product removal;

(vi) investigation for soil and groundwater cleanup; and

(vii) corrective action plan.

B. Railroad Commission of Texas

1. Statutory Provisions

The Texas Legislature delegated a number of environmental regulatory functions to the RCT. This statutory delegation serves as the basis for the RCT's spill reporting regulations.

The RCT is authorized to exercise its authority pursuant to Section 91.101 of the Natural Resources Code to issue and enforce rules, permits, and orders to prevent pollution of surface and subsurface waters by activities associated with the exploration, development, or production

of oil or gas, or geothermal resources, including the transportation of oil or gas by pipeline.[68] The TNRCC is similarly authorized under Section 26.131 of the Water Code to issue orders and regulations to prevent pollution of surface and subsurface waters.[69]

2. Regulatory Provisions

The RCT spill regulations are contained in Title 16, Chapters 1 through 13 of the Texas Administrative Code.

a. General Requirements

The rules contain a general prohibition against polluting surface or subsurface waters. Section 3.8 of the Railroad Commission's rules addresses water protection. The regulations prohibit the pollution of surface or subsurface water by any person subject to regulation by the RCT.[70]

In the event of a fire, leak, spill or break, the operator is required to give a description of the event and amount of substance released. Initial notice must be made by telephone or telegraph, followed by a letter giving a full description of the event.[71]

b. Hazardous Material

Chapter 5 requires a railroad operator to report immediately by telephone to the RCT whenever it learns of a collision, derailment, fire, explosion, act of God or other event which involves a commodity classified as a hazardous material under 49 C.F.R. Part 172.[72] The information to be reported includes:

(i) name of the railroad;

(ii) name, title, and telephone number of the person making the report;

(iii) the time, date, and location of the incident;

(iv) the circumstances surrounding the incident; and

(v) the name of the hazardous substances involved.[73]

c. Hazardous Liquid

Chapter 7 requires reporting to the RCT of any accident involving an intrastate pipeline in which a hazardous liquid is released, where reporting would be required under 49 C.F.R. Part 195.

The operator must notify the agency's Pipeline Safety Section at the earliest practicable moment following discovery of the incident (not later than two hours). The Pipeline Safety Section will then notify the appropriate Oil and Gas District Office. Within 30 days of the discovery of the incident, a completed H-8 form (available from the Commission) must be submitted to the Oil and Gas Division. In situations specified in 40 C.F.R. Part 195, the operator must also file duplicate copies of the United States Department of Transportation form with the Pipeline Safety Section.[74]

Within 30 days of discovery of the incident, duplicate copies of a written report using the appropriate United States Department of Transportation form (as required by 49 C.F.R. Part 195) must be filed both with the U.S. Department of Transportation and the Pipeline Safety Section.[75]

When initially reporting either type of incident by telephone, the report must include:

(i) the company or operator name;

(ii) the location of the leak or incident;

(iii) time and date of the accident or incident;

(iv) fatalities or personal injuries;

(v) phone number of the operator; and

(vi) any other significant facts relating to the incident.[76]

Chapter 9 of the agency's rules requires the reporting of a release of liquified petroleum gas ("LP-Gas") during or following transfer, during container transportation, or because of an accident. In such an event, the licensee owning, operating or servicing the equipment is to notify the Commission's LP-Gas Division by telephone as soon as possible after the incident.[77]

Any loss of LP-Gas that is less than 1.0% of the gross gallons delivered need not be reported; however, any loss resulting from a pull-away (i.e., an accidental separation of a hose from a bulkhead, container, or dispensing equipment) must be reported.[78] Information to be reported includes:

(i) the date and time of the accident;

(ii) type of structure or equipment involved;

(iii) resident's or operator's name;

(iv) physical location;

(v) any injuries or fatalities;

(vi) whether a fire, explosion or gas leak occurred;

(vii) whether gas is still leaking; and

(vii) whether immediate assistance from the division is now requested.[79]

Following the initial phone report, a properly completed LPG 20 Form (Report of LP-Gas Incident Accident) must be submitted to the LP-Gas division and must be postmarked within 14 calendar days of the initial notification of the incident.[80]

C. General Land Office

1. Statutory Provisions

a. Oil Spill Prevention and Response Act ("OSPRA")[81]

The 72d Legislature amended the Texas Natural Resources Code by adding Chapter 40, known as OSPRA. OSPRA transfers authority for coastal oil spills to the General Land Office ("GLO").[82]

Under OSPRA, the GLO is the state's lead agency for the protection of the state's coastal waters from oil spills.[83] The Act gives the GLO broad authority to develop and enforce a regulatory program aimed at preventing, responding to, and remediating oil spills that pose a threat to coastal waters of the state.[84]

OSPRA gives the GLO regulatory authority over "facilities" and over "unauthorized discharges of oil" into or in close proximity to the state's "coastal waters."[85] OSPRA definitions include the following:

(i) "Facility" (or "terminal facility") means any waterfront or off-shore pipeline, structure, equipment, or device used for the purposes of drilling for, pumping, storing, handling, or transferring oil and operating where a discharge of oil from the facility could threaten coastal waters, including but not limited to any such facility owned or operated by a public utility or a governmental or quasi-governmental body.[86] It should be noted that this definition has been interpreted by the GLO as giving the GLO the power to regulate onshore facilities that are more inland than "on the waterfront" if those facilities are capable of "threatening coastal waters."[87]

(ii) "Unauthorized Discharge of Oil" means any discharge of oil, or any discharge of oil emanating from a vessel into waters adjoining and accessible from coastal waters, that is not authorized by a federal or state permit.[88] A "discharge of oil" is further defined as an intentional or unintentional act or omission by which harmful quantities of oil are spilled, leaked, pumped, poured, emitted or dumped into or on coastal waters or at a place adjacent to coastal waters

where, unless controlled or removed, an imminent threat of pollution to coastal waters exists.[89] A harmful quantity is "the presence of oil from an unauthorized discharge in a quantity sufficient either to create a visible film or sheen upon or discoloration of the surface of the water or a shoreline, tidal flat, beach, or marsh, or to cause a sludge or emulsion to be deposited beneath the surface of the water or on a shoreline, tidal flat, beach or marsh."[90]

(iii) "Coastal Waters" means waters within the jurisdiction of the State of Texas that are either subject to tidal influence or navigable by vessels that can carry at least 10,000 gallons of oil as fuel or cargo.[91]

It should also be noted that the Railroad Commission retains lead jurisdiction on abatement of oil spills of 240 barrels or less.[92]

2. Regulatory Provisions

The GLO rules are generally found in Chapters 1-25 of Title 31 of the Texas Administrative Code.

a. Discharge and Response Certification

The GLO promulgated regulations concerning spill prevention and preparedness as required by Section 40.109 of OSPRA. These regulations pertain to facilities which, under the GLO's regulatory scheme, anywhere on the coastal side of the "Coastal Facility Designation Line"[93] that the GLO determines, based on the quantity of oil handled and the precise location of the facility, require certification. Facilities inland of this line generally are not included in the definition of "facility" under the regulations.

The regulations provide that "[n]o (regulated) facility may commence or continue operations after January 1, 1993 without a discharge and response certificate issued by the GLO."[94] The certificate application requires the operator to, among other things, prepare and submit a description of the facility's "planned response actions," in the form of a response plan.

The regulations establish five categories of coastal facilities which are divided into three groups for the purposes of applying for certification. The five categories include the following:

(i) Exempt Facilities -- tanks of 1,320 gallons or less for farm or residential purposes only and certain exploration and production facilities.

(ii) Small Commercial Facilities -- commercial oil storage or transfer facilities with a capacity of 1,320 gallons or less.

(iii) Underground Storage Facilities -- waterfront facilities which store oil only in underground storage tanks.

(iv) Small Facilities -- facilities with a storage or daily transfer capacity of 10,000 gallons or less.

(v) Major Facilities -- facilities with a storage or daily transfer capacity of more than 10,000 gallons.[95]

Exempt Facilities need not apply for certification. Certification requirements for the other four types of facilities are set forth in three groups:

(i) Small Commercial and Underground Storage facilities must meet minimal requirements and are not subject to financial assurance requirements.[96]

(ii) Small Facilities must complete a more lengthy application.[97]

(iii) Major Facilities must complete an extensive application, which must include proof of training programs, and preventive measures such as leak detection and discharge prevention safety systems.[98]

If the requirements for certification are met, the GLO will issue a certificate, which has a term of five years. The facility owner is required to update the information in the application yearly. All material changes in discharge prevention response capability must be reported within ten days of the change. Certain personnel changes must be reported within 30 days.[99]

Vessels with a capacity of 10,000 gallons or more are regulated under OSPRA, but are not required to obtain certification; however, OSPRA does require that they operate pursuant to regulations issued under the Clean Water Act and Oil Pollution Act.[100] These vessels may be required to show such a plan and to report any actual or threatened unauthorized discharges before being granted entry to any Texas port.[101] Such vessels may be subject to GLO inspection.[102]

b. Notification Requirement

Any party responsible for an unauthorized discharge must immediately notify the Commissioner of the GLO of the discharge and undertake all reasonable actions to abate, contain, and remove pollution resulting from the discharge.[103] Regulations promulgated pursuant to OSPRA elaborate on this reporting requirement.

Both the person in charge of the facility and the person responsible for the discharge have a duty immediately to report the discharge to the GLO.[104] "Immediately" means within one hour of the time the discharge was discovered.[105] In determining whether notification was immediate, the GLO will consider the need for initial response actions, the accessibility of communication devices, the reasonableness of the efforts made to provide notice, and whether the discharge could have been discovered earlier.[106]

Notification must accurately describe:

(i) the substance and quantity actually or potentially discharged, and the rate of the discharge;

(ii) the time, location, and apparent cause of the discharge;

(iii) the size of the area actually impacted by the discharge and the area potentially impacted, and whether any environmentally sensitive areas will be affected;

(iv) the nature of any response actions undertaken, and the identity of the person or organization who has undertaken these actions; and

(v) the name and title of the responsible person, the person in charge, the person reporting the discharge, and the manner in which the responsible person and the facility or vessel involved may be contacted.[107]

The reporting duty is a continuing one, *i.e.*, where any material changes occur (*e.g.*, changes in the quality, quantity or location of the discharge), further notification must be provided to the GLO.[108]

If the discharge threatens to damage or pollute property other than that of the owner or operator or responsible person, the person in charge and the responsible person must make reasonable efforts to notify the owners of property threatened by the discharge. This includes taking steps to identify and contact such owners within a reasonable time period that allows them to take measures to minimize damage to their property.[109]

If the discharge immediately threatens public health, safety or welfare, then the responsible person and the person in charge must notify the appropriate local, health, fire, and law enforcement authorities.[110]

It should be noted that releases into coastal waters attributable to historical contamination associated with coastal lands might be jointly regulated by the GLO and either the RCT or the TNRCC. The conservative approach is to notify the GLO and any other state agency that would otherwise have authority over a spill occurring on land.

c. Response Procedures

Upon receiving notice of an actual or threatened discharge, the GLO will determine whether state response action is required. If assessment indicates the discharge is predominately a hazardous substance (more than 50% of a non-oil substance and is a hazardous substance as defined by the TNRCC), the GLO will coordinate the response action only until such time that the TNRCC can assume responsibility over the operations.[111] In response to a discharge, the

GLO may designate an on-site coordinator who will cooperate with any federal authorities in the assessing of the incident and the implementation and supervision of the response activities.[112]

The responsible person at the facility must initiate response action immediately. The responsible person must inform the GLO of the response strategy, including whether the facility's discharge prevention and response plan will be adequate. The strategy must also be reported to the on-site coordinator on a regular basis. If the responsible person is unwilling or unable to respond adequately, the GLO may take over.[113]

No person other than persons employed by the responsible person or a certified discharge cleanup organization under contract with the responsible person, or a person assisting in initial emergency cleanup may conduct cleanup operations unless approval is given by the on-site coordinator.[114] Disposal of waste from unauthorized discharges is to be only at sites properly permitted to accept the type of waste discharged. The responsible persons are to inform the on-site coordinator in writing of the name and location of the site where the waste will be disposed.[115]

The GLO will determine, in conjunction with the designated natural resources trustees of the State of Texas (the GLO, TNRCC, and Texas Parks and Wildlife), whether response actions are complete. The responsible person must file a written report of the discharge within 30 days of the response actions being declared complete, detailing the known extent of the damages to and loss of real and personal property. This report must also contain a listing of known damages to natural resources.[116] The designated natural resources trustees for the state may determine that the discharge has damaged natural resources and may then require the responsible persons to submit and execute a plan for remediation.[117]

d. Payment of Costs and Damages

OSPRA also creates the Coastal Protection Fund which serves as a source of immediately available funds for response to all unauthorized discharges.[118] The GLO is authorized to recover funds expended in claims for compensation for response actions from persons responsible for the unauthorized discharge.[119] Persons who incur response costs or who are entitled to damages as a result of an unauthorized discharge may receive compensation from the fund by filing a claim with the commissioner of the GLO.[120]

The fund is available for all "reasonable response costs" approved by the commissioner, all natural resource damages and other damages, except those caused by the negligence or willful misconduct of the claimant.[121] A person liable for an unauthorized discharge may not file a claim or seek reimbursement, unless that person can assert a defense such as act of war or terrorism, government action, act of God, or willful or negligent action of a third party.[122]

The claims procedures are set out in 31 Texas Administrative Code Section 19.53, and generally require claims to first be presented to the designated responsible person, then to the GLO. Where the claim exceeds $50,000, a claimant must look first to the federal fund before

seeking to recover from the GLO. Claims must be filed within 180 days from the date the claim first became eligible to be filed with the GLO, even if it is under consideration by the responsible person or federal fund.

The claim must be in writing, signed and verified by the claimant or the claimant's agent or representative, and set out the following information:

(i) whether it is for damages or response costs or both;

(ii) the cause, nature, and dollar amount of the claim;

(iii) whether the claim is covered by insurance or other benefits for which the claimant is eligible;

(iv) the amount and nature of any compensation or earnings the claimant received as a consequence of the unauthorized discharge; and

(v) an oath or affirmation that the same claim is not being pursued through any other claim, suit, settlement, or proceeding.[123]

e. Enforcement Measures for Violations of OSPRA

Section 40.251 of the agency's rules sets out a list of acts which constitute a violation of OSPRA and a Class A misdemeanor and are subject to various fines. This list includes:

(i) operating a facility or vessel without a proper plan or without establishing financial responsibility;

(ii) causing or allowing an unauthorized discharge of oil;

(iii) making false statements on an application; or

(iv) removing a vessel from the GLO's jurisdiction before showing financial responsibility.[124]

Additional penalties include administrative penalties and suspension of certificates.[125]

IV. Conclusion

Spill regulation in Texas remains complicated with a division of jurisdiction between three state agencies. When it appears, but it is not certain, that reporting might be required, the prudent approach is to notify the applicable agency. If it turns out that reporting was not required, subsequent actions can be taken to void the report. Generally speaking, spills of substances for which RQs have been promulgated must be reported to EPA and TNRCC. If the

release is an oil spill in a coastal area, notification should be given to the GLO. With a spill involving petroleum products, notice should be given to the RCT. When in doubt, the following "rule of thumb" should be remembered -- it is far better to notify too many agencies than too few.

1. 42 U.S.C. §§ 9601 *et seq.*
2. 42 U.S.C. § 9603(a).
3. 42 U.S.C. § 9603(b).
4. 42 U.S.C. §§ 11001 *et seq.*
5. 42 U.S.C. § 11004.
6. 42 U.S.C. § 11021.
7. 42 U.S.C. § 11022.
8. 42 U.S.C. § 11023.
9. 42 U.S.C. §§ 6901 *et seq.*
10. *See* 40 C.F.R. § 270.30(k)(6).
11. 40 C.F.R. § 300.300(b).
12. 15 U.S.C. § 2607(e).
13. 40 C.F.R. § 761.125.
14. *See* 40 C.F.R. § 761.125.
15. Tex. Water Code Ann. § 26.164(a) (Vernon Supp. 1993).
16. Tex. Water Code Ann. § 26.121 (Vernon 1988).
17. Tex. Water Code Ann. § 26.039(b) (Vernon 1988).
18. Tex. Water Code Ann. § 26.039(a)(1-3) (Vernon 1988).
19. Tex. Health & Safety Code Ann. § 361.272 (Vernon 1992).
20. Tex. Health & Safety Code Ann. § 361.271(1)-(4) (Vernon 1992).
21. 31 Tex. Admin. Code § 305.145(a)(2)(A-G) (West 1989).
22. Tex. Water Code Ann. §§ 26.261 *et seq.* (Vernon 1988 & Supp. 1993).
23. Tex. Water Code Ann. § 26.262 (Vernon Supp. 1993).
24. Tex. Water Code Ann. § 26.264 (Vernon 1988)

25. The Contingency Plan was promulgated prior to the 1991 Oil Spill Prevention and Response Act (Tex. Nat. Res Code Ann. ch.40 (Vernon Supp. 1993)) which shifts responsibility for coastal oil spills to the General Land Office.

26. Plan § 2.2.

27. Plan § 1.4(a) (The Water Code has revised the definition of "Discharge or Spill" to conform with the provisions of the 1991 Oil Spill Prevention and Response Act. The Water Code definition no longer includes any discharge to which Subchapter C, D, E, F, or G of Chapter 40 of the Natural Resources Code applies. *See* Tex. Water Code Ann. § 26.253(1) (Vernon Supp. 1993).

28. Plan § 1.4(e).

29. Plan § 1.4(f).

30. Plan § 1.4(i).

31. Plan § 4(j).

32. Plan § 2.3.

33. Plan § 8.33.

34. To be codified at 30 Tex. Admin. Code §327.2.

35. To be codified at 30 Tex. Admin. Code § 327.2.

36. To be codified at 30 Tex. Admin. Code § 327.2.

37. To be codified at 30 Tex. Admin. Code § 327.2.

38. To be codified at 30 Tex. Admin. Code § 327.2.

39. To be codified at 30 Tex. Admin. Code §327.3.

40. To be codified at 30 Tex. Admin. Code § 327.4.

41. To be codified at 30 Tex. Admin. Code § 327.3 (f).

42. To be codified at 30 Tex. Admin. Code § 327.3 (d).

43. To be codified at 30 Tex. Admin. Code § 327.5.

44. To be codified at 30 Tex. Admin. Code § 327.3 (h).

45. 19 Tex. Reg. 6204, 6211 (Aug. 9, 1994).

46. H.B. 2296 amending Tex. Health & Safety Code § 361.604.

47. 30 Tex. Admin. Code § 335.8.

48. To be codified at 30 Tex. Admin. Code § 327.1 (b)(5).

49. Plan § 4.1.

50. Tex. Water Code Ann. § 26.263(6) (Vernon 1988).

51. Plan § 4.2.

52. Plan § 4.1.

53. Plan § 4.2. *See also* Tex. Water Code Ann. § 26.268(b) (Vernon 1988).

54. Plan § 4.2. *See also* Tex. Water Code Ann. § 26.268(d) (Vernon 1988).

55. Plan § 4.2. *See also* Tex. Water Code Ann. § 26.268(a) (Vernon Supp. 1993).

56. Id.

57. Id.

58. Id.

59. Id.

60. Plan § 5.0.

61. 31 Tex. Admin. Code § 335.5(a).

62. 31 Tex. Admin. Code §§ 334.72 & 334.129.

63. 31 Tex. Admin. Code § 334.74 (West Supp. 1993).

64. 31 Tex. Admin. Code § 334.74 (1)-(2) (West Supp. 1993).

65. 31 Tex. Admin Code § 334.74(3) (West Supp. 1993).

66. 31 Tex. Admin. Code § 334.75(a) (West Supp. 1993).

67. 31 Tex. Admin. Code § 334.75(b) (West Supp. 1993).

68. Tex. Nat. Res. Code Ann. § 91.101 (Vernon 1993).

69. Tex. Water Code Ann. § 26.131 (Vernon 1988 and Supp.).

70. 16 Tex. Admin. Code § 3.8 (West Supp. 1993).

71. 16 Tex. Admin. Code § 3.20 (West 1988).

72. 16 Tex. Admin. Code § 5.612(b) (West 1988).

73. 16 Tex. Admin. Code § 5.612(c) (West 1988).

74. 16 Tex. Admin. Code § 7.84(a)(1).

75. 16 Tex. Admin Code § 7.84(a)(2).

76. Id.

77. 16 Tex. Admin. Code § 9.61(a) (West Supp. 1993).

78. Id.

79. 16 Tex. Admin. Code § 9.61(b).

80. 16 Tex. Admin. Code § 9.61(d).

81. Tex. Nat. Res. Code Ann. ch. 40 (Vernon Supp. 1993).

82. Tex. Nat. Res. Code Ann. § 40.004 (Vernon Supp. 1993).

83. Tex. Nat. Res. Code Ann. § 40.004 (Vernon Supp. 1993).

84. *See, generally,* Tex. Nat. Res. Code Ann. § 40.007 (Vernon Supp. 1993).

85. Tex. Nat. Res. Code Ann. § 40.003 (Vernon Supp. 1993).

86. Tex. Nat. Res. Code Ann. § 40.003(22) (Vernon Supp. 1993).

87. *See* 17 Tex. Reg. 6009 (1992).

88. Tex. Nat. Res. Code Ann § 40.003(24) (Vernon Supp. 1993).

89. Tex. Nat. Res. Code Ann. § 40.003(7) (Vernon Supp. 1993).

90. Tex. Admin. Code § 19.2.

91. Tex. Nat. Res. Code Ann. § 40.003(2) (Vernon Supp. 1993).

92. Tex. Nat. Res. Code Ann. § 40.053(b) (Vernon Supp. 1993).

93. 31 Tex. Admin. Code § 19.2(20) provides a detailed description of the Coastal Facility Designation Line. *See* 19 Tex. Reg. 2852-53 (Apr. 30, 1993).

94. 31 Tex. Admin. Code § 19.12 (West Supp. 1993).

95. 31 Tex. Admin. Code § 19.11(d)-(f) (West Supp. 1993).

96. 31 Tex. Admin. Code § 19.13(a) (West Supp. 1993).

97. 31 Tex. Admin. Code § 19.13(b) (West Supp. 1993).

98. 31 Tex. Admin. Code § 19.14 (West Supp. 1993).

99. 31 Tex. Admin. Code § 19.16(g) (West Supp. 1993).

100. 31 Tex. Admin. Code § 19.17 (West Supp. 1993).

101. Tex. Nat. Res. Code Ann. § 40.115 (Vernon Supp. 1993).

102. Tex. Nat. Res. Code Ann. § 40.116 (Vernon Supp. 1993).

103. Tex. Nat. Res. Code Ann. § 40.101(a)(1) & (2) (Vernon Supp. 1993).

104. 31 Tex. Admin. Code § .32(b) (West Supp. 1993).

105. 31 Tex. Admin. Code § 19.32(c) (West Supp. 1993).

106. Id.

107. 31 Tex. Admin. Code § 19.32(e)(1)-(6) (West Supp. 1993).

108. 31 Tex. Admin. Code § 19.32(f) (West Supp. 1993).

109. 31 Tex. Admin. Code § 19.32(g) (West Supp. 1993).

110. 31 Tex. Admin. Code § 19.32(h) (West Supp. 1993).

111. 31 Tex. Admin. Code § 19.33(a) (West Supp. 1993).

112. 31 Tex. Admin. Code § 19.33(b) (West Supp. 1993).

113. 31 Tex. Admin. Code § 19.34 (West Supp. 1993).

114. 31 Tex. Admin. Code § 19.35 (West Supp. 1993).

115. 31 Tex. Admin. Code § 19.36 (West Supp. 1993).

116. 31 Tex. Admin. Code § 19.37 (West Supp. 1993).

117. 31 Tex. Admin. Code § 19.38 (West Supp. 1993).

118. Tex. Nat. Res. Code Ann. § 40.151(b) (Vernon Supp. 1993).

119. Tex. Nat. Res. Code Ann. § 40.153 (Vernon Supp. 1993).

120. Tex. Nat. Res. Code Ann. § 40.157 (Vernon Supp. 1993).

121. Tex. Nat. Res. Code Ann. § 40.158(a) (Vernon Supp. 1993).

122. Tex. Nat. Res. Code Ann. § 40.158(b) (Vernon Supp. 1993).

123. 31 Tex. Admin. Code § 19.53(e) (West Supp. 1993).

124. Tex. Nat Res. Code Ann. § 40.251 (Vernon Supp. 1993).

125. Tex. Nat. Res. Code Ann. §§ 40.252-.254 (Vernon Supp. 1993).

Risk Reduction Rules

"Clean Up Your Own Backyard"

Robert Hahn

Mr. Robert Hahn is a geologist with experience in ground-water geochemistry, environmental risk assessment, and RCRA regulations. He received a Bachelor of Science degree in Geology from Texas A&M University in 1982 and a Master of Science degree in Geology emphasizing groundwater geochemistry from Texas A&M in 1985. From 1986 to 1991, Mr. Hahn worked in the Texas Water Commission's (TWC) Hazardous and Solid Waste and Ground-Water Enforcement units. At the TWC, he gained experience in RCRA permitting and corrective action for ground water. In 1990, he served as the TWC's chairman of the Risk Assessment Task Force, whose task was to develop proposed rules to include risk assessment based on cleanup criteria for the Hazardous and Solid Waste Division's RCRA and State corrective action programs. Mr. Hahn served as unit head for the TWC Ground-Water Enforcement Unit. While at the TWC, Mr. Hahn performed ground-water and solid waste compliance audits. At RMT/Jones and Neuse, Inc., Mr. Hahn is responsible for project management of geologic and hydrogeologic investigations, hazardous waste risk assessments, and corrective action planning.

Cleanup Your Own Backyard-Implementation of the Risk Reduction Rules

By Robert Hahn
RMT/Jones and Neuse, Inc.

Introduction

Late one night I had a friend call me telling me that he had bought a $120,000 house six months ago in a peaceful community that had recently discovered an environmental problem. During the familiar process of trying to sell a large piece of vacant property, an environmental assessment discovered the presence of several pesticides whose concentrations exceeded several times the "safe levels". Through our conversation, he informed me that this piece of property, which was partially wooded, had been the local neighborhood kids' "hot spot" for baseball, dirt bike riding, and whatever. My friend explained that the owner of the property was having a tough time finding a landfill to accept the impacted soil and the surrounding community was concerned about health issues and decreased property values. The next day in my office I wondered about the many "backyard scenarios" that I had encountered over the last ten years in the environmental arena. It seemed to me that it is publicly acceptable to find the dirty stuff (i.e., contaminated soils) at industrial facilities where workers are taught safe handling of materials and wear protective clothing, but unacceptable to find any contamination in a residential area.

The story of my friend is similar to stories of many who have knocked on the door of the Texas Natural Resource Conservation Commission and predecessors asking relief from the backyard scenario. It is an issue facing the agency to provide a balance between industrial solid waste management regulations, human health and environment protection and property rights. Because this issue has the potential to impact owner-operator decisions on the three closure/remediation options addressed in the TNRCC Risk Reduction Rules, I decided to focus this paper on reviewing key provisions in the rules that address the backyard scenario from two view points, industry and the adjacent landowner.

The first view point is from the perspective of the industrial facility in that there are far more regulatory incentives in the rules for keeping their "dirt" on their own site rather than picking it up and placing it in an off-site landfill. However, in situations where wastes are removed and carried off-site, it is the permitted off-site landfill that receives the public heat for being located near someone's backyard.

The second view point is from the adjacent landowner next to an industrial facility. Although the risk reduction rules provide the owner/operator with the decision power to select among the three options on managing wastes and contamination, the rules afford assurances that the "backyards" of adjacent properties will not be impacted. I believe that a recent corrective action strategy that was negotiated between the agency and industry involving a boundary-wide approach at petroleum refineries characterizes a philosophy that it is acceptable to leave some contamination in-place as long as it will not impact adjacent land use and important natural resources. This article will focus on a review of the risk reduction rules as they pertain to industrial facilities. The primary media examined are soil and ground water.

Risk Reduction Standards

Cleanup levels for contaminated media have been developed in the TNRCC Risk Reduction Rules promulgated June 1993 and codified in 30 TAC Part 335 Subchapter S. These rules serve to identify health-based cleanup levels and are applicable to land-based closures and remediations regulated under the hazardous/industrial solid waste, Superfund, and spill programs.

The rules identify the following three risk-based remediation options:

- Risk Reduction Standard No. 1 (RRS#1): Remediation to background levels
- Risk Reduction Standard No. 2 (RRS#2): Remediation to health-based criteria
- Risk Reduction Standard No. 3 (RRS#3): Remediation in-place with controls

The process for determining the health-based cleanup standards is modeled after the Environmental Protection Agency's Risk Assessment Guidance for Superfund, used for baseline risk assessments. Each contaminant is evaluated in all environmental media (air, surface water, soil, and ground water) as to the use of the land and the mechanisms and pathways which an exposure to human health and the environment could occur. The contaminant's toxicological data is used to calculate reference doses for non-carcinogens and slope factors for carcinogens. The values are used to calculate cleanup levels known as "medium-specific concentrations (MSCs)" for two different types of land use (residential and non-residential/industrial). The MSCs for approximately 150 compounds have been calculated and published in the Risk Reduction Rules. Guidelines for calculating other compounds are specified in the rules.

Cleanup to Standard No. 1 (Background Levels) Risk Reduction Standard 1 requires (1) the removal of all hazardous waste, hazardous waste residues and operating components (2) the removal or decontamination of all non-hazardous waste, non-hazardous waste residues and components and (3) the removal or decontamination of environmental media to background levels unaffected by industrial activities. With respect to the added option of decontamination of non-hazardous waste, waste residues and design components, the preamble to the rules assumes these materials are soil-like in composition.

Prior to the promulgation of the risk reduction rules, closure plans were approved with background locations meeting only a condition of being unaffected by the industrial solid waste management unit undergoing closure. This condition is described on page 3-13 in EPA's Surface Impoundment Clean Closure Guidance Manual (1987):

> "It is critical that levels established as background be representative of the natural or existing local conditions that were not affected by operations of the surface impoundment."

The establishment of background levels of contaminants as "cleanup levels" are to be determined from an evaluation of background sample data as the greater of (1) a statistically determined upper limit concentration or (2) the practical quantitation limit (PQL). Since promulgation of the risk rules, acceptance of on-site background locations at an industrial facility by the TNRCC can be difficult. It is the agency's position that the background locations must be unaffected by waste management or industrial activities and that organics are not naturally occurring and background values for organics should be set at the Practical

Quantitation Limit (PQL). I would like to point out, however, that over 350 organic compounds have been identified in background soils in the United States.[1] Among these documented in Dragun (1988) are benzene (1-5 mg/Kg), benzo(a)pyrene (0-8 mg/Kg), toluene (1-5 mg/Kg), ethyl benzene (1-5 mg/Kg), xylene (1-5 mg/Kg), benzo(a)anthracene (0-0.01 mg/Kg), and straight chain alkanes (0-286 mg/Kg). These constituents are also present in automobile exhaust. The preamble to the rules recognizes that background may be affected by anthropogenic sources such as roads or area-wide use of pesticides and herbicides.

One advantage of remediation under Risk Reduction Standard 1 is that it is self-implementing and does not require pre-approval by the TNRCC prior to initiating closure although preliminary notification to the TNRCC of intent to perform remediation under this standard is required. This standard requires the performance of verification sampling to demonstrate compliance with established cleanup levels and the submittal of a remediation verification report to the TNRCC.

A second advantage of remediation under this standard is allowance of unrestricted future use of the site. Deed recordation and post-remediation care would not be required. This standard is not appropriate for soils containing elevated total petroleum hydrocarbons (TPH) concentrations that cannot be attributed to anthropogenic sources (i.e., highway use, etc.) unless they are remediated to below the detection level.

Cleanup to Standard No. 2 (Health Based Levels) The cleanup criteria for soil and ground water under Standard Number 2 are based on conservative values for human health exposure and can be adjusted based on land use, ground-water use, and other site-specific factors. Cleanup levels for soils at an industrial site must meet the following four criteria under Standard No. 2: (1) the soil can not exhibit a hazardous waste characteristic as defined in 40 CFR § 261; (2) the sum of volatile organic concentrations in the vapor phase can not exceed 1,000 ppm by weight or volume; (3) near surface soils (0-2 feet) must meet the lower of either (a) the health-based worker exposure Soil-Air-Ingestion/Inhalation ("SAI") media specific concentration or (b) the industrial Soil-to-Ground-water-Cross-Media Protection Concentration ("GWP"); and (4) subsurface soils (depths greater than 2 feet) must meet the industrial GWP numerical criteria. For the majority of constituents, the GWP value is the lower of the two.

The health-based industrial SAI numerical criteria for soil cannot be adjusted for site specific exposure scenarios under Standard No. 2. The assumptions required for input into the SAI equations are specified for Standard No. 2 in the rules, but may be adjusted under Standard No. 3.

The GWP numerical criteria can be attained by demonstrating achievement of one of the following: (1) the default GWP which is a constituent concentration (mg/kg) in soil equal to 100 times (and change the units) the constituent's ground-water cleanup criteria (MCL or calculated MSC, which is termed the "GW" value in the TNRCC rulemaking) or (2) the site-specific GWP which is a constituent concentration in soil based on the SPLP test. The concentration of constituent in the leachate must be at or below the constituent's ground-water cleanup criteria (MCL or calculated MSC). In addition, the GWP numerical soil criteria can be adjusted by a factor of 100 if the naturally occurring total dissolved solids content is greater than 10,000

[1] Dragun, James (1988). The Soil Chemistry of Hazardous Materials, Hazardous Materials Control Research Institute Silver Spring, Maryland, pp 343-345.

mg/L (see 30 TAC § 335.559 (g)(2) (A) and § 335.559 (d) (3)). No other adjustments are specified for the Standard No. 2 criteria.

Cleanup levels for ground water at an industrial site under Standard No. 2 must meet the MCL or the industrial Ground-Water ("GW") media-specific concentration. 335.559 (d) requires that affected ground water located beneath residential or non-residential properties be cleaned up to the Maximum Contaminant Level (MCL) if promulgated by the Federal Safe Drinking Water Act for the specific contaminant of concern. If no federal MCL exists for the chemical of concern, then the cleanup level for the contaminant is to be established through calculation of the contaminant's Media Specific Concentration (MSC) using standardized conservative exposure factors as directed in 30 TAC § 335.556. Under Standard Number 2, the GW Cleanup level must be achieved throughout the plume of contamination. A statistical approach is allowed.

The rule states in §335.559 (d)(2) that the cleanup level can not be adjusted based on land usage if a MCL exists for that constituent. However, adjustments can be made to the calculated MSCs based on residential vs. non-residential land use. An adjustment factor of 100 can be applied to the MCL or MSC for ground water exhibiting naturally occurring TDS of 10,000 mg/L or greater beneath residential or non-residential land. Other considerations that may affect the final GW media-specific concentrations include contaminated ground-water discharge into a surface water body. In these cases, the Risk Reduction Standard No. 2 concentrations would possibly require adjustment to reflect Texas Surface Water Quality Standards of Chapter 307 (see 30 TAC §335.559 (b) regarding discharges).

The site-specific adjustments allowed for soil and ground water under Standard No. 2 may make this approach practical for many areas at industrial facilities involving historical spills. The issue that appears to be impractical for many landfills and surface impoundments is the requirement of removing the waste. While it is clear that Standard 2 requires the removal of all hazardous wastes, hazardous waste residues, and contaminated system components for the contaminated area, it is less clear whether the agency will accept a Standard 2 closure plan proposing that non-hazardous waste achieving the Standard 2 criteria be allowed to remain in-place. The rules imply that removal, decontamination, and/or treatment are all adequate to meet Standard 2 for non-hazardous waste and affected environmental media.

One advantage of remediation under Standard 2 is that it is self-implementing and does not require pre-approval by the TNRCC prior to initiating closure. Reporting requirements include preliminary notification to the TNRCC of intent to perform remediation and a remediation verification report to the TNRCC. A second advantage is that post-remediation care of the site would not be necessary under this standard. However, a deed certification stating that constituents remain on the property must be filed with the county deed records would be required under Standard 2. If the site has been remediated to industrial MSCs, which are higher than residential MSCs, then the deed certification must include a statement that current or future owners of the site must undertake actions as necessary to protect human health and the environment in accordance with the TNRCC.

Standard No. 3 (Remediation With Controls) The soil and ground-water cleanup levels under Standard 3 are site-specific and established through a baseline risk assessment. The procedure for calculating cleanup levels takes into account site-specific exposure variables including the frequency of exposure, soil type, atmospheric conditions, vegetative or other

cover present over impacted soils and contaminant migration pathways. No adjustments to the soil cleanup levels are specifically addressed in the rules since the factors affecting exposure are all to be considered in the Baseline Risk Assessment. However, the rules reflect a departure from setting the cleanup level at the 1.0×10^{-6} cancer risk level (as is the case under Standard No. 2) to an acceptable risk range of 1.0×10^{-4} to 1.0×10^{-6} which is to be applied to soils or ground water after remediation efforts have taken place.

30 TAC §335.563 (h) specifies that the ground-water cleanup criteria for Standard No. 3 is also established at the MCL if the ground water is a current or potential source of drinking water and an MCL is promulgated under the SDWA for the contaminant of concern. If no federal MCL exists for the contaminant of concern, then the cleanup level for the contaminant is to be established through calculation of the contaminant's intake dose and risk and compared to the acceptable cancer risk range (1×10^{-6} to 1×10^{-4}) or hazard quotient (<1.0). Section 335.563 allows the owner/operator under Standard 3 to justify alternate exposure factors based on site-specific data to calculate the contaminant's intake dose and estimated risk or hazard. Standard No. 3 adjustments can be made to a cleanup level based on land usage, use of institutional or legal controls, consideration of the ground water as a current or potential source of drinking water (defined on the basis of the quality of ground water, yield of ground water, and interconnection with potable ground water) and remedy selection.

Standard No. 3 allows exceptions to cleaning up the ground water throughout the plume of contamination by affording the owner/operator the opportunity to propose (1) Alternate Concentration Limits (40 CFR §264.94 b) or (2) utilize appropriate control measures in the remedy design such that portions or zones of contamination encompassing the original source may be allowed to remain in-place. Standard No. 3 also allows the owner/operator an opportunity to demonstrate that remediation is not warranted by demonstrating that the aquifer is not itself, or interconnected with, a current or potential source of drinking water or that cleanup to risk-based levels is impracticable.

The Standard No. 3 approach allows the greatest flexibility in establishing cleanup levels for soil and ground water under the Risk Reduction Rules. However, Risk Reduction Standard 3 closures require post-closure care.

Procedures for the implementation of remediation in accordance with Standard 3 include (1) preliminary notification to the TNRCC of intent to perform remediation; (2) the implementation of a remedial investigation (RI) submittal to TNRCC; (3) the development of a baseline risk assessment (BRA) to evaluate potential adverse effects under current and future conditions (assuming no action taken) and to determine media cleanup values for all environmental media submittal to TNRCC (4) the development of a corrective measure study (CMS) to evaluate the ability of alternative remedial actions to achieve permanent, cost-effective control of environmental impacts in accordance with established cleanup levels and remedy evaluation criteria submittal to TNRCC; and (5) the implementation of the recommended corrective measure and the submittal of a remediation implementation report to the TNRCC (following agency review of the RI, BRA, and CMS).

No removal or decontamination of waste, waste residues, or contaminated system components within the contaminated area would be required for closure under this standard. However, post-remediation care and deed recordation of the site would be required.

Selection of Remediation Standard

In the remediation/closure process, the owner/operator has a cost incentive to close with waste in-place under Risk Reduction Standard No. 3. A feasibility study/corrective measures study rarely selects a full removal action based on cleanup of contaminated media to background levels or conservative Risk Reduction Standard No. 2 levels primarily because of the waste removal requirement. Beyond stabilization and capping the waste in-place, there are regulatory disincentives (i.e., land disposal restrictions, benzene NESHAPS) that limit doing anything more about actually reducing concentrations of chemicals of concern in the waste or media. Other regulatory impediments include the strict definition of background levels for Standard No. 1 and the issue of whether non-hazardous waste whose constituents meet Risk Reduction Standard No. 2 can be allowed to remain in-place and receive the benefit of a Standard No. 2 closure. In contrast, Standard 3 offers several alternatives by which demonstrations can be made to allow in-place closures.

The ability of the owner/operator to choose the remediation standard changes when a release has occurred off-site. First, Standard 3 (§335.559) requires that the quality of ground water at an industrial facility meet the residential standard at the property boundary. Second, the TNRCC has taken the position that the facility must achieve Standard 1 for releases located on property not owned or effectively controlled by the owner/operator unless the adjacent landowner grants consent for a Standard 2 or 3 closure.

Case I - Pesticide Contamination

A five-acre vacant lot located in a residential area was found to be contaminated by chlordane. Under the Risk Reduction Rules, three values are acceptable for establishing background soil concentrations:

- 3.3 mg/Kg 95% UTL Background Data
- 0.001 mg/Kg PQL
- 5.0 mg/Kg Label Application Rate

The soil contamination was found to be primarily present in the upper four feet of soil. Deeper contamination was found in a location of a former pond at a depth below 3 feet. The 95% Upper Confidence Bound of soil chlordane concentrations was 0.25 mg/Kg. The TNRCC Standard 2 criteria indicates the following for residential soils:

SAI-Res 0.493 mg/Kg
GWP-Res 0.20 mg/Kg

In accordance with 335.556(b) the SAI was modified to a value of 0.100 mg/Kg to account for dermal exposure. All soil samples subjected to the Synthetic Precipitation Leachate Procedure were found to have concentrations below the detection limit (<0.002 mg/L). The Risk Reduction Rules require the clean-up level established under Risk Reduction Standard No. 2 to be set at the lower of the SAI or the GWP. For this site the clean-up level was set at the 0.100 mg/Kg level for dermal exposure. The feasibility study identified that the soil volume exceeding 0.100 mg/Kg accounted for 75% of the soil volume exceeding the PQL.

Case II - Solvent Contamination

The site referred to as Case II involves solvent contamination of soil and ground water at a former manufacturing facility. The shallow aquifer is located 10 feet below ground surface in a silty clay. All contaminated soil generated had to be managed as a U-listed waste requiring incineration and off-site disposal. Action levels were established for the contaminant at:

soil SAI = 3,200 mg/Kg (Residential soil ingestion scenario)
soil GWP = 140 mg/Kg (Soil to ground-water cross-media protection)
ground water = 1.4 mg/L (Residential ground-water ingestion scenario)

Soil remedial alternatives identified in the Feasibility Study and then associated accosts included:

- Capping/Slurry Wall 1.3 M
- Excavation 800,000 - 34M
- Treatment 814,000 - 1.3 M

Soil Remediation Costs

Contaminant Area Defined	Volume of Contaminated Soils	Excavation Costs	Treatment
Background Concentrations	16,100 cubic yards	$34 M,	$1.3 M
Greater than 140 mg/Kg	5,090 cubic yards	$11 M	$1 M
Greater than 3,200 mg/Kg	150 cubic yards	$800,000	$814,000

Natural Resource Damages

"I'll Have a Blue Christmas Without You"

Ramon Dasch

Biography

Ramon Dasch currently is the Superfund Coordinator for the Legal Division of the Texas Natural Resource Conservation Commission. Previously he has served as Assistant Division Director of the Petroleum Storage Tank Division of the Texas Water Commission, Section Chief of the Water Quality Enforcement Section and Staff Attorney in the Legal Division. Prior to that he was a Hearing Examiner at the Public Utility Commission and Director of Hearings at the Texas Air Control Board.

Mr. Dasch won a City of Austin award for his yard xeriscape and is a member of the American Motorcycle Association, The Austin Pond Society, and no telling what else.

Natural Resource Damages

You've been named as a PRP; You've had to incriminate yourself in response to an information request. You've hastily formed a committee. You've had protracted negotiations with other PRPs, some sincere, some not, all trying to get to you. Some have dropped out. Some have hidden in the weeds. No time to go after them now. You'll get them later. You've re-familiarized yourself with the three headed monster of CERCLA - strict liability, joint and several liability, retroactive liability. You've agonized over your minimal involvement; you've paid lawyers extravagant fees to tediously negotiate an agreement in which you pay 20% of the cost of clean-up even though you only contributed 7% of the hazardous substances; you've entered into a consent decree with EPA which obligates you to pay $25 million to remediate a site; you've suppressed your queasiness over the re-openers in the covenant not to sue; you think, "Everybody does it, I got no choice."

At least, finally it's behind us. Now we can move on. The reserves are committed to the $25 million. Now if the remedy works like our gold-plated engineers say it will, home free. - The end to our four years of hard times. Uncertainty, taint on the corporate reputation, threats from regulators - those surly bastards - it doesn't come from their pockets. But we were lucky. A relatively reasonable bunch we had to deal with, in spite of the horror stories. In five years it will be complete. If we meet the contingency laden schedules our attorneys have wheedled from the agencies, it's all behind us. Won't happen again; the new procedures and in-house environmental section will see to that.

Ahh, life is good again! But just when you thought halloween was safe, Freddie NRDA is released from the CERCLA asylum. The world will never be the same.

A. "Who is Freddie NRDA?"

NRDA has lain sleeping in CERCLA sections 101 (16); 104(b)(2); 107(a)(4)(c), (f)(1), (2); 111(b)(1),(2); (d)(1), (i); 113(g); 122(j);

(See attachment A)

NRDA is a new cause of action that has not been fully appreciated for his danger to traditional thinking about environmental damages.

Hey, you acted right as soon as you got the nasty-gram from the agency. You've negotiated a settlement. You're cleaning it up. What's to complain about?

Well, some people in Freddie's sect say "Wait, that's not enough. We must have

blood" - just kidding.

Actually, what they say is "remediation" is not the same thing as "complete restoration." Consider an economic example. If I steal (no inflammatory language here) $100 from you today and 10 years from now you discover the loss and sic the constable on me, I will agree to give you back your $100 in an instant. But you will say, "you owe me $200 since you had the use of my money for 10 years during which my money was worth another $100." You are right. Remediation does not compensate for lost use. This is the critical and essential difference between traditional RCRA and CERCLA actions and a Freddie NRDA claim.

NRDA seeks complete restoration (being made whole) and other regulatory programs seek remediation.

(See attachment B)

As we can see, even though the resources have been restored to where they were before (baseline) there was a period of lost services that has not been compensated. You owe for that period even though there are now just as many otters as before.

You also owe for the cost of restoring the resource, not just remediating to a human based maximum contaminant level. And the cost of performing the assessment. (Freddie's salary and studies)

(See attachment C)

B. "How come we never heard of Freddie NRDA till now?"

You haven't been listening! Ha- just kidding again. Really, Freddie was there all along. It's just taken a while for Freddie to assemble the troops. But he's here now, so no point in cursing the darkness. Let's light a candle.

C. "All biblical allusions aside, who are Freddie's troops?"

1. The "Trustees"
   a. "Who are they?"
      They are: the Secretary of the Interior, Secretary of Commerce, Secretary of Energy, Secretary of Agriculture, Secretary of Defense and State Trustees. In Texas, these are the Texas Natural Resource Conservation Commission, Texas Parks and Wildlife Dept. and Texas General Land Office.

D. "How bad is Freddie NRDA?"

Freddie is bad, but not as bad as he could be.

NRDA begins at 1980 unlike general CERCLA provisions. (unless there is a continuing release or the damages from an earlier release occur after 1980) But Freddie can recover the costs of studies, agency actions - employee salaries, overhead; and Freddie can find more damages than you thought you were exposed to. For example, your CERCLA remedy was based on a "dirt eating" risk analysis that was "overkill", in your opinion, but Freddie says, "Humans are not the only standard, protect the critters too."

E. "So how much are natural resources worth anyway?"

Generally, they are valued by different economic theories. The most common is the value in the fish market, so to speak. What does a trout sell for?

Nonetheless, it would be misleading to think that an otter is only worth the price of its pelt or that the value of lost services of a destroyed acre of coastline is what one can buy waterfront property for. The natural resources have what is called "non-use" values or "passive use" values such as their significance to an ecosystem, aesthetics, or other intangible value.

F. "How do we cost out non-use values?"

Glad you asked. Economists, the second oldest profession, the same guys who have successfully predicted ten of the last six recessions, have a theory. It's called contingent valuation methodology. It's basically a glorified poll where people are asked what value they would place on a resource. "How much would you pay to be able to see or catch see a trout where, if killed by pollution, you would not have seen or caught it?"

"I tell you what Bubba, I'd a paid a lot to see that trout."

It's easy to make fun or Freddie, but I think we all recognize the essential truth in the proposition that nature is complex, unknown in its myriad relationships, and both hardy and fragile. And, in light of our choices in the location of our vacations and vacation homes, irreplaceable. So, Freddie has a point. And there are other legitimate "lost use" values that are neither fish now fowl. Consider the Houston Ship Channel. What is the value of its lost uses if a pollution event shuts it down for both fishing and commercial transportation use? Certainly, the market value of the killed fish. Certainly some value for non-commercial critters, however valued, but also a loss to the economy of Texas, in the form of a closure of a vital waterway. This lost use of a state resource is recoverable from the RPs.

The State of Texas has settled for approximately $1.3 million from the PRPs involved in the APEX - SHINOSA collision in the Houston Ship Channel for, among other lost uses, lost transportation uses. The theory is: the State has an economic use value in

the use of its water resources. When, because of a pollution release it loses that use, it is due the value of that loss.

Other "lost use" values are associated with groundwater. How much is a lost groundwater source worth? The cost of replacement with currently available treated surface water, or the cost to build a surface reservoir with the equivalent capacity of the irrevocably polluted aquifer?

Other ways to quantify and value natural resource damages are set out in rules promulgated by the Department of the Interior and the Natural Oceanic and Atmospheric Administration. There is a type A model mathematical rule which calculates the extent and value for damages to coastal and marine environments; a type B assessment which is more complex and labor intensive and which applies to releases in more environments.

G. "How do Freddie's troops know I'm there?"

By statute and regulation, EPA must notify the Trustees about superfund sites and incidents. It must coordinate its assessments, investigation and planning with the Trustees. It must notify them of its negotiations with PRPs and encourage the Trustees to participate.

Other sources of information are state actions, such as state superfund, RCRA enforcement, and spill response.

Remember, every release of oil or hazardous substances potentially includes natural resource damages.

H. "Alright, alright how much money do they want?"

Well, they don't want money. They want restoration. (equivalent resources etc.)

"Well what does <u>that</u> cost?"

Procure a biologist. He will know.

I. But if they don't want money how can I restore lost uses when they're gone and won't be back until the site is cleaned up?

You can add resources of the same kind back to nature with additional activity such as restoring a damaged marsh down the road, building a breakwater, or enhancing similar habitat. Use your imagination. You might end up with a local park named after your company.

(See attachment D)

J. "Jeez, I feel like I'm getting tooled here. I mean it's awful no matter which way I go. Hey, I fixed it or I'm gonna, even though I didn't cause it all. Doesn't that count for something with these Eco-Nazis?"

Think of this as an opportunity. With a little foresight, you can gain the efficiency of co-generation. You can investigate a site for both the usual cleanup purposes and natural resource restoration at the same time. And in many cases your remedial design will accomplish traditional CERCLA remediation purposes and natural resource restoration, although it is likely that additional activity and cost will be involved to account for the lost use of the natural resources in the interim.

K. "Suppose Freddie wants me to spend more money than I think is right. Can I challenge him?"

Yes, you can - with biologists and economists and lawyers. But Freddie has supernatural powers. He has a rebuttable presumption. By statute, if he follows the procedures set out in the type A or B regulations his evaluation is given legal deference, much like, but less than the courts give agencies under the substantial evidence rule.

. However, this presumption appears merely to shift the burden of proof to the defendant, which he can overcome by proving it wrong by a preponderance of the evidence. As McCormick has said "rebuttable presumptions are like bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts."

L. "Are there any other defenses?"

Yes, there are both defenses to and constraints on Trustee activities. As noted above, damages prior to 1980, if divisible from post 1980 damages, are not subject to natural resource damage claims.

Unlike other CERCLA liabilities, causation must be proven. The pollutants that you released must be the cause of the natural resource damages.

There is no liability for natural resource damages if they are accounted for in an environmental impact statement or other analysis and a permit allowing the release of hazardous substance is granted with such knowledge, or the damages result from a federally permitted release. These exceptions are construed narrowly, however. A party must operate within its permit limits to avoid liability. The protection also does not cover permit-exempt discharges, contaminants not included in the permit, or releases prior to the impact statement that must specifically identify "an irreversible and irretrievable commitment of resources."

"Double recovery" is not allowed for the same resource damage.

"Disproportionate costs" are not allowed. The court in Ohio v. Interior preferred restoration costs as one of the appropriate measures of damages but suggested that if restoration costs were disproportionate to the lost service values, restoration costs might be excessive. By example, the court suggested that a multiplier of 3 would make restoration costs grossly disproportionate to use values. It should be noted that even if restoration costs are so high as to be disproportionate, this does not prohibit recovery of other lost service values, including use and non-use values.

The statute of limitations for bringing a natural resource damage action is uncertain at best. CERCLA states that an action must be brought within three years after the latter of discovery of the loss or " the date on which regulations were promulgated."

The relevant regulations were made final in 1986 (Type B Rule) and 1987 (Type A Rule). Arguably, natural resource damage claims for known damages were barred after 1989 or 1990. However, the courts overturned significant portions of the rules in 1989. The re-promulgated rules (still not beyond judicial threat) attempted to steal this issue from the courts by defining "promulgation" as the date on which final rules revising the rules in compliance with the Ohio and a related Colorado case are published. This did not prevent a federal district judge in California from granting summary judgement on March 21, 1995, (U.S. v. Montrose) stating that the statute of limitations had run out when the trustees filed their case in 1990. An Idaho court federal district judge on April 28, 1995 disagreed with that ruling and agreed with Interior's claim that the statute does not run until final promulgation of the rules (U.S. v. Blackbird Mining Co.). To paraphrase an old legal cliché, the D.C. Cir. Court of Appeals is still out on this one.

There is a limit on natural resource damages of $50,000,000 per release. You can see the issue coming in regard to multiple or continuing releases of the same hazardous substance. In addition to these hurdles, by statute the limitation disappears if the release is the result of . . . . . willful negligence; or a violation of safety, construction or operating standards; or the PRP "fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under" the National Contingency Plan.

While these features of natural resource damage law (initially) are shocking in their legal majesty, the reality is much less grandiose, much as a President's ability to declare war is subject to the financial constraints of Congress's budgetary process.

Money from the federal superfund cannot be used to restore natural resource damages. The Trustees cannot issue orders to RPs to perform natural resource damages assessments, in contrast to EPA's ability to order RPs to investigate and clean up superfund sites or face large administrative penalties.

The budgetary restraints and lack of enforcement power are critical and fundamental impediments to abusive Trustee activities. The Trustees must choose the most important cases and finance themselves until cost recovery.

Recently, the Clinton administration has begun to emphasize acquisition of habitat equivalency in contrast to dollar recovery. This approach has several merits. It avoids the controversial foundations of natural resource economic valuation by simply demanding that resource loss equals resource restoration, no dollars assigned.

At the same time it acknowledges that an otter is not a pelt, a fish market is not a ecosystem and an acre's natural resources should not be undervalued and discarded lightly.

N. "Hey, I completed a cleanup of a federal superfund site five years ago. Will Freddie NRDA come after me for that?"

No, if a site is listed on the National Priorities List, the statue of limitations is three years after completion of the remedial action.

NATURAL RESOURCE DAMAGES IN CERCLA/SARA

Sec. 101 Definitions

(6) The term "damages" means damages for injury or loss of natural resources as set forth in section 107(a) or 111(b) of this act.

(8) The term "environment" means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management of the United States under the Fishery Conservation and Management Act of 1976, and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

(9) The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

(15) The term "navigable waters" or "navigable waters of the United States" means the waters of the United States, including the territorial seas.

(16) The term "natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Fishery Conservation and Management Act of 1976), any state or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.

Response Authorities
Sec. 104(b)(2) Coordination of Investigations

The President shall promptly notify the appropriate Federal and State natural resource trustees of potential damages to natural resources resulting from releases under investigation pursuant to this section and shall seek to coordinate the assessments, investigations, and planning under this section with such Federal and State trustees.

National Contingency Plan
Sec. 105 (a)(4)Revision and Republication

...the national hazardous substance response plan....which shall include at a minimum: (4) appropriate roles and responsibilities for the Federal, State ...governments ...in effectuating the plan.

Sec. 107 Liability

(a)(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release, ...of a hazardous substance, shall be liable for-

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

Sec. 107(f)(1) Natural Resources Liability

In the case of an injury to, destruction of, or loss of natural resources ....liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe,....Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, **for use only to restore, replace, or acquire the equivalent of such natural resources.** Sums recovered by a State as trustee under this subsection shall be available **for use only to restore, replace, or acquire the equivalent of such natural resources** by the State. The measure of damages in any action ....shall not be limited by the sums which can be used to restore or replace such resources.

Sec. 107(f)(2)Designation of Federal and State Officials

(A) Federal-The President shall designate in the National Contingency Plan....the Federal officials who shall act on behalf of the public as trustees for natural resources under this act and section 311 of the Federal Water Pollution Control Act. Such officials shall assess damages for injury to, destruction of, or loss of natural resources under their trusteeship and may, upon request of and reimbursement from

a State and at the Federal officials discretion, assess damages for those resources under the States trusteeship.

(B) State-The Governor of each State shall designate State officials who may act on behalf of the public as trustee for natural resources under this act and section 311 of the Federal Water Pollution Control Act and shall notify the President of such designations. Such State officials shall assess damages to natural resources for the purposes of this Act and such section 311 for those natural resources under their trusteeship.

(C) Rebuttable Presumption-Any determination or assessment of damages to natural resources for the purposes of this Act and section 311 of the Federal Water Pollution Control Act made by a Federal of State trustee in accordance with the regulations promulgated under section 301(c) of this Act shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this Act or section 311 of the Federal Water Pollution Control Act.

Uses of the Fund (See SARA Sec. 517) [see sec. 517](b)(6).
Sec. 111 In General

[excerpt-the fund may be used for natural resource claims pursuant to Sec. 111(b) and decided pursuant to Sec. 112]

Sec. 111(b)(1) In General

Claims asserted and compensable but unsatisfied under provisions of section 311 of the Clean Water Act, which are modified by section 304 of this Act may be asserted against the Fund....for injury to, or destruction or loss of, natural resources, including cost for damage assessment: Provided, however, that such claim may be asserted only by the President, as trustee, for natural resources,....or by any State,....or by any Indian tribe...

Sec. 111(b)(2) Limitation on Payment of Natural Resource Claims

(A)General Requirements-No natural resource damage claim may be paid from the Fund unless the President determines that the claimant has exhausted all administrative and judicial remedies to recover the amount of such claim from persons who may be liable under section 107.

B) Definition-As used in this paragraph, the term "natural resource claim" means any claim for injury to, or destruction or loss of, natural resources. The term does not include any claim for the cost of natural resource damage assessment.

Sec.111(d)(1) No money from the fund may be used...where the injury, destruction, or loss of natural resources and the release of a hazardous substance from which such damages have occurred wholly before the enactment of this Act.

Sec. 111(e)(2)....No money in the fund may be used for the payment of any claim under subsection (a)(3) or subsection (b) of this section in any fiscal year for which the President determines that all of the fund is needed for response to threats to public health from releases or threatened releases of hazardous substances.

Sec. 111(i) Except in a situation requiring action to avoid an irreversible loss of natural resources or to prevent or reduce any continuing danger to natural resources or similar need for emergency action funds may not be used under this Act for the restoration, rehabilitation, or replacement or acquisition of the equivalent of any resources until a plan for the use of such funds for such purposes has been developed and adopted by affected Federal agencies and the Governor or Governors of any State and by the governing body of any Indian tribe.....after adequate public notice and opportunity for hearing and consideration of all public comment.

Sec. 112(b)(1) Prescribing Forms and Procedures

The President shall prescribe appropriate forms and procedures for claims filed hereunder,...[including natural resources]

Litigation, Jurisdiction, and Venue
Sec. 113(g) Period in Which Action May Be Brought

(1)Actions for Natural Resource Damages-Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 101(6) under this Act unless that action is commenced within 3 years after the later of the following:

(A) The date of discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 301(c).

With respect to any facility listed on the National Priorities List ("NPL"),...or any vessel or facility at which a remedial action under this Act is otherwise scheduled , an action for damages under this Act must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance

activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this Act with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 104(b) or section 120 (relating to Federal facilities).

Sec. 121(f) State Involvement

(1)(E) Notice to the State of negotiations with potentially responsible parties regarding the scope of any response action at a facility in the State and an opportunity to participate in such negotiations and, subject to paragraph (2), be a party to any settlement.

Sec. 122(j) Natural Resources

(1) Notification of Trustee- Where a release or threatened release of any hazardous substance that is the subject of negotiations under this section may have resulted in damages to natural resources under the trusteeship of the United States, the President shall notify the Federal natural resource trustee of the negotiations and encourage the participation of such trustee in the negotiations.

(2) Covenant Not To Sue-An agreement under this section may contain a covenant not to sue under section 107(a)(4)(c) for damages to natural resources under the trusteeship of the United States resulting from the release or threatened release of hazardous substances that is the subject of the agreement, but only if the Federal trustee has agreed in writing to such covenant. The Federal natural resource trustee may agree to such covenant if the potentially responsible party agrees to undertake appropriate actions necessary to protect and restore the natural resources damaged by such release or threatened release of hazardous substances.

Sec. 126 Indian Tribes

(a)Treatment Generally- The governing body of an Indian tribe shall be afforded substantially the same treatment as a State with respect to the provisions of section 103(a)...,104(e)...,104(i)..., and 105...but not including the provision regarding the inclusion of at least one facility per State on the NPL.

Sec. 126(d) Limitation

Notwithstanding any other provision of this Act, no action under this Act by an Indian tribe shall be barred until the later of the following:

(1) The applicable period of limitations has expired.

(2) 2 years after the United States, in its capacity as trustee for the tribe, gives written notice to the governing body of the tribe that it will not present a claim or commence an action on behalf of the tribe or fails to present a claim or commence an action within the time limitations specified in this Act.

SARA

Sec. 301

(c)(1) The President, acting through Federal officials designated by the National Contingency Plan published under section 105 of this Act, shall study and not later than two years after the enactment of this Act, shall promulgate regulations for the assessment of damages to, destruction of, or loss of natural resources resulting from a release of oil or a hazardous substance for the purposes of this Act and section 311(f)(4) and (5) of the Federal Water Pollution Control Act. ....., the President shall promulgate such regulations not later than 6 months after the enactment of the Superfund Amendments and Reauthorization Act of 1986.

(c)(2) Such regulations shall specify (A) standard procedures for simplified assessments requiring minimal field observation,...and (B) alternative protocols for conducting assessments in individual cases to determine the extent of short-and long-term injury, destruction, or loss. Such regulations shall identify the best available procedures to determine such damages, including both direct and indirect injury, destruction, or loss and shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover.

Sec. 517 Hazardous Substance Superfund

(c)Expenditures From Superfund-

(1) In General-Amounts in the Superfund shall be available, as provided in appropriation Acts, only for the purposes of making expenditures-

(A) to carry out the purposes of-

(ii) section 111(c) of CERCLA (as so in effect), other than paragraphs (1) and (2) thereof,.. [The fund shall be available for purposes other than natural resource damage assessments and restorations, rehabilitation, or acquiring the equivalent resource].

revised 9/13/93
Prepared by Joe Tieger, USEPA, OWPE/CED (703) 603-9007

NATURAL RESOURCE DAMAGES IN THE NATIONAL CONTINGENCY PLAN

National Contingency Plan 40CFR Part 300
Federal Register March 8, 1990

Subpart B-Responsibility And Organization for Response
300.160 Documentation and Cost Recovery

(a)(3) The lead agency shall make available to the trustees of affected natural resources information and documentation that can assist the trustees in the determination of actual or potential natural resource injuries.

300.170 Federal Agency Participation

Federal agencies listed in 300.175 have duties established by statute, executive order, or Presidential directive which may apply to federal response actions following, or in prevention of, the discharge of oil or release of a hazardous substance, pollutant, or contaminant. Some of these agencies also have duties relating to the rehabilitation, restoration, or replacement of natural resources injured or lost as a result of such discharge or release as described in subpart G of this part. The NRT and RRT organizational structure, and the NCP,....,provide for agencies to coordinate with each other in carrying out these duties.

Subpart E-Hazardous Substance Response
300.410 Removal Site Evaluation

(g) If natural resources are or may be injured by the release, the OSC or lead agency shall ensure that state and federal trustees of the affected natural resources are promptly notified in order that the trustees may initiate appropriate actions, including those identified in subpart G of this part. The OSC or lead agency shall seek to coordinate necessary assessments, evaluations, investigations, and planning with such state and federal trustees.

Subpart E-Hazardous Substance Response
300.430 Remedial Investigations/ Feasibility Study And Selection of Remedy

(b) Scoping. In implementing this section,...,the lead agency shall:

(7) If natural resources are or may be injured by the release, ensure that state and federal trustees of the affected natural resources have been notified in order that the trustees may initiate appropriate actions, including those identified in subpart G of this part. The lead agency shall seek to coordinate necessary assessments, evaluations, investigations, and planning with such state and federal trustees.

Subpart G-Trustees for Natural Resources
300.600 Designation of Federal Trustees

(a) The President is required to designate in the National Contingency Plan those federal officials who are to act on behalf of the public as trustees for natural resources. Federal officials so designated will act pursuant to section 107(f) of CERCLA and section 311(f)(5) of the Clean Water Act.

(b) The following individuals shall be the designated trustee(s) for general categories of resources. They are authorized to act ... when there is injury to, loss of, or threat to natural resources as a result of a release of a hazardous substance or a discharge of oil. Notwithstanding the other designations in this section the Secretaries of Commerce and the Interior shall act as trustees of those resources subject to their respective management or protection.

(1) Secretary of Commerce. The Secretary of Commerce shall act as trustee for natural resources managed or protected by the Department of Commerce or other federal agencies and that are found in or under waters navigable by deep draft vessels, in or under tidally influenced waters, or waters of the contiguous zone, the exclusive economic zone, and the outer continental shelf, and in upland areas serving as habitat for marine mammals and other protected species....Examples of the Secretary's trusteeship include marine fishery resources and their supporting ecosystems; anadromous fish; certain endangered species and marine mammals; and National Marine Sanctuaries and Estuarine Research Reserves.

(2) Secretary of the Interior. The Secretary of the Interior shall act as trustee for natural resources managed or protected by the Department of the Interior. Examples of the Secretary's trusteeship include migratory birds; certain

anadromous fish, endangered species, and marine mammals; federally owned minerals; and certain federally managed water resources. The Secretary shall also be the trustee for those natural resources for which an Indian tribe would otherwise act as trustee in those cases where the United States acts on behalf of the Indian tribe.

(3) Secretary for the Land Managing Agency. For natural resources located on,over, or under land administered by the United States, the trustee shall be the head of the Department in which the land managing agency is found. The trustees for the principal federal land managing agencies are the Secretaries of the Department of the Interior, the Department of Agriculture, the Department of Defense, and the Department of Energy.

(4) Head of Authorized Agencies. For natural resources located in the United States but not otherwise described in this section, the trustee shall be the head of the federal agency or agencies authorized to manage or protect those resources.

300.605 State Trustees

State trustees shall act on behalf of the public as trustees for natural resources within the boundary of a state or belonging to, managed by, controlled by, or appertaining to such state. For the purposes of subpart G of this part, the definition of the term "state" does not include Indian tribes.

300.610 Indian Tribes

The tribal chairman (or heads of the governing bodies) of Indian tribes,...shall act on behalf of the Indian tribes as trustees for the natural resources belonging to, managed by, controlled by, or appertaining to such Indian tribe, or held in trust for the benefit of such Indian tribe, or belonging to a member of such Indian tribe, if such resources are subject to a trust restriction on alienation....

300.615 Responsibilities of Trustees

(a) Where there are multiple trustees, because of coexisting or contiguous natural resources or concurrent jurisdictions, they should coordinate and cooperate in carrying out these responsibilities.

(c) Upon notification or discovery of injury to,destruction of, loss of, or threat to natural resources, trustees may, pursuant to section 107(f) of CERCLA or section 311(f)(5) of the Clean Water Act, take
the following actions as appropriate:

(1) Conduct a preliminary survey of the area affected by the discharge or release to determine if trust resources under their jurisdiction are, or potentially may be, affected;

(2) Cooperate....in coordinating assessments, investigations, and planning.

(3) Carry out damage assessments; or

(4) Devise and carry out a plan for restoration, rehabilitation,replacement, or acquisition of equivalent natural resources. In assessing damages to natural resources, the .... trustees have the option of following the procedures for natural resources located at 43 CFR part 11.

(d) The authority of federal trustees includes, but is not limited to the following actions:

(1) Requesting that the Attorney General seek compensation from the responsible parties for the damages assessed and for the costs of an assessment and of restoration planning; and

(2) Participating in negotiations between the United States and potentially responsible parties (PRPs) to obtain PRP-financed or PRP-conducted assessments and restorations for injured resources or protection for threatened resources and to agree to covenants not to sue, where appropriate.

(3) Requiring, in consultation with the lead agency, any person to comply with the requirements of CERCLA section 104(e) regarding information gathering and access.

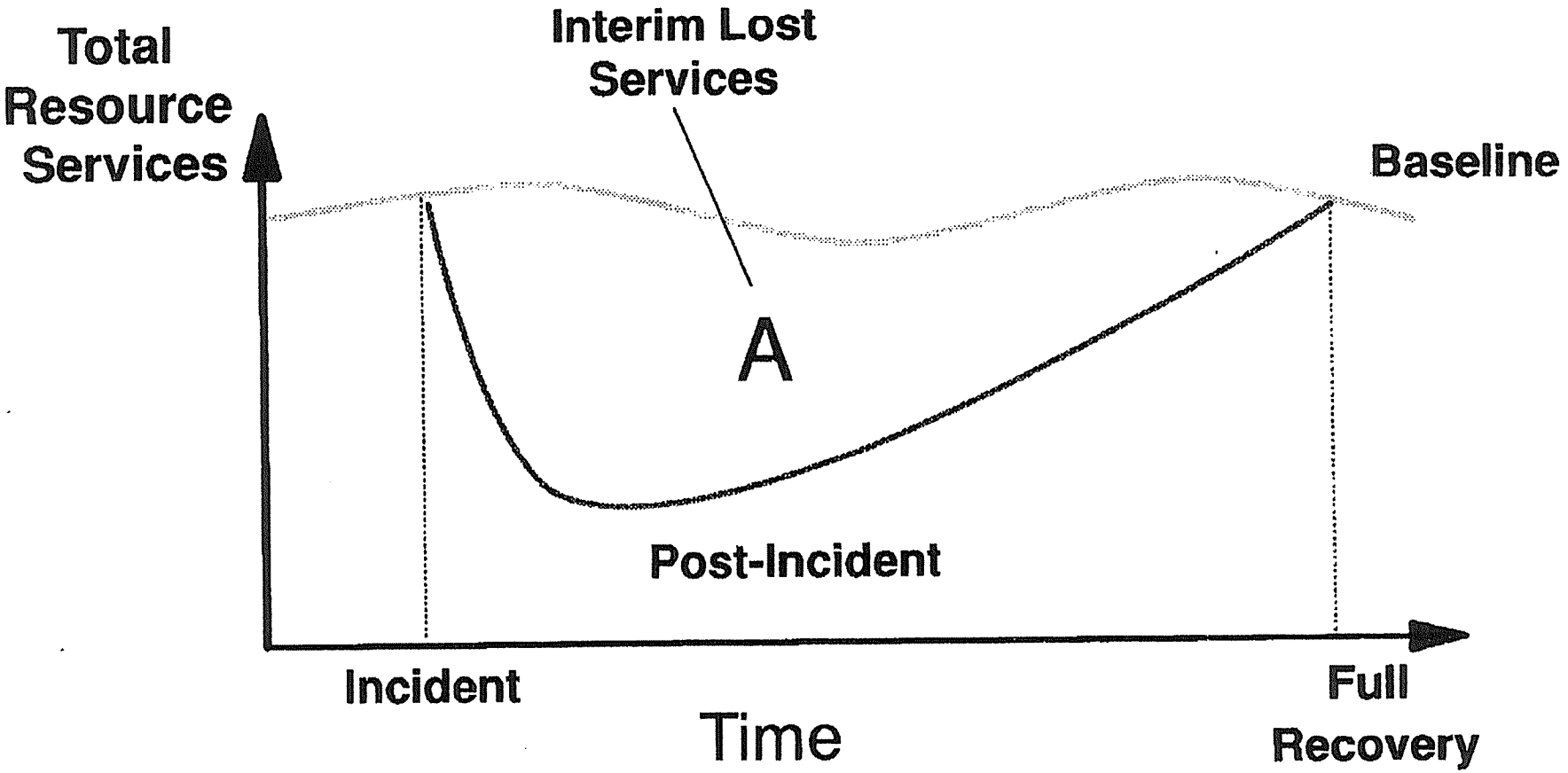
(e) Actions which may be taken by any trustee pursuant to section 107(f) of CERCLA or section 311(f)(5) of the Clean Water Act include but are not limited to, any of the following:

(1) Requesting that an authorized agency issue an administrative order or pursue injunctive relief against the parties responsible for the discharge or release; or

(2) Requesting that the lead agency remove, or arrange for the removal of, or provide for remedial action with respect to, any hazardous substances from a contaminated medium pursuant to section 104 of CERCLA.

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Interim Lost Services Following Resource Injury



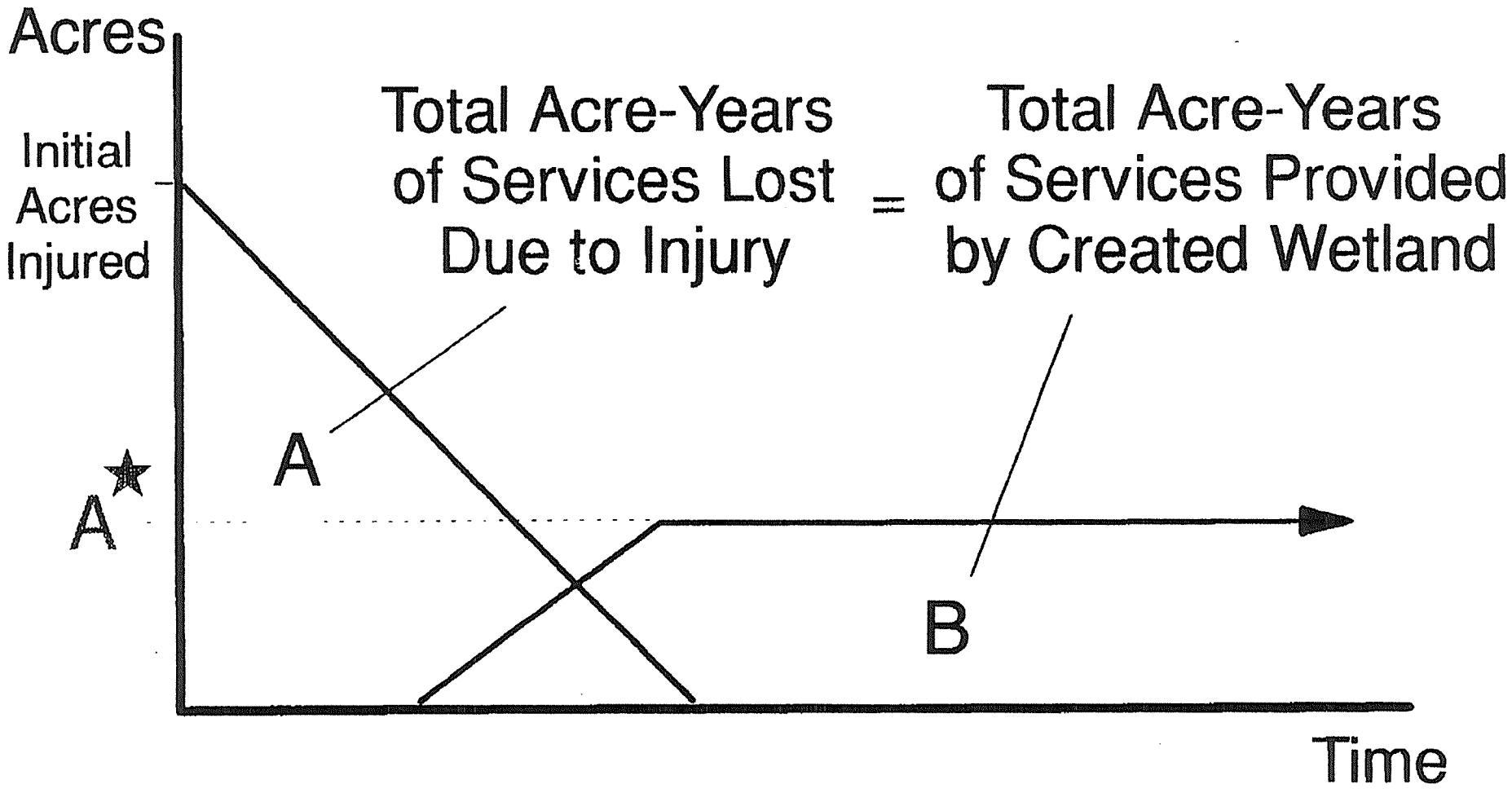
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Components of a Natural Resource Damage Claim

- The cost of restoring the resource
- The interim lost value of the resource services from the time of injury until restoration
- The cost of performing the assessment

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Example of Habitat Equivalency Approach for an Injured Wetland



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Compensation Options Under Habitat Equivalency Approach

- Monetary
  - PRP pays damages equal to the number of acres to be created times the cost per acre
- In-Kind
  - PRP agrees to perform restoration project according to specified performance standards

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Habitat Equivalency Analysis - General Principles

- Looks at resource services in aggregate using extent-time measures (acre-years)
- Calculates the amount of habitat to be created to provide the same level of services over time as were lost due to the injury
- Creation of habitat may compensate for injuries to the same or different types of habitat or individual species

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Habitat Equivalency Analysis - Four Basic Steps

- Document and quantify the injury
- Identify and evaluate restoration/habitat creation options
- Scale the restoration/creation project to compensate for the injury over time
- Determine the appropriate means of compensation (monetary or in-kind)

Texas Natural Resource Conservation Commission

NATURAL RESOURCES DAMAGE ASSESSMENT

September 1994

Office of Waste Management
Pollution Cleanup Division
Emergency Response and Assessment Section
Damage Assessment and Restoration Program

NRDA

- *Restores injured natural resources.*
- *Compensates the public for the loss of natural resources.*
- *TNRCC was designated as a Natural Resource Trustee by the governor in 1988.*
- *Authority for NRDA comes from CERCLA, CWA, OPA, Tx. Water Code, Tx. Natural Resource Code.*
- *Focuses on protection and restoration rather than regulation and remediation.*
- *Requires a high degree of inter-agency and intra-agency coordination.*
- *Cost effective since administrative costs are recoverable from the RPs.*
- *A program where every TNRCC dollar spent can result in as much as 12 dollars of restoration and compensation to the public and the environment*

NATURAL RESOURCE TRUSTEE

A federal or state natural resource management agency that acts on the behalf of the public to compensate for damages to natural resources under CERCLA, CWA and OPA.

FEDERAL TRUSTEES

(Designated by Executive Order 12580 and the NCP)

- *Department of the Interior*
- *Department of Commerce*
  National Oceanic and Atmospheric Administration

STATE TRUSTEES

(Designated by the Governor)

- *TNRCC (1988)*
- *Texas Parks and Wildlife (1990)*
- *General Land Office (1991)*

COORDINATION OF INVESTIGATIONS

EPA, acting of behalf of the President, shall seek to coordinate the assessments, investigations and planning under this section with Federal and State Trustees. (CERCLA 104(b)(2)

Where there are multiple trustees, because of coexisting or contiguous natural resources or concurrent jurisdictions, they shall coordinate and cooperate in carrying out their responsibilities.
(Proposed NCP 300.615)

STATE RESOURCES

TNRCC Jurisduction

(Tx. Water Code, Tx. Clean Air Act, and Tx. Natural Resources Code)

- *Air*
- *Groundwater*
- *Surface water including sediments*
- *Drinking water*

TPWD Jurisdiction

(Tx. Natural Resources Code)

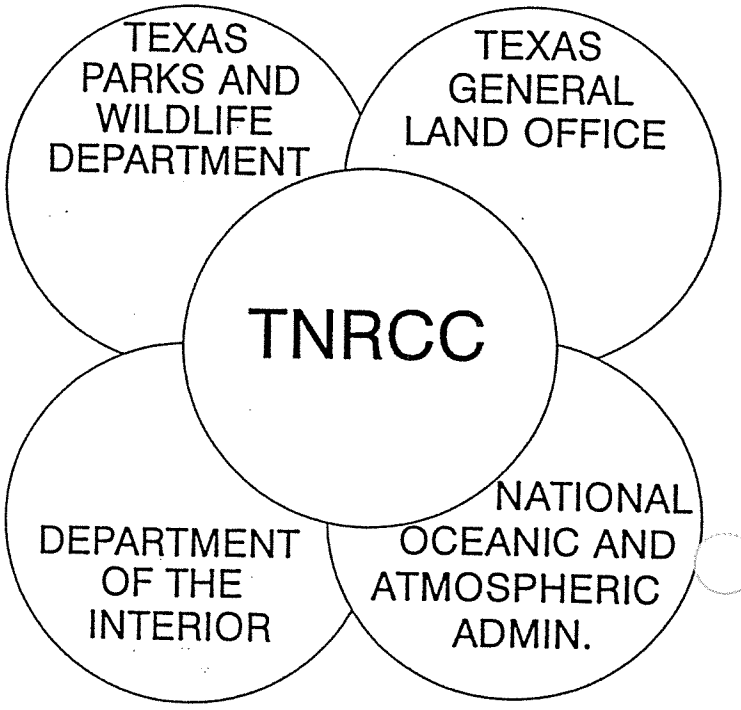
- *Wildlife*
- *Fish*
- *Biota*

GLO Jurisdiction

(Tx. Natural Resources Code)

- *State lands*

NATURAL RESOURCE TRUSTEES



NRDA

The process of documenting injuries to natural resources and seeking compensation for restoration and the loss of the use of the natural resources. Prescribed methodologies appear in 43 CFR Part 11.

Trustees which follow the procedures in 43 CFR Part 11 obtain a Rebuttable Presumption (i.e., the PRP/RP has the burden of proving that the trustees' assessment in incorrect).

TYPES OF NATURAL RESOURCES
(CERCLA §101)

- *Land*
- *Wildlife*
- *Groundwater*
- *Drinking water supplies*
- *Surface water (lakes, rivers, wetlands, sediment)*
- *Fish*
- *Biota*
- *Air*

AND

other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States, and any state.

INJURY

- *A measurable, adverse change in the physical, biological or chemical quality of a natural resource that disrupts the service that the resource provides to humans or other resources.*

Examples of Injuries to Natural Resources

- *Contaminated surface waters of the state that cannot support a healthy fish population.*
- *The closure of a bay to fishing due to the contamination of the fish from the unauthorized release of hazardous substances.*
- *The interruption of public boating due to an oil spill into a public waterway.*
- *The inability of the public to use a drinking water aquifer due to exceedances of MCLs in the aquifer.*

DAMAGE DETERMINATION

- *Determine the appropriate amount of monetary compensation for the reduction in <u>natural resource services</u> resulting from the injuries attributable to the release.*

Damage Assessment Costs	+	*Cost of Restoration*	+	*Value of Lost Services*

- *Includes - $ to compensate public for natural resource service losses from time of release until time of full restoration of services to baseline condition*
- *Excludes - permitted discharges (e.g., NPDES)*
  Violations of NPDES permits are <u>NOT</u> excluded

THE CONCEPT OF SERVICE

- *Functions that one resource performs for another or for humans either through physical or visual contact.*

    - *fishing*
    - *transportation*
    - *recreation*
    - *habitat*
    - *bird watching*

Use services - involves some physical or visual contact between people and natural resource

- *bird watching*
- *fishing*
- *transportation*
- *recreation*

Non-use service - services that resources provide for other resources

- *nesting habitat*

Reduction in Service = *Baseline Services* - *Post-Release Services*

ORIGIN OF NATURAL RESOURCE TRUSTEE AUTHORITY
(Oil and Hazardous Substance Liability)

Federal Water Pollution Control Act (Clean Water Act -1977)

Section 311(B)(2)(f)(4) - The cost of removal of oil or a hazardous substance.... shall include any costs or expenses incurred by the Federal Government or any State Government in the restoration or replacement of natural resource damaged or destroyed...

Section 311(B)(2)(f)(5) - The President or the authorized representative of any State, shall act on behalf of the public as the trustee of the natural resource to recover costs of replacing or restoring such resources.

Comprehensive Environmental Response Compensation, and Liability Act (CERCLA-1980)

Section 107(a)(4)(C) - Damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

Section 107(f)(1) - Natural Resource Liability - In case of an injury to, destruction of, or loss of natural resources... the United States Government and any State shall be liable for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State....

The President or authorized representative of any State shall act on behalf of the public as trustees of such natural resources to recover for such damages. Sums recovered shall... restore, rehabilitate, or be used to acquire the equivalent of the resources by appropriate agencies...

Under NRDA, a RP is liable for the following:

- *The cost of restoring the resource*
- *The interim lost value of the resource services from the time of injury until restoration*
- *The cost of performing the assessment*

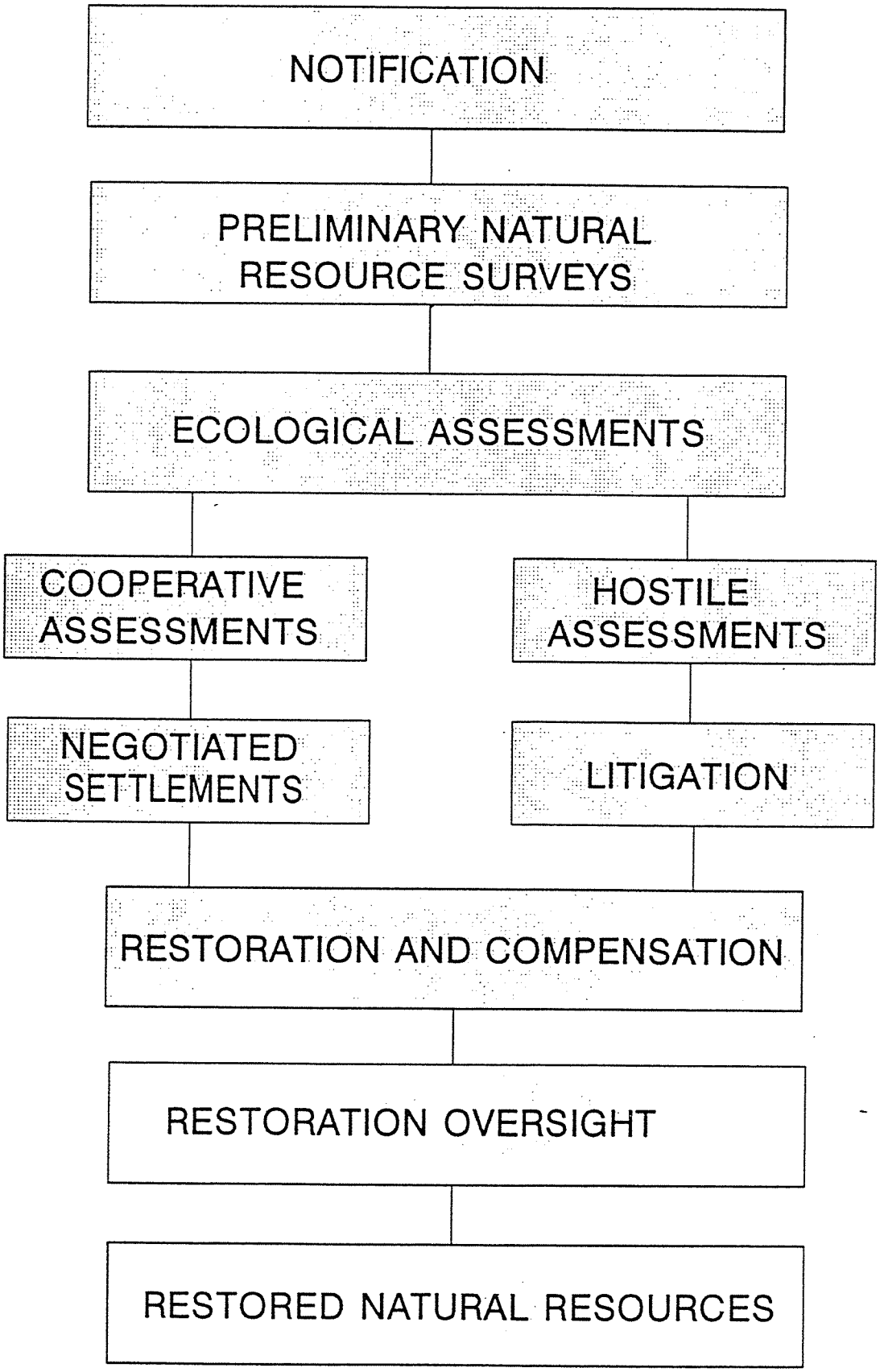
FOUR PHASES OF NRDA (43 CFR PART 11)

- *Preassessment Screen*
- *Assessment Plan*
- *Damage Assessment*
- *Post-Assessment Phase*

ADVANTAGES of NEGOTIATED SETTLEMENT APPROACH

- *Keeps focus on technical, rather than procedural issues*
- *Less costly for both Trustees and PRPs*
- *Expedites restoration of injured resources*

NRDA PROCESS



NATURAL RESOURCE DAMAGE ASSESSMENT

Progress Status Per Case

	PRELIMINARY NATURAL RESOURCE ASSESSMENT	ECOLOGICAL ASSESSMENT	COOPERATIVE DAMAGE ASSESSMENT	LITIGATION	DAMAGE ASSESSMENT COMPLETE	RESTORATION COMPLETE
CURRENT NRDA CASES						
AIR FORCE PLANT #4 DOD	■					
APEX SPILL			■	■	✳	
ASS. MILK PRODUCERS SPILL	■					
BAILEY NPL			■		□	
BRAZOS RIVER SPILL			■			■
BRIO/DOP NPL			■		□	
CHILTIPIN CREEK SPILL			■		✳	
COLTEX SSF	■					
ELF ATOCHEM		■				
FRENCH LTD NPL			■		✳	
HI YIELD SSF		■				
INTERN. CREOSOTING SSF		■				
J C S COMPANY SSF	■					
JERRELL THOMPSON SSF	■					
HIGH ISLAND SPILL			■		✳	■ △
LAVACA BAY			■	■	✳	
LONGHORN AMMUN. PLANT	■					
MEGA BORG SPILL			■		✳	■
MOBIL MINING SPILL			■		□	
MOTCO NPL	■					
PANTEX DOE	■					
PENNZOIL SULFUR SPILL			■		■	■
PESSES CHEMICAL NPL	■					
PETRO-CHEM SYS. NPL	■					
SALT CREEK SPILL					■	
SIKES DISPOSAL NPL	■					
SONIC INTERN. SSF	■					
TEX TIN CORP.	■					
TEX. N. M. PIPELINE SPILL			■			
UNOCAL SPILL			■		□	

■ ACTION ONGOING

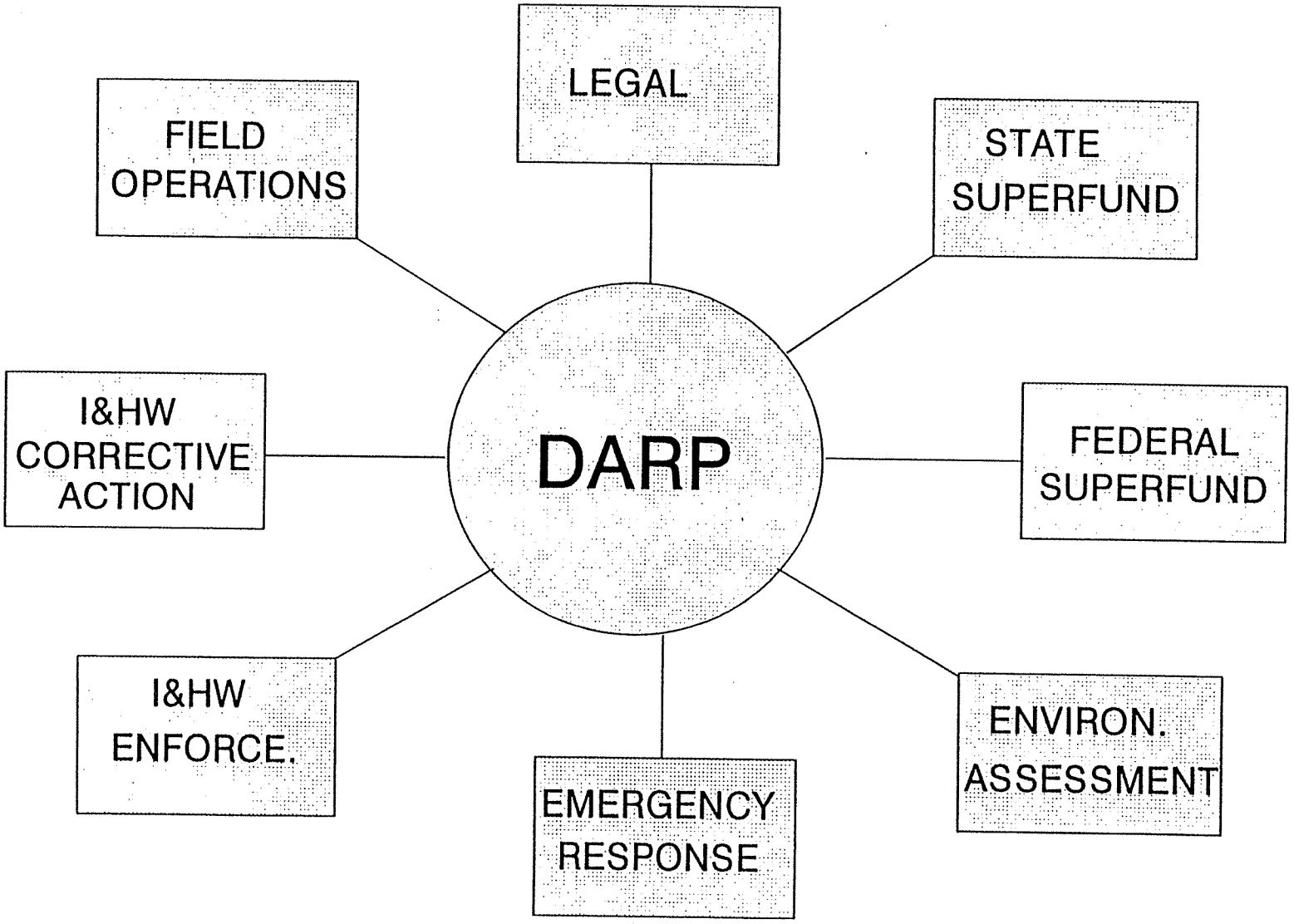
□ SETTLEMENT PENDING

✳ ADMIN. COSTS RECOVERED

△ RESTORATION PROJECT

DAMAGE ASSESSMENT AND RESTORATION PROGRAM

INTRA-AGENCY COORDINATION



The Endangered Endangered Species Act

"Only the Strong Survive"

Francesca Ortiz

FRANCESCA ORTIZ

BAKER & BOTTS, L.L.P.

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Fran Ortiz practices in the areas of environmental law and litigation. She has substantial experience relating to state and federal ethics laws, underground storage tanks, hazard communication, occupational safety and health, endangered species counseling, wastewater and sand dredging permitting and agency rulemaking. Ms. Ortiz is an Adjunct Professor at the University of Texas School of Law, teaching a course on environmental liabilities.

Ms. Ortiz is a member of the State Bar of Texas (Environmental and Natural Resources Section) and the Travis County Bar Association. She has published numerous articles on administrative law and has spoken before industry and professional groups on various environmental and ethics issues.

THE ENDANGERED SPECIES ACT

FRANCESCA ORTIZ
Baker & Botts, L.L.P.
Austin, Texas

Seventh Annual Texas Environmental Superconference
August 3-4, 1995

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1. Ninety-Day Finding for a Petition to List the Comal Springs Salamander, 60 Fed. Reg. 31137 (June 13, 1995).

2. Proposal to List Three Aquatic Invertebrates in Comal and Hays Counties, Texas, as Endangered, 60 Fed. Reg. 29537 (June 5, 1995).

3. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 1995 WL 382088 (U.S. June 29, 1995).

The Endangered Species Act

The Endangered Species Act of 1973 has received increasing attention in the last few years as a result of controversial proposed and final listings of species as endangered and judicial interpretation of not only the act's provisions, but also implementation of the act by the United States Fish & Wildlife Service. This discussion will focus on the historical background of the act, the basic provisions of the act, judicial interpretation of the act and its implementation, and recent listings and proposed listings under the act.

I. Historical Background of the Endangered Species Act

A. Early Statutes

The first laws to protect species were established in the early 1900's. The Lacey Act of 1900, ch. 553, §§ 1-5, 31 Stat. 187, provided federal sanctions for the violation of non-federal laws geared toward protecting species. This act, in conjunction with the later enacted Bass Act of 1926, ch. 346, 44 Stat. 576, worked to prohibit interstate transportation of fish or wildlife taken in violation of federal, state or foreign law. Between enactment of the Lacey Act and the Bass Act, Congress enacted the Migratory Bird Treaty Act, ch. 128, § 2, 40 Stat. 755. This act was slightly more expansive, allowing the Secretary of the Interior to adopt regulations protecting migratory birds and establishing wildlife refuges. Despite this early legislation, however, species protection was fairly limited and required further legislation.

B. Endangered Species Preservation Act of 1966

Congress supplemented the scope of its protection of endangered species with its enactment of the Endangered Species Preservation Act ("ESPA"), Pub. L. No. 89-669, 80 Stat. 926 (1966). Unlike later attempts, the ESPA was still limited in its scope, authorizing protection for only native fish and wildlife species and providing only limited protection for those species. A major problem with the ESPA was that the Department of the Interior was required to harmonize its programs with the ESPA only "to the extent practicable." In addition, the agency was only required to encourage other agencies to further the act's purposes "where practicable." Although the ESPA did allow for the acquisition of land to protect species, the ESPA still failed to prohibit takings on any lands except federal lands. In even those instances, however, the act allowed for exceptions.

C. Endangered Species Conservation Act of 1969

Three years after the passage of the ESPA, Pub. L. No. 91-135, 83 Stat. 275 (1969), Congress enacted the Endangered Species Conservation Act of 1969 ("ESCA") to expand the scope of protection from just native fish and wildlife to species in danger of "worldwide extinction." Under this act, the Department of the Interior was required to "list" species in the Federal Register. Under the ESCA, Congress took an international scope prohibiting the importation or sale of listed species within the United States and providing for

an international ministerial meeting to adopt a convention on the conservation of endangered species.

D. Convention on International Trade in Endangered Species of Wild Fauna and Flora

Under the authority of the ESCA, the United States held an international conference to work toward the protection of both endangered animal and plant species. This conference led to the signing of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), 1976, 27 U.S.T. 1087, T.I.A.S. No. 8249, amended June 22, 1979; T.I.A.S. No. 11079, and restricted international commerce in plant and animal species that were either actually or potentially harmed by trade. CITES, effective in 1975, established three lists: Appendix I for species threatened with extinction; Appendix II for species not currently endangered but in danger of becoming so in the light of unrestricted commercial trade; and Appendix III for species that a country has identified as in need of protection. The United States has taken a lead in the implementation of CITES and has furthered its cause with implementation of the Endangered Species Act.

E. Endangered Species Act of 1973

In 1973, Congress passed the Endangered Species Act ("ESA"), the most comprehensive legislation on endangered species to date, which put teeth into the provisions of the previous statutes. The ESA also established additional provisions geared toward protecting species. For example, Congress established definitions for "endangered" and "threatened" and provided that plants and all classes of invertebrates were eligible for protection, as they were protected under CITES. In addition, the ESA combined the separate domestic and foreign species lists and established uniform provisions that would apply to each. Like the ESPA, the ESA also provided authority to acquire land for listed animals and allowed such acquisition for plants listed under CITES. Matching federal funds were made available for states that entered into cooperative agreements related to the protection of endangered species, and the statute required all federal agencies to undertake programs that would provide for the conservation of endangered and threatened species and prohibited them from authorizing, funding or carrying out any actions that would jeopardize a listed species or destroy or modify its "critical habitat." The ESA also instituted broad "taking" prohibitions that applied specifically to all endangered animal species and could apply to threatened animal species by special regulation.

Since its enactment, the ESA has been significantly amended three times, in 1978, 1982 and 1988. Among the Endangered Species Act Amendments of 1978, Pub. L. No. 95-362, 92 Stat. 3751, was the requirement that critical habitat be designated concurrently with the listing of the species, when prudent to do so, and the requirement that economic and other designated impacts be considered when determining boundaries for critical habitat. In addition, the 1978 amendments limited the definition of "species" as it relates to "populations" to include only "vertebrate fish or wildlife."

Key among the Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411, were provisions relating to the status of a species. For example, the

1982 amendments provided that status determinations of a species must be made solely on the basis of biological and trade information, without any consideration of possible economic or other effects. In addition, the 1982 amendments required that a final rule determining the status of a species must follow within one year of its proposal unless it had been withdrawn for cause.

The Endangered Species Act Amendments of 1988, Pub. L. No. 100-478, 102 Stat. 2306, required the implementation of programs for monitoring candidate species and recovered species and provided for the adoption of emergency listing when evidence existed of a significant risk to a species. The 1988 amendments also dealt with several recovery issues. Under the amendments, recovery plans must undergo public notice and comment, and federal agencies were required to consider such comments. In addition, the amendments required biennial reports on the development and implementation of recovery plans and on the status of all species covered by such plans. The 1988 amendments also expanded protection for endangered plants to include destruction on federal land and other taking when it violated federal law.

E. Administration of the Endangered Species Act

The ESA, as amended, is implemented by three agencies, the Fish and Wildlife Service ("FWS") in the Department of the Interior, the National Marine Fisheries Service ("NMFS") in the Department of Commerce, and the Animal and Plant Health Inspection Service ("APHIS") in the Department of Agriculture. FWS is responsible for terrestrial and freshwater species and migratory birds, while NMFS generally regulates those species that occur in marine environments. APHIS regulates the importation and exportation of listed terrestrial plants.

II. Principle Provisions of the Endangered Species Act

A. Section Three - Definitions

Section three of the ESA contains definitions key to implementation of the act. See 16 U.S.C.A. § 1532.

1. Species. "Species" is defined as "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." Id. § 1532(16).

2. Endangered Species. An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range." Id. § 1532(6). Excluded from the definition of endangered species are species of the Class Insecta that have been determined by either the Department of the Interior or the Department of Commerce to be a "pest" whose protection would present an "overwhelming and overriding risk to man." Id.

3. Threatened Species. A "threatened species" includes "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Id. § 1532(20).

4. Critical Habitat. With respect to endangered and threatened species, "critical habitat" is defined in two parts. Critical habitat with regard to areas within the geographical area occupied by the species at the time of its listing are those specific areas on which are found physical or biological features that are essential to conserving the species and that may require special management considerations or protection. Id. § 1532(5)(A)(i). With regard to areas outside the geographical areas occupied by the species at the time of its listing, critical habitat includes only those areas deemed essential by either the Department of the Interior or the Department of Commerce as essential for conserving the species. Id. § 1532(5)(A)(ii).

5. Take. "Take" is broadly defined and means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Id. §1532(19).

B. Section Four - Listing, Critical Habitat, Monitoring and Recovery Plans

Section four of the ESA provides for listing of species as endangered or threatened and designating critical habitat for such species. Because of the difficulty involved in "delisting" a species, involvement in the listing process is essential for a person who may be affected by regulation of a particular species.

1. Factors in Listing. Determination of species status depends on five statutorily established factors:

> (1) the present or threatened destruction, modification, or curtailment of its habitat or range;
>
> (2) overutilization for commercial, recreational, scientific, or educational purposes;
>
> (3) disease or predation;
>
> (4) the inadequacy of existing regulatory mechanisms; or
>
> (5) other natural or manmade factors affecting its continued existence.

16 U.S.C.A. § 1533(a)(1). Significantly missing from these considerations is any weight given to economic considerations. In determining species status, the agency may only consider the "best scientific and commercial data available" after conducting a review and taking into account local, state or foreign efforts to protect the species. See id. § 1533(b)(1)(A).

2. Petition for Listing.

a. Petition characteristics. Section four of the ESA allows any interested individual or organization to petition either FWS or NMFS, as appropriate, to list, delist or reclassify species, or to revise a listed species' critical habitat. See id. § 1533(b)(3)(A). Once presented to the appropriate agency, the agency begins its review by determining whether the document submitted can be considered a "petition." To be considered such, a document must clearly identify itself as a petition, be dated and signed, contain the petitioner's name, address, and organizational affiliation, and clearly indicate what action is being requested. In November 1994, FWS issued a guidance document on the management of petitions. See United States Department of the Interior, Fish & Wildlife Service, Endangered Species Petition Management Guidance (Nov. 1994). To prevent inadvertent triggering of the ESA's petition process by individuals or organizations merely seeking information about a species, the FWS guidance document cautions that specific identification of a document as a petition is required. Mere suggestion of a listing of a candidate species or the provision of comments in response to a notice of review soliciting information about a candidate species is insufficient to begin the process. See id. at 3. Doubts regarding the type of document submitted to the agency, however, is generally resolved by contacting the document's author for clarification. See id.

b. Petition review. Once a document submitted to FWS or NMFS has been classified as a petition, the appropriate agency begins its review. To the maximum extent practicable, the agency has ninety days from the date the petition is received to determine whether the petition presents "substantial scientific or commercial information" indicating that the petition may be "warranted." 16 U.S.C.A. § 1533(b)(3)(A). If adequate information suggests that a listing might be warranted, the agency commences a review of the status of the species and makes a twelve-month finding on whether or not the action is actually warranted. In its twelve-month finding, the agency may make a determination of warranted, not warranted, or warranted but precluded. Id. § 1533(b)(3)(B). A "warranted but precluded" finding is reserved for those situations where expeditious progress is being made on adding or removing other species that take precedence over the petitioned action. Id. § 1533(b)(3)(B)(iii)(II).

If either the FWS or NMFS determined that a petition is either not warranted or warranted but precluded at either the ninety-day finding or the twelve-month finding, the petitioner may appeal to a federal district court for judicial review of the finding. Id. § 1533(b)(3)(C)(ii).

c. Proposed rule. If the appropriate agency determines that a petition is warranted at the twelve-month finding, the actual rulemaking process begins. Notice of the proposed rule to list a species and the complete text of the proposed rule must be published in the Federal Register no later than ninety days prior to the effective date of the regulation. Id. § 1533(b)(5)(A). Notice and a request for comments must also be given to the appropriate agency in the state where the species is believed to occur as well as to each county in which the species is believed to occur. Id. § 1533(b)(5)(A)(ii). In the case of foreign states, notice is given, insofar as practical, to each foreign state where a species is

believed to occur or whose citizens harvest the species on the high seas. Id. § 1533(b)(5)(B). The agency must also give notice to any appropriate professional scientific organizations deemed appropriate and publish a summary of the proposed rule in a newspaper generally circulated in the area where the species is believed to occur. Id. § 1533(b)(5)(C)-(D). If requested within forty-five days of publication of the notice, the agency must also hold at least one public hearing. Id. § 1533(b)(5)(E).

d. Final rule. Within one year after publication of the proposed rule, the agency must publish in the Federal Register either its determination of whether a final rule listing a species as endangered or threatened should be implemented or its determination to extend the one-year period for further review. Id. § 1533(b)(6)(A)(i). The agency may extend its one-year review period for up to six months to solicit additional data if there is "substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination." Id. § 1533(b)(6)(B)(i). If the agency determines that the listing should not be made, the proposed rule is withdrawn. Such decision is subject to judicial review. Id. § 1533(b)(6)(B)(ii).

e. Emergency rulemaking. In certain situations, the agency may find that an emergency rule regarding a species is appropriate if there is an "emergency posing a significant risk to the well-being of any species of fish or wildlife or plants." Id. § 1533(b)(7). In such situations, the agency may issue a rule that is effective on publication, but only if the agency details its reasons why the rule is necessary and provides notice to the appropriate state agency. Id. Emergency regulations are valid for only 240 days after publication of the rule, unless the regular rulemaking procedures are complied with during that 240-day period. Id. The agency must withdraw the emergency rule if, at any time, substantial evidence based on best appropriate data available shows that the regulation is not warranted. Id.

3. Designating critical habitat. A final regulation designating critical habitat of a species listed as endangered or threatened must be published concurrently with the final regulation implementing the listing, unless it is essential that the listing be promptly published to conserve the species or the critical habitat is not then determinable. Id. § 1533(b)(6)(C). In cases where the critical habitat is not determinable at the time of listing, the agency may extend the one-year period for not more than an additional year, after which the agency must publish a final regulation on critical habitat, basing the decision on data available at that time and designating, to the extent prudent, such habitat. Id. In designating critical habitat, the agency must consider not only the best scientific data available, but also the economic impact and other relevant impacts of specifying a particular area as critical habitat. Id. § 1533(b)(2). An area may be excluded from critical habitat if the agency determines that the benefits of the exclusion outweigh the benefits of including the area as habitat, unless the agency determines that excluding the area will result in extinction of the species at issue. Id.

The provisions for revising designated critical habitat follow the same procedures established for listing species as endangered or threatened. Id. § 1533(b)(3)(D).

4. Monitoring and recovery plans. Section four of the ESA also provides two mechanisms for ensuring the effectiveness of the listing of the species. First, the agency must conduct a monitoring program every five years of all species then-listed as endangered or threatened. Id. § 1533(c)(2)(A). Under this program, the agency must determine whether the species should be removed from the list (i.e., delisted), changed in status from endangered to threatened, or changed in status from threatened to endangered. Id. § 1533(c)(2)(B). Procedures for delisting or changing the status of a species follow those procedures established for listing a species. Id. § 1533(c)(2).

The second mechanism for ensuring the effectiveness of the listing is the establishment of a recovery plan for the conservation and survival of the species. A recovery plan must be established for each species listed as endangered or threatened unless it is determined that such a plan will not promote the conservation of the species. Id. § 1533(f). In developing recovery plans, priority is given to those species that will most likely benefit from such plans, especially those that are, or may be, in conflict with construction or other developmental or economic activities. Id. § 1533(f)(1)(A). The agency must incorporate into each plan (i) site-specific management actions to achieve conservation and survival of the species; (ii) objective, measurable criteria that, when met, would result in a determination that the species be delisted; and (iii) estimates of the time required and the cost to carry out measures needed to reach the plan's goal. Id. §1533(f)(1)(B).

C. Section Seven - Consultation

1. Activity Affected. Section seven of the ESA requires that federal agencies work with the FWS or NMFS to protect species listed as endangered or threatened. The ESA accomplishes this by establishing the consultation process. Under this program, a person seeking a permit or funding from a federal agency for an activity that may (i) jeopardize the continued existence of a listed species or a species proposed to be listed or (ii) result in the destruction or adverse modification of designated critical habitat or critical habitat proposed to be designated must consult with the FWS or NMFS as well as the permitting or funding agency to ensure that the species will not be jeopardized or that the critical habitat will not be destroyed or adversely modified. Id. § 1536(a). In determining the effects of the activity, the agencies must use the best scientific and commercial data available. Id. § 1536(a)(2).

2. Timing. Generally, the consultation process must be concluded within ninety days after the process is initiated, although the agencies may agree to another time period in which to conclude the process. Id. § 1536(b)(1)(A)-(B). The process may not exceed the ninety-day requirement, however, unless the agency provides a written statement to the applicant explaining why a longer period is required, the information needed, and the estimated date on which the process will conclude. If the extension will exceed 150 days after the process was initiated, the consent of the applicant is required. Id. § 1536(b)(1)(B).

3. Decision. Once consultation is completed, the FWS or NMFS must provide the applicant and the permitting or funding agency a written statement of the agency's opinion and the basis for the opinion. If jeopardy or adverse modification is found, the FWS or NMFS must suggest reasonable and prudent alternatives that can be taken by the

applicant or permitting or funding agency in implementing the activity. Id. § 1536(b)(3)(A). If the FWS or NMFS determines that the proposed activity will not cause jeopardy or adverse modification, or if reasonable and prudent alternatives are offered, and the activity will not result in an incidental take of a species listed as endangered or threatened, the FWS or NMFS must provide a written statement that specifies (i) the impact of any incidental taking, (ii) the reasonable and prudent measures necessary or appropriate to minimize impacts, and (iii) the terms and conditions (including reporting requirements, if applicable) that the applicant or permitting or funding agency must comply with to implement the measures specified by the FWS or NMFS to minimize impacts. Id. § 1536(b)(4). If an authorized take of a marine mammal is involved, the statement must also specify the measures necessary to comply with the authorized taking. Id.

4. Biological Assessment. For certain construction activities, a biological assessment may be required as part of the consultation process. If the FWS or NMFS determines, based on best scientific and commercial data available, that a species listed or proposed to be listed may be present in the affected area, a biological assessment must be conducted to identify species in the area listed as endangered or threatened. The assessment must be completed within 180 days after the date on which it is initiated, unless another completion date is mutually agreed upon, and before any contract for construction is entered into or before construction is begun. The biological assessment may be undertaken as a part of the permitting or funding agency's efforts to comply with the National Environmental Policy Act ("NEPA"). Id. § 1536(c).

5. Exemptions. If, after consultation, the FWS or NMFS, as appropriate, determines that an activity will cause jeopardy or adverse modification, the permitting or funding agency, the state in which an activity will occur, or the applicant may apply to the FWS or NMFS, as appropriate, for an exemption. Id. § 1536(g)(1). To request an exemption, the exemption applicant must submit a written application within ninety days after completion of the consultation process. In cases in which a federal permit or license is at issue, the application must be submitted within ninety days after the final agency action on the permit or license. Id. § 1536(g)(2)(A). Within twenty days after receiving an application, or after another time mutually agreed upon, the FWS or NMFS, as appropriate, must determine whether the permitting or funding agency and the applicant have (i) proceeded with consultation in good faith and made a reasonable effort to develop and fairly consider modification or other reasonable and prudent alternatives to the activity, (ii) conducted any required biological assessment, and (iii) refrained from making any irreversible or irretrievable commitment of resources prohibited under the ESA. Id. § 1536(g)(3). If such findings are made, the FWS or NMFS then must conduct a hearing on the exemption. Id. § 1536(g)(4).

Within 140 days after the hearing, or another mutually agreeable time, the FWS or NMFS must submit a report discussing its findings to the Endangered Species Committee. Id. § 1536(g)(5). The Committee must make its final determination on whether to grant an exemption within thirty days of receiving the report. Id. § 1536(h)(1). An exemption will be granted if the Committee determines that:

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance;

(iv) neither the federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited under the ESA; and

(v) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Id. § 1536(h)(1). Any exemption granted by the Committee is considered permanent with respect to all endangered or threatened species for purposes of completing the proposed activity regardless whether the species was identified in the biological assessment. Id. § 1536(h)(2)(A). If, however, the FWS or NMFS finds that such an exemption would result in the extinction of a species that was not the subject of the consultation or was not identified in any biological assessment, the Committee may make a determination that the exemption should not be permanent within sixty days after such finding. Id. § 1536(h)(2)(B).

D. Section Nine - Prohibitions

Section nine of the statute sets out actions prohibited by the ESA. The prohibitions extend to persons subject to United States jurisdiction and broadly covers actions relating to endangered species of fish or wildlife or plants. Prohibitions with regard to threatened species are far more limited.

1. Fish and Wildlife. With regard to species of fish or wildlife, the act prohibits: (i) importing or exporting endangered species into or from the United States; (ii) taking any endangered species within the United States, territorial or high seas, (iii) possessing, selling, delivering, carrying, transporting or shipping by any means any endangered species taken in violation of the ESA; (iv) delivering, receiving, carrying, transporting or shipping an endangered species in interstate or foreign commerce by any means in the course of a commercial activity; or (iv) selling or offering for sale in interstate or foreign commerce any endangered species. Id. § 1538(a)(1)(A)-(F). The act further prohibits the violation of any regulation pertaining to any endangered or threatened species. Id. § 1538(a)(1)(G).

2. Plants. With regard to plant species, the ESA prohibits (i) importing or exporting endangered species into or from the United States; (ii) removing or reducing to possessing any endangered species from areas under federal jurisdiction or maliciously damaging or destroying such species on such area; (iii) delivering, receiving, carrying, transporting, or shipping any endangered species in interstate or foreign commerce by any means and in the course of a commercial activity; and (iv) selling or offering for sale any endangered species in interstate or foreign commerce. Id. § 1538(a)(2)(A)-(D). The act also prohibits the violation of any regulation pertaining to any endangered or threatened species. Id. § 1538(a)(1)(E).

3. Specimens, Imports and Exports. Section nine also specifies prohibitions relating to certain specimens and importers and exporters of endangered or threatened species. The act makes it unlawful, with certain exceptions, to engage in the trade of any specimens, or possess any specimens traded, contrary to the provision of CITES. Id. § 1538(c)(1). The act also requires importers and exporters of fish, wildlife or plants to obtain permission from the appropriate agency, id. § 1538(d)(1), and specifies requirements related to recordkeeping and reporting and access by the agency to the imported fish, wildlife or plants, id. § 1538(d)(2).

E. Section 10 - Incidental Take Permits

1. Permits Allowed. Despite the prohibitions specified in section nine, the ESA does provide a means for projects that would result in the take of listed species to be permitted, subject to carefully prescribed conditions, as long as the take is incidental to, and not the purpose of, the otherwise lawful activity. Id. § 1539(a)(1)(B). In addition, such permits are authorized for scientific activities or to enhance propagation of the species. Id. § 1539(a)(1)(A).

2. Habitat Conservation Plan. To obtain a permit, an applicant must submit to the FWS or NMFS a habitat conservation plan. The habitat conservation plan must specify (i) what impact will likely result from the taking; (ii) the steps that will be taken to minimize and mitigate the impacts and the funding available to implement such steps; (iii) the alternative actions available to the taking that the applicant has considered and the reasons that the alternatives were not utilized; and (iv) any other measures that the FWS or NMFS might require as appropriate or necessary for purposes of the action. Id. § 1539(a)(2)(A).

3. Permit Process. The incidental take permit process consists of three basic phases: a pre-application coordination phase, a permit application processing phase, and a post-issuance phase. To assist FWS staff in issuing incidental take permits, FWS issued a draft guidance document in September 1994 detailing the various procedures required in issuing an incidental take permit and reviewing the issuance criteria for such permits. See Preliminary Draft Handbook for Habitat Conservation Planning and Incidental Take Permit Processing (Sep. 15, 1994) ("Draft Handbook").

a. Pre-application coordination. The pre-application coordination phase involves negotiations between FWS and other affected parties, developing programs to mitigate or minimize the effects of the proposed project on affected species, and preparing

the habitat conservation plan. In addition, the preparation of an Environmental Impact Statement under NEPA may be required to ensure that the agency's own action in issuing the permit will not jeopardize the species. An application is considered complete when the FWS receives a permit application form, the required fee, a completed habitat conservation plan, a draft NEPA document, if required, and an implementing agreement. Draft Handbook, supra, at 3. An implementing agreement is a legal contract that identifies the responsibilities of all participants to a habitat conservation plan program, binds the parties to their respective obligations under the plan and is signed by all parties. Id. at 39. Once received a completed application package is forwarded to the appropriate FWS regional office for review. Id. at 3.

b. Permit application processing. In the second phase of the permit process, the appropriate regional office reviews the application package for biological and statutory completeness, provides a notice and comment period on the application and NEPA document, if any, and consults within the FWS regarding the proposed permit under section seven of the ESA. Id. at 4. Notice of the application must be provided in the Federal Register and allow at least a thirty-day comment period, except in those instances where the health or life of an endangered animal is threatened and no reasonable alternative is available to the applicant. 16 U.S.C.A. § 1539(c). The FWS must either incorporate or acknowledge comments received before determining whether the application package has satisfied the permit issuance criteria required by the ESA. Draft Handbook, supra at 4.

> An incidental take permit will be issued if it meets the following criteria:
>
> (1) the taking will be incidental;
>
> (2) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
>
> (3) the applicant will ensure that adequate funding for the plan will be provided;
>
> (4) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild;
>
> (5) any measures specified by the FWS or NMFS will be met; and
>
> (6) the FWS or NMFS has received any other assurances required that the habitat conservation plan will be implemented.

16 U.S.C.A. § 1539(a)(2)(B). The permit may contain terms and provisions deemed necessary or appropriate, including but not limited to specified reporting requirements. Id.

c. Post-issuance notice and monitoring. The last step in the permit process is the post-issuance phase, which requires notification to the public of the outcome of the permit application and monitoring of the permittee's compliance with the conservation

program, as well as monitoring of long-term habitat conservation plan progress and success. Draft Handbook, supra, at 4.

III. Recent Listing Activity

The continued vitality of the Endangered Species Act is currently in question due to calls to weaken the act. Speculation continues over when, or if, the act will be reauthorized. In addition, in April 1995, Congress passed a rescissions bill, Pub. L. No. 104-6, 109 Stat. 73, that instituted a moratorium on final listings of endangered and threatened species. Under the law, Congress rescinded $1.5 million from the amounts available for making such determinations.

Despite the moratorium on final listings, the law allows FWS to continue to process petitions and make proposed listings. Recent activity in the central Texas area includes:

A. Comal Springs Salamander. In June 1995, FWS announced its ninety-day finding on the Comal Springs Salamander. Although the FWS found that the petition did not present substantial information indicating that listing the salamander might be warranted, the FWS is continuing its status review and has requested information relating to the species' taxonomic status and relationship to other populations and the boundaries of the species' ecosystem. See 60 Fed. Reg. 31137 (June 13, 1995) (Attachment 1).

B. Comal Aquatic Invertebrates. In June 1995, FWS also proposed to list as endangered three aquatic invertebrates located in Comal and Hays Counties. The primary threat to the invertebrates is a decrease in water quantity and quality due to water withdrawal and other human activity throughout the San Antonio segment of the Edwards Aquifer. The comment period on the proposed listing is scheduled to close on August 4, 1995. See 60 Fed. Reg. 29537 (June 5, 1995) (Attachment 2). A hearing has been requested on the listing.

C. Barton Creek Salamander. A proposed rule to list the Barton Creek Salamander as an endangered species was issued in February 1994. See 59 Fed. Reg. 7968 (Feb. 17, 1994). The primary threat to the salamander is contamination of the waters feeding Barton Springs due to the potential for catastrophic events (such as petroleum or chemical spills) and chronic degradation resulting from urban activities). The public comment period closed on July 29, 1994. See 59 Fed. Reg. 35089. Further activity is currently on hold due to the legislative moratorium.

D. Bexar County Cave Invertebrates. In December 1993, FWS issued a positive ninety-day finding on nine karst invertebrates in the Bexar County area. See 58 Fed. Reg. 63328 (Dec. 1, 1993). The alleged threats to the species are destruction and/or deterioration of habitat by commercial, residential and road construction; filling of caves; loss of permeable cover; potential contamination from septic effluent, sewer leaks, runoff and pesticides, predation by and competition with fire ants, and vandalism. FWS is still in the process of determining whether or not to propose the species for listing.

E. Travis and Williamson Counties Karst Invertebrates. In September 1988, FWS issued a final listing of six karst invertebrates in the Travis and Williamson County areas. See 53 Fed. Reg. 36029 (Sept. 16, 1988). A petition to delist the invertebrates and reclassify five listed species as seven species was submitted to FWS on June 7, 1993. In March 1994, FWS issued a negative ninety-day finding on the petition to delist. See 59 Fed. Reg. 11755 (Mar. 14, 1994). Williams County subsequently brought suit in federal district court for judicial review of the negative finding, but was dismissed for lack of standing. The decision is currently on appeal and is expected to be heard by the Fifth Circuit Court of Appeals in September 1995. A recovery plan for the species was issued by FWS in August 1994.

IV. Recent Case Law

On June 29, 1995, the United States Supreme Court issued its long-awaited decision in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 1995 WL 382088 (U.S. June 29, 1995) (Attachment 3), which reviewed the validity of a FWS regulation that interpreted the meaning of "harm" to include "habitat modification." The Court reversed the D.C. Circuit's prior ruling and held that FWS had reasonably construed Congress' intent by promulgating the regulation.

In Sweet Home, the Sweet Home Chapter of Communities for a Great Oregon and several other organizations brought suit against the Secretary of the Interior to invalidate a number of regulations promulgated by the FWS. The district court rejected all of the challenges, see Sweet Home Chapter of Communities for a Great Oregon v. Lujan, 806 F. Supp. 279 (D.D.C. 1992), and the D.C. Circuit Court of Appeals affirmed the lower court unanimously except for one issue relating to the FWS' regulation that "harm" would include "significant habitat modification that leads to an injury to an endangered species of wildlife." Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 1 F.d. 1 (D.C. Cir. 1993). In a split opinion by a three-judge panel, the court held that the regulation did not violate the ESA and was not void for vagueness. Id. at 3.

On rehearing, the same panel reviewed the case and reversed their decision. Analyzing the statute's terminology, its legislative history and prior case law, two members of the panel (Judges Williams and Sentelle) agreed that the FWS definition of "harm" was "neither clearly authorized by Congress nor a 'reasonable interpretation' of the statute" and that "no later action of Congress supplied the missing authority." The regulation was therefore held invalid. Sweet Home Chapter of Communities for a Great Oregon, 17 F.3d 1463, 1464 (D.C. Cir. 1994). In dissent, Judge Mikva argued that the burden for showing that the FWS interpretation was unreasonable should have been placed on the petitioners and not on the FWS, as the court had done in this case. Judge Mikva also criticized the court's holding based on insufficient support in the language of the statute and on the statute's legislative history.

The Supreme Court reversed, finding that the circuit court was in error to determine that "harm" required a direct application of force. The Court based its decision on three reasons. First, the court found support in the ordinary meaning of "harm," which does not suggest exclusively direct or willful action. See id. at 5. Second, the court justified its

reading using the ESA's broad purpose: "Given Congress' clear expression of the ESA's broad purpose to protect endangered and threatened wildlife, the Secretary's definition of 'harm' is reasonable." Id. at 5 (footnote omitted). Finally, the Court based its decision on the fact that FWS was authorized to issue incidental take permits. As the court stated: "No one could seriously request an 'incidental' take permit to avert § 9 liability for direct, deliberate action against a member of an endangered or threatened species, but respondents would read 'harm' so narrowly that the permit procedure would have little more than that absurd purpose." Id. at 6.

In a concurring opinion, Justice O'Connor agreed with the majority on the understanding that the regulation was limited to "significant habitat modification that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals" and the regulation's application is limited by "ordinary principles of proximate causation, which introduce notions of foreseeability." Id. at 8 (O'Connor, J., concurring). Justice O'Connor's analysis called into question the validity of other endangered species case law and suggested that the regulation might be misapplied. However, "because there is no need to strike a regulation on a facial challenge out of concern that it is susceptible of erroneous application," Justice O'Connor concurred with the majority. Id.

In a dissenting opinion joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia argued that the regulation exhibited three features that did not comport with the ESA. First, the regulation interprets the statute to prohibit habitat modification in any way, regardless of foreseeability. Id. at 11 (Scalia, J., dissenting). Second, the regulation does not require an "act," but allows an "omission" to serve as well. Id. at 11-12. Finally, the regulation "encompasses injury inflicted, not only upon individual animals, but upon populations of the protected species." Id. at 12. Justice Scalia found no support for any of these features in the statutory provisions authorizing the regulation.

Attachment 1

address given above, and seven copies from which the purportedly confidential information has been deleted should be submitted to the Docket Section. A request for confidentiality should be accompanied by a cover letter setting forth the information specified in the agency's confidential business information regulation. 49 CFR part 512.

All comments received before the close of business on the comment closing date indicated above for the proposal will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Comments received too late for consideration in regard to the final rule will be considered as suggestions for further rulemaking action. The NHTSA will continue to file relevant information as it becomes available in the docket after the closing date, and it is recommended that interested persons continue to examine the docket for new material.

Those persons desiring to be notified upon receipt of their comments in the rules docket should enclose a self-addressed, stamped postcard in the envelope with their comments. Upon receiving the comments, the docket supervisor will return the postcard by mail.

List of Subjects in 49 CFR Part 571

Imports, Incorporation by reference, Motor vehicle safety, Motor vehicles, Rubber and rubber products, Tires.

In consideration of the foregoing, the agency proposes to amend Standard No. 121, *Air Brake Systems,* in Title 49 of the Code of Federal Regulations at Part 571 as follows:

PART 571—[AMENDED]

1. The authority citation for Part 571 would be revised to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegation of authority at 49 CFR 1.50.

2. In § 571.121, S5.1.1.1 would be revised to read as follows:

§ 571.121 Standard No. 121; Air brake systems.

* * * * *

S5.1.1.1 Air compressor cut-in pressure. The air compressor governor cut-in pressure shall be greater than 100 p.s.i.

* * * * *

Issued on: June 8, 1995.

Barry Felrice,

Associate Administrator for Safety Performance Standards.

[FR Doc. 95–14461 Filed 6–12–95; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-day Finding for a Petition To List the Comal Springs Salamander

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding.

SUMMARY: The Fish and Wildlife Service (Service) announces a 90-day finding for a petition to list the Comal Springs salamander (*Eurycea* sp.) under the Endangered Species Act of 1973, as amended. The Service finds that the petition did not present substantial information indicating that listing this species may be warranted. The Service is continuing its status review of the species.

DATES: The finding announced in this document was made on June 6, 1995.

ADDRESSES: Data, information, comments, or questions concerning this petition finding should be submitted to the Field supervisor, U.S. Fish and Wildlife Service, Ecological Services Field Office, 10711 Burnet Road, Suite 200, Austin, Texas 78758. The petition finding, supporting data, and comments will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Lisa O'Donnell, Biologist, at the above address (512/490–0057).

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires that the Service make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to demonstrate that the petitioned action may be warranted. To the maximum extent practicable, this finding is to be made within 90 days of the date the petition was received, and notice of the finding is to be published promptly in the **Federal Register**. If the finding is that substantial information was presented, the Service is also required to promptly commence a status review of the species.

The Service has made a negative 90-day finding on the petition to list the Comal Springs salamander (*Eurycea* sp.). The Service finds that the petitioner has not presented substantial information indicating that the requested action for this species may be warranted, as required under section 4(b)(3)(A) of the Act. The Service has been assessing the status of this taxon since its designation as a category 2 candidate. The Comal Springs salamander is currently included in the *Eurycea neotenes* species group, which has been a category 2 candidate species in the Service's candidate notices of review since December 30, 1982 (47 FR 58454). No new information was presented in the petition beyond that used by the Service to assign *Eurycea neotenes* to category 2. Thus, the Service has determined that the Comal Springs salamander shall retain the Category 2 classification currently assigned to the *Eurycea neotenes* species group. Category 2 means that information now in possession of the Service indicates a proposal to determine endangered or threatened status is possibly appropriate, but conclusive data on biological vulnerability and threats are not currently available to support such a proposal.

On June 6, 1994, the Service received a petition from Mr. David Whatley, Director of Parks and Recreation for the City of New Braunfels, Texas, to add the Comal Springs salamander to the list of Threatened and Endangered Wildlife. The letter, dated June 3, 1994, was clearly identified as a petition and contained the name, signature, institutional affiliation, and address of the petitioner. The petition stated that the Comal Springs salamander is generally found in the Comal Springs in Landa Park and Landa Lake, and is among the several unique species in the Comal Springs ecosystem faced with the loss of its habitat due to groundwater withdrawal from the Edwards Aquifer. Although the Service concurs that the Comal Springs ecosystem, as well as other spring ecosystems of the Edwards Aquifer, faces threats from increased groundwater withdrawals and groundwater contamination, many uncertainties still exist regarding the taxonomic status of the Comal Springs salamander (including whether or not it represents a distinct population segment) and its distribution. Until these uncertainties are resolved, the Service believes the Comal Springs

salamander should remain a category 2 candidate.

If additional data become available in the future, the Service will reassess the need for listing the Comal Springs salamander. As part of our continuing review of species on the Notice of Review, the Service would appreciate any additional data, information, or comments from the public, government agencies, the scientific community, industry, or any other interested party concerning the status of the Comal Springs salamander. In particular, the Service needs additional information to determine the Comal Springs salamander's taxonomic status and relationship to other *Eurycea* populations (for example, whether or not the Comal Springs salamander represents a distinct species or a distinct population segment) and if it is restricted to the Comal Springs ecosystem.

References Cited

Chippindale, P., D. Hillis, and A. Price. 1990. Central Texas Salamander Studies. Section 6 report submitted by Texas Parks and Wildlife Department to U.S. Fish and Wildlife Service. Federal Aid Project No: E–1–2, Job No. 3.4.

Chippindale, P., D. Hillis, and A. Price. 1992. Central Texas Salamander Studies. Section 6 report submitted by Texas Parks and Wildlife Department to U.S. Fish and Wildlife Service. Federal Aid Project No: E–1–3, Job No. 3.4.

Chippindale, P., D. Hillis, and A. Price. 1993. Central Texas Salamander Studies. Draft Section 6 report submitted by Texas Parks and Wildlife Department to U.S. Fish and Wildlife Service. Federal Aid Project No: E–1–4, Job No. 3.4.

Chippindale, P., D. Hillis, and A. Price. 1994. Central Texas Salamander Studies. Draft Section 6 report, Part I, submitted by Texas Parks and Wildlife Department to U.S. Fish and Wildlife Service. Federal Aid Project No: E–1–4, Job No. 3.4.

Sweet, S. 1978. The Evolutionary Development of the Texas *Eurycea*. Unpublished Ph.D. Diss. Univ. of California Berkeley. 450 pp.

Sweet, S. 1982. A Distributional Analysis of Epigean Populations of *Eurycea neotenes* in central Texas, with comments on the origin of troglobitic populations. Herpetologica 38: 430–444.

Author. The primary author of this document is Lisa O'Donnell, Austin Ecological Services Field Office (See **ADDRESSES** section).

Authority

The authority for this action is the Endangered Species Act (16 U.S.C. *et seq.*).

Dated: June 6, 1995.

Mollie H. Beattie,

Director, Fish and Wildlife Service.

[FR Doc. 95–14394 Filed 6–12–95; 8:45 am]

BILLING CODE 4310–55–M

Attachment 2

6. Section 80.953 is amended by redesignating the text as paragraph (a), revising the first sentence of paragraph (a), removing the second sentence of paragraph (a) and adding a new paragraph (b) to read as follows:

§ 80.953 Inspection and certification.

(a) Each U.S. flag vessel subject to the Great Lakes Agreement must have an inspection of the required radiotelephone installation at least once every 13 months. * * *

(b) This inspection may be conducted by the FCC or by a classification society that is a member of the International Association of Classification Societies (IACS). A certificate issued by a classification society has the same standing as one issued by the FCC.

[FR Doc. 95–13491 Filed 6–2–95; 8:45 am]
BILLING CODE 6712–01–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AD28

Endangered and Threatened Wildlife and Plants; Proposal To List Three Aquatic Invertebrates in Comal and Hays Counties, Texas, as Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The Fish and Wildlife Service proposes to list three aquatic invertebrate species known only from Comal and Hays counties, Texas, as endangered species under the Endangered Species Act of 1973, as amended (Act). The primary threat to these species is a decrease in water quantity and quality as a result of water withdrawal and other activities by humans throughout the San Antonio segment of the Edwards Aquifer. This proposal, if made final, will implement Federal protection provided by the Act for the Peck's cave amphipod *(Stygobromus pecki)*, Comal Springs riffle beetle *(Heterelmis comalensis)*, and Comal Springs dryopid beetle *(Stygoparnus comalensis)*.

DATES: Comments from all interested parties must be received by August 4, 1995. Public hearing requests must be received by July 20, 1995.

ADDRESSES: Comments and materials concerning this proposal should be sent to the State Administrator, U.S. Fish and Wildlife Service, 10711 Burnet Road, Suite 200, Austin, Texas 78758. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Ruth Stanford, Ecologist, or Alisa Shull, Fish and Wildlife Biologist (see **ADDRESSES** section) (512/490–0057).

SUPPLEMENTARY INFORMATION:

Background

The U.S. Fish and Wildlife Service (Service) proposes to list as endangered under the Endangered Species Act of 1973, as amended (Act) three aquatic invertebrate animal species with a known distribution in spring sites in Comal and Hays counties, Texas; two of the species are subterranean. Peck's cave amphipod is known from Comal Springs and Hueco Springs, both in Comal County. The Comal Springs riffle beetle is known from Comal Springs and San Marcos Springs (Hays County). The Comal Springs dryopid beetle is known from Comal Springs and Fern Bank Springs (Hays County). The water flowing out of each of these springs comes from the Edwards Aquifer (Balcones Fault Zone—San Antonio Region), which extends from Hays County on the east to Kinney County on the west. Comal Springs are located in Landa Park, which is owned and operated by the City of New Braunfels, and on private property adjacent to Landa Park. Hueco Springs and Fern Bank Springs are located on private property. San Marcos Springs are located on the property of Aquarena Springs, formerly a privately owned resort facility. Southwest Texas State University purchased the facility in 1994. Aquarena Springs continues to operate as a resort, but the university plans to increase conference facilities and provide educational and interpretive displays and to increase availability of the springs for biological and ecological research (Billy Moore, Public Affairs Director, Southwest Texas State University, pers. comm., 1995).

Peck's cave amphipod is a subterranean, aquatic crustacean. The other two species are aquatic beetles. The families to which these beetles belong live primarily in flowing, uncontaminated waters. The Comal Springs riffle beetle is a surface species in the family Elmidae. The Comal Springs dryopid beetle is the only known subterranean member of the family Dryopidae.

The first recorded specimen of the amphipod *Stygobromus* (=*Stygonectes*) *pecki* (Holsinger 1967) was collected by Peck at Comal Springs in June, 1964. Reddell collected a second specimen at the same place in May, 1965. In 1967, Holsinger named the species *Stygonectes pecki*, in Peck's honor; the 1965 specimen, an adult female 10.5 mm (about one half inch) long, served as the type specimen. Later he included all the nominal *Stygonectes* species in the synonymy of the large genus *Stygobromus*. The Service has used "cave amphipod" as a generic common name for members of this genus, and this name was simply translated as "Peck's cave amphipod" without reference to a particular cave. Other known springs and artesian wells of the Edwards Aquifer in central Texas have been extensively sampled for amphipod crustaceans; a single specimen of Peck's cave amphipod was collected at Hueco Springs by Barr in August, 1992.

Over 300 specimens of Peck's cave amphipod have been collected since its description. Most documented specimens were netted from crevices in rock and gravel near the orifices of the three largest Comal Springs on the west side of Landa Park in Comal County, Texas. Barr collected one specimen from a fourth Comal spring run on private property adjacent to Landa Park and one specimen from Hueco Springs, about 7 km (4 miles) north of Comal Springs (Barr 1993). However, like all members of the exclusively subterranean genus *Stygobromus*, this species is eyeless and unpigmented, indicating that its primary habitat is a zone of permanent darkness in the underground aquifer feeding the springs. Above ground, individuals are easy prey for predators, but they usually take shelter in the rock and gravel crevices and may succeed in reentering the spring orifice. Barr (1993) got most specimens in drift nets at spring orifices and found them less often as she moved downstream, supporting the notion that they may be easy prey and do not likely survive for long outside the aquifer.

The Comal Springs riffle beetle is a small, aquatic beetle known from Comal Springs and San Marcos Springs. It was first collected by Bosse in 1976 and was described in 1988 by Bosse *et al.* The closest relative of *H. comalensis* appears to be a species that occurs farther to the west (Bosse *et al.* 1988).

Adult Comal Springs riffle beetles are about 2 mm (1/10 inch) long, with females slightly larger than males. Unlike the other two organisms proposed here, the Comal Springs riffle beetle is not a subterranean species. It occurs in the gravel substrate and shallow riffles in spring runs. Some riffle beetle species can fly, but the hind wings of *Heterelmis comalensis* are short and almost certainly non-functional, making the species

incapable of this mode of dispersal (Bosse *et al.* 1988). The larvae have been collected with adults in the gravel substrate of the spring headwaters and not on submerged wood as is typical of most *Heterelmis* species (Brown and Barr 1988). Usual water depth in occupied habitat is 2 to 10 cm (1 to 4 inches) although the beetle may also occur in slightly deeper areas within the spring runs. Populations are reported to reach their greatest densities from February to April (Bosse *et al.* 1988). The Comal Springs riffle beetle has been collected from spring runs 1, 2, and 3 at Comal Springs in Landa Park, and a single specimen was collected from San Marcos Springs 32 km (20 miles) to the northeast.

The Comal Springs dryopid beetle is a recently discovered species. It was first collected in 1987 and described as a new genus and species in 1992 by Barr (California State University) and Spangler (National Museum of Natural History, Smithsonian Institution). Adult Comal Springs dryopid beetles are about 3.0–3.7 mm (⅛ inch) long. They have vestigial (non-functional) eyes and are weakly pigmented, translucent, and thin-skinned. The species is the first stygobiontic (subterranean aquatic) member of its family to be discovered (Brown and Barr 1988, Barr, *in litt.* 1990, Barr and Spangler 1992). Collection records for the Comal Springs dryopid beetle are primarily from spring run 2 at Comal Springs, but they have also been collected from runs 3 and 4 at Comal Springs and from Fern Bank Springs about 32 km (20 miles) to the northeast in Hays County. Specimens have been collected in April, May, June, July, and August. Most of the specimens have been taken from drift nets or from inside the spring orifices. Although the larvae of the Comal Springs dryopid beetle have been collected in drift nets positioned over the spring openings, they are presumed to be associated with air-filled voids inside the spring orifices since all other known dryopid beetle larvae are terrestrial. Unlike Peck's cave amphipod, the Comal Springs dryopid beetle does not swim, and it may have a smaller range within the aquifer.

The exact depth and subterranean extent of the ranges of the two subterranean species (Comal Springs dryopid beetle and Peck's cave amphipod) are not precisely known because of a lack of methodologies available for studying karst aquifer systems and the organisms that inhabit such systems. The subterranean portion of this habitat may be a single, interconnected system that provides the area necessary for the feeding, growth, survival, and reproduction of the Comal Springs dryopid beetle and Peck's cave amphipod, which are obligate aquatic stygobiontic species. However, no specimens of *Stygoparnus comalensis* or *Stygobromus pecki* have appeared in collections from 22 artesian and pumped wells flowing from the Edwards Aquifer (Barr 1993), suggesting that these species may be confined to small areas surrounding the spring openings and are not distributed throughout the aquifer. Barr (1993) also surveyed nine springs in Bexar, Comal, and Hays counties considered most likely to provide habitat for endemic invertebrates and found *Stygoparnus comalensis* only at Comal and Fern Bank springs and *Stygobromus pecki* only at Comal and Hueco springs.

The low water limits for survival are not known for any of these three invertebrate species. At least a single population of each species survived the drought of the middle 1950's, which resulted in cessation of flow at Comal Springs from June 13 through November 3, 1956. Hueco springs is documented to have gone dry in the past (Brune 1981; Barr 1993), and although no information is available for Fern Bank Springs, it has probably gone dry as well given its higher elevation (Glenn Longley, Edwards Aquifer Research and Data Center, pers. comm., 1993). San Marcos Springs has not gone dry in recorded history.

Although these invertebrates were not entirely extirpated by the temporary cessation of spring flow, they may have been adversely affected and are not expected to be able to survive long periods of drying (up to several years in duration) that may occur in the absence of an adequate water management plan for the Edwards Aquifer. Stagnation of water may be a limiting condition, particularly for the two stygobiontic invertebrates. Stagnation of water and/or drying within the spring runs and the photic (lighted) zone of the spring orifices would probably be limiting for the Comal Springs riffle beetle. Natural water flow is considered important to the respiration and therefore survival of these species. The two beetle species have a mass of tiny, hydrophobic (unwettable) hairs on their underside where they maintain a thin bubble of air through which gas exchange occurs (Chapman 1982). This method of respiration loses its effectiveness as the level of dissolved oxygen in the water decreases. A number of aquatic insects that use dissolved oxygen rely on flowing water to obtain oxygen from the water.

In a petition dated September 9, 1974, the Conservation Committee of the National Speleological Society requested the Service to list Peck's cave amphipod. The species was included in a notice of review published on April 28, 1975 (40 FR 18476). A "warranted but precluded" finding regarding several species in that petition was made October 12, 1983, and published January 20, 1984 (49 FR 2485). The same petition determination has been repeated for Peck's cave amphipod in subsequent years. The species was included as a category 2 candidate in comprehensive notices of review published May 22, 1984 (49 FR 21664), January 6, 1989 (54 FR 554), and November 21, 1991 (56 FR 58804). In the latest notice of review of November 15, 1994 (59 FR 58982), it was included as a category 1 candidate.

In a petition dated June 20, 1990, and received June 21, 1990, Mr. David Whatley, Director of the City of New Braunfels Parks and Recreation Department, requested the Service to list five invertebrate taxa, including Peck's cave amphipod and four insects. The Service treated this as a second petition for the amphipod. A notice of 90-day petition finding published April 29, 1991 (56 FR 19632) announced that the petition had presented substantial information indicating that listing the Comal Springs riffle beetle and the Comal Springs dryopid beetle may be warranted, and initiated a formal status review for those species. Taxonomic uncertainties about the Comal Springs *Microcylloepus* riffle beetle and *Hexagenia* mayfly, also included in the June 21, 1990, petition, led to 90-day petition findings that were negative for those insects. The *Heterelmis* was recognized as a category 2 candidate in the November 21, 1989, notice of review, and both it and the *Stygoparnus* were recognized as category 1 candidates in the 1994 notice of review.

The present proposal constitutes a positive 1-year finding for the petitions to list the Comal Springs riffle beetle, Comal Springs dryopid beetle, and Peck's cave amphipod.

Summary of Factors Affecting the Species

Section 4(a)(1) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and regulations promulgated to implement the listing provisions of the Act (50 CFR Part 424) set forth the procedures for adding species to the Federal lists. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in Section 4(a)(1). These factors and their application to the Peck's cave amphipod *(Stygobromus pecki)*, Comal Springs riffle beetle *(Heterelmis comalensis)*, and Comal Springs dryopid

beetle *(Stygoparnus comalensis)* are as follows:

A. *The present or threatened destruction, modification, or curtailment of their habitat or range.* The main threat to the habitat of these aquatic invertebrates is a reduction or loss of water of adequate quantity and quality, due primarily to human withdrawal of water from the Edwards Aquifer and other activities. Total withdrawal from the San Antonio region of the Edwards Aquifer has been increasing since at least 1934, when the total well discharge was 101,900 acre-feet (Edwards Underground Water District 1989). In 1989, the total well discharge was slightly more than 542,000 acre-feet (Longley 1991; Edwards Underground Water District 1992a).

There is an integral connection between the waters in the aquifer west of the springs and the waters serving as habitat for these species at the springs. Water entering the Edwards Aquifer as far west as Kinney County would eventually exit at springs were it not for withdrawal of groundwater from wells. Water in the Edwards Aquifer flows from west to east or northeast, and withdrawal or contamination of water in the western part of the aquifer can have a direct effect on the quantity and quality of water flowing toward the springs and at the spring openings.

Prior to wells being drilled into the aquifer, the average springflow from Comal and San Marcos springs was equal to the average annual recharge. That is, almost all of the water entering the aquifer eventually exited at the springs. At present, much of the recharge is pumped out of the aquifer, and most of what is left becomes the average springflow (Guadalupe-Blanco River Authority 1988). The amount of water removed by wells is therefore a direct, one-for-one depletion of water that would otherwise exit through the springs (Guadalupe-Blanco River Authority 1988) and provide habitat for the proposed invertebrates.

The Texas Water Commission (TWC) (1989) classified the San Antonio segment of the Edwards Aquifer as a critical area in terms of its potential for groundwater problems related to overdrafting. The Commission also ranked Bexar, Comal, and Hays counties among the top 23 counties in Texas for number of active groundwater public supply systems. Human population in the region is expected to increase (Technical Advisory Panel 1990; Edwards Underground Water District 1993), which will result in increased demand for water from the aquifer.

The Texas Water Development Board has applied its model of the Edwards Aquifer to determine the maximum pumping level that would allow Comal Springs to continue to flow (Technical Advisory Panel 1990). The Board found that during a drought similar to that of the 1950's, the maximum pumpage that would allow spring flow at Comal Springs is about 250,000 acre-feet per year (less than half the current pumping rate). "At this pumping level, Comal Springs could be expected to maintain some annual flow although they may flow on an intermittent basis during a recurrence of the drought of record" (Technical Advisory Panel 1990). The Panel also stated that in the year 2000, if pumping continues to grow at historical rates and a drought of record were to occur, Comal Springs would go dry for a number of years (Technical Advisory Panel 1990). Wanakule (1990) states: "The present problem facing the Edwards Aquifer is the threat of overdrafting of the annual average recharge rate (1934–1988) of approximately 635,500 acre-feet. McKinney and Watkins (1993) evaluated the Texas Water Development Board model and other models and concluded that, without limiting withdrawal to about 200,000 acre-feet per year, Comal Springs will likely go dry for extended periods during even a minor drought. The creation of the Edwards Aquifer Authority may help to alleviate this threat to some degree (see Factor D for further discussion). The Edwards Aquifer Authority is currently subject to litigation regarding violation of the Voting Rights Act in its formation. The Texas Legislature is now considering bills designed to bring the Authority into compliance, but the outcome of this effort remains to be determined.

In 1984 and 1990, some of the higher-elevation Comal Springs ceased flowing and water levels in the index well (J–17) in San Antonio dropped to within twelve feet of the historic low of 612.5 ft that occurred in 1956 (Wanakule 1990). Because these invertebrates require relatively well-oxygenated water, a reduction or cessation of spring flows, even if standing water remained around the spring orifices, may adversely affect the species. Loss of water entirely within their habitat would result in the extirpation of these aquatic species from their native habitat.

In addition to a loss of water, a decrease in the water level in the aquifer could lead to a decreased quality of water at the springs. The Balcones Fault Zone—San Antonio Region is bounded on the south and east by a "bad water" line across which the groundwater quality abruptly deteriorates to greater than 1000 mg/l total dissolved solids (TDS). In other words, at the bad water line, there is a transition in groundwater from fresh to saline or brackish. Lowered water levels resulting from groundwater pumpage or decreased recharge may result in deterioration of water quality in the fresh water section of the aquifer through movement of the bad water line. The Comal and San Marcos Springs are very close to the bad water line (TWC 1989; Edwards Underground Water District 1992b) and although the data are inconclusive at present, these springs may be sensitive to intrusion of saline waters at low aquifer levels. Other possible effects of reduced springflow levels include changes in the chemical composition of the water in the aquifer and at the springs, a decrease in current velocity and corresponding increase in siltation, and increase in temperature and temperature fluctuations in the aquatic habitat (McKinney and Watkins 1993).

Another threat to the habitat of these species is the potential for groundwater contamination. Pollutants of concern include those associated with human sewage (particularly septic tanks), animal/feedlot waste, agricultural chemicals (especially insecticides, herbicides, and fertilizers) and urban runoff (including pesticides, fertilizers, and detergents). Pipeline, highway, and railway transportation of potentially harmful materials in the Edwards Aquifer recharge zone and its watershed with the attendant possibility of accidents presents a particular risk to water quality in Comal and San Marcos springs. Comal and San Marcos springs are both located in highly urbanized areas. Hueco Springs is located alongside River Road, which is heavily travelled for recreation on the Guadalupe River, and may be susceptible to road runoff and spills related to traffic. Fern Bank Springs is in a relatively remote, rural location and its principal vulnerability is probably to contaminants associated with leaking septic tanks, animal/feedlot wastes, and agricultural chemicals.

Of the counties containing portions of the San Antonio segment of the Edwards Aquifer, the potential for acute, catastrophic contamination of the aquifer is greatest in Bexar, Hays, and Comal counties because of the higher density of urbanization compared to the western counties. Although spill or contamination events that could affect water quality may occur to the west of Bexar County, dilution and the time required for the water to reach the springs may lessen the threat from that area. As aquifer levels decrease,

however, dilution of contaminants moving through the aquifer may also decrease.

The TWC reported that in 1988 within the San Antonio segment of the Edwards Aquifer, Bexar, Hays, and Comal counties had the greatest number of land-based oil and chemical spills in central Texas that affect surface and/or groundwater with 28, 6, and 4 spills, respectively (TWC 1989). As of July, 1988, Bexar County had between 26 and 50 confirmed leaking underground storage tanks, Hays County had between 6 and 10, and Comal County had between 2 and 5 (TWC 1989), putting these counties among the top five counties in central Texas for confirmed underground storage tank leaks. The TWC estimates that, on average, every leaking underground storage tank will leak about 500 gallons per year of contaminants before the leak is detected. These tanks are considered one of the most significant sources of groundwater contamination in the State (TWC 1989).

A TWC project, using the DRASTIC methodology/tool (Aller, *et al.* 1987) classified Texas aquifers statewide according to their pollution potential. The Edwards Aquifer (Balcones Fault Zone—Austin and San Antonio Regions) was ranked among the highest in pollution potential of all major Texas aquifers (TWC 1989). The project's objective was to identify areas sensitive to groundwater pollution from a contaminated land surface. The project modelled both point source and non-point source types of contamination. The area of particular concern is the Edwards Aquifer recharge zone and its watershed. The TWC (1989) also reviewed and reported on the risk to Texas aquifers from sanitary landfills, hazardous waste disposal facilities, industrial waste and sewage disposal wells, commercial feedlots, and graveyards.

The DRASTIC methodology may underestimate the importance of faults and fractures, which affect the movement of groundwater and pollutants. Faults and fractures may act as conduits and/or barriers to groundwater flow and, in the vicinity of springs, could facilitate movement of contaminants. The Comal Springs fault facilitates the movement of groundwater (and potentially pollutants) towards Comal Springs. Hueco Springs has a large local recharge component (Brune 1981) and may be more susceptible to contamination via polluted runoff than Comal or San Marcos Springs. Little information is available on the relative contribution of groundwater and local recharge to the water emerging at Fern Bank Springs, although the temporary increase in discharge seen after storm events indicates a local recharge component (Barr 1993).

B. *Overutilization for commercial, recreational, scientific or educational purposes.* No threat from overutilization of these species is known to exist.

C. *Disease or predation.* While individuals of these three species may be preyed upon by various predatory insects or fishes, no information indicates that this is a substantial threat to any of the three species.

D. *The inadequacy of existing regulatory mechanisms.* Invertebrates are not included on the Texas Parks and Wildlife Department's (TPWD) list of threatened and endangered species and are provided no protection by the State. Nor do the TPWD regulations contain provisions for protecting habitat of any listed species.

Traditionally, the State of Texas has had no authority to regulate withdrawal of groundwater from an aquifer. In response to a lawsuit filed against the Service by the Sierra Club (Sierra Club v. Babbitt, formerly Sierra Club v. Lujan), the Texas State Legislature passed a bill (S.B. 1477) authorizing the creation of the Edwards Aquifer Authority (Authority) and granting the Authority the power to regulate groundwater withdrawal from the Edwards Aquifer. The bill recommends limiting groundwater withdrawal from the aquifer to 450,000 acre-feet per year initially, then reducing it to 400,000 acre-feet per year by January 1, 2008, based on a model developed by the TWC. One stated goal of the bill is to provide continuous minimum springflow of at least 100 cfs at Comal and San Marcos Springs by the year 2012 to protect species that are designated as threatened or endangered under Federal or State law. However, some researchers have maintained that, even with such pumping limits, flow at Comal Springs will drop below 100 cfs, and the springs will likely go dry for extended periods in time of severe drought and probably during minor droughts (McKinney and Watkins 1993).

The bill creating the Authority gives consideration in setting minimum springflow requirements only to those species protected under Federal or State law. These invertebrates would receive no consideration under the current plan until they are listed. In addition, Comal and San Marcos Springs are the lowest elevation springs in which these invertebrates are found, and maintaining flow at Fern Bank and Hueco Springs is not a stated goal of the water withdrawal limitations. Efforts to maintain minimum springflow at Comal and San Marcos Springs would not necessarily be sufficient to maintain flow at Hueco and Fern Bank Springs, which lie at higher elevations.

Although creation of the Edwards Aquifer Authority and development of regulations for limiting withdrawal of groundwater from the Edwards Aquifer is a positive step toward protecting the Comal and San Marcos spring ecosystems, creation of the Authority is currently a matter in litigation regarding compliance with the Voting Rights Act. It is uncertain if or when the Authority will be empowered to enforce the pumping limits dictated by the legislation, and thus whether it will be able to protect these aquatic invertebrates and other threatened and endangered species dependent upon water from the aquifer.

The major regulations affecting water quality in the San Antonio segment of the Edwards Aquifer are the Edwards Rules (31 Texas Administrative Code, Chapter 313), promulgated and enforced by the TWC (recently renamed as the Texas Natural Resource Conservation Commission). The Edwards Rules regulate construction-related activities on the recharge zone that may "alter or disturb the topographic, geologic, or existing recharge characteristics of the site" as well as any other activity "which may pose a potential for contaminating the Edwards Aquifer." The Edwards Rules regulate construction activities through review of Water Pollution Abatement Plans (WPAPs). The WPAPs do not require site-specific water quality performance standards for developments over the recharge zone nor do they address land use or impervious cover limitations. The WPAPs do not regulate activities in the aquifer contributing zone and, as yet, the Edwards Rules do not include a comprehensive plan to address the effects of cumulative impacts on water quality in the aquifer (Edwards Underground Water District 1993).

E. *Other natural or manmade factors affecting its continued existence.* The effect of droughts in south central Texas will be much more severe than previously was the case, due to the large increase in groundwater withdrawals (Wanakule 1990). These species' very limited habitat is likely to be lost through drying or decreased volume of springflow during minor or severe drought.

At present, competition is not known to be a significant threat to these species. However, two exotic snail species, *Thiara granifera* and *Thiara tuberculata* are common in the spring runs and, as grazers, may compete for food. Another exotic, the giant ramshorn

snail (*Marisa cornuarietis*), is present in two of the spring runs and may colonize the other runs at low flow levels or through transfer by humans.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by these species in determining to propose this rule. Based on this evaluation the preferred action is to list the Peck's cave amphipod (*Stygobromus pecki*), Comal Springs riffle beetle (*Heterelmis comalensis*), and Comal Springs dryopid beetle as endangered.

Critical Habitat

Critical habitat is defined by Section 3 of the Act as— (i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. "Conservation" means the use of all methods and procedures needed to bring the species to the point at which listing under the Act is no longer necessary.

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time a species is determined to be endangered or threatened. The Service finds that designation of critical habitat is not prudent for Peck's cave amphipod, the Comal Springs riffle beetle, and the Comal Springs dryopid beetle at this time. Service regulations (50 CFR 424.12(a)(1) state that designation of critical habitat is not prudent when one or both of the following situations exist— (1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species.

The Service finds that designation of critical habitat for these three species would not be prudent because it would not provide a conservation benefit to them, and would actually be detrimental by suggesting a misleadingly restricted view of their conservation needs.

Designation of critical habitat would not be beneficial to these species beyond the benefits provided by listing and the subsequent evaluation of activities under section 7 of the Act for possible jeopardy. In the Service's section 7 regulations at 50 CFR Part 402, the definition of "jeopardize the continued existence of" includes "to reduce appreciably the likelihood of both the survival and recovery of the listed species," and "adverse modification" is defined as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." Because these species are endemic to such highly localized areas, actions that apparently diminish water quality and quantity at the springs would be fully evaluated for their effects on the three species through analysis of whether the actions would be likely to jeopardize their continued existence. Any action that would appreciably diminish the value, in quality or quantity, of spring flows on which they depend would also reduce appreciably the likelihood of survival and recovery of the three species. The analysis for possible jeopardy applied to these species would therefore be identical to the section 7 analysis for determining adverse modification or destruction of critical habitat; no distinction between jeopardy and adverse modification for activities impacting the springs on which these species depend can be made at this time. Application of section 7 relative to critical habitat would therefore not add measurable protection to these species beyond what is achievable through review for jeopardy.

Designation of the springs and their immediate environment as critical habitat would actually be detrimental to conservation efforts for these species because it would promote the misconception that the springs are the only areas important to their conservation. Conservation efforts for these species must address a wide variety of federally funded or authorized activities (summarized in the "Available Conservation Measures" section of this proposed rule) that affect the quality and quantity of water available to these species through effects on the recharge sources and aquifer that supply water to their habitats. Nearly all of these activities will occur beyond the immediate vicinity of the springs, and some will occur many miles away. Designation of the springs as critical habitat would be misleading in implying to Federal agencies whose activities may affect these species that the Service's concern is limited only to activities taking place at the springs occupied by the species. Designation of critical habitat for these species would therefore not be prudent.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against taking and harm are discussed, in part, below.

Conservation and management of the Peck's cave amphipod, Comal Springs riffle beetle, and Comal Springs dryopid beetle are likely to involve protection and conservation of the Edwards Aquifer and spring flow at Comal Springs, Hueco Springs, San Marcos Springs, and Fern Bank Springs. It is also anticipated that listing will encourage research on critical aspects of the species' population biology.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR Part 402. Section 7(a)(4) requires Federal agencies to confer informally with the Service on any action that is likely to jeopardize the continued existence of a proposed species. If a species is listed subsequently, Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service. Federal actions that could affect the Peck's cave amphipod, Comal Springs riffle beetle, and/or Comal Springs dryopid beetle include the funding, authorization, and implementation of projects that would reduce the quantity or quality of water within the San Antonio segment of the Edwards Aquifer or otherwise significantly affect the outlets or water output of Comal Springs in New Braunfels, Texas; San Marcos Springs in

San Marcos, Texas; Hueco Springs in Comal County, Texas; and Fern Bank Springs in Hays County, Texas. Examples of these types of activities include projects that would involve withdrawal of water from the aquifer; permits for municipal wastewater discharge; agricultural irrigation; use of pesticides and herbicides; Environmental Protection Agency National Pollutant Discharge Elimination System permits; section 18 exemptions under the Federal Insecticide, Fungicide, and Rodenticide Act; and Corps of Engineers permits for stream crossings.

The Act and implementing regulations found at 50 CFR 17.21 set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, or collect; or to attempt any of these), import or export, ship in interstate commerce in the course of a commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. It is also illegal to possess, sell, deliver, carry, transport, or ship any wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered wildlife species under certain circumstances. Regulations governing permits are at 50 CFR 17.22 and 17.23. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and/or for incidental take in connection with otherwise lawful activities. It is anticipated that few trade permits would ever be sought or issued because these species are not known to be in trade.

It is the policy of the Service (59 FR 34272) to identify to the maximum extent practicable at the time a species is listed or proposed to be listed those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a listing on proposed and ongoing activities within a species' range. The Service emphasizes that this action is a proposed listing, and that the guidelines presented herein are for use in the event that the listing becomes final. Should the listing become final, the discussion and outline presented here should assist landowners and managers in avoiding violation of section 9 of the Act. The Service believes that, based on the best available information, activities that could potentially harm the Comal invertebrates and result in "take" include, but are not limited to—

(1) Collecting or handling of the species;

(2) Activities that may result in destruction or alteration of the species' habitat (including, but not limited to withdrawal of water from the aquifer to the point at which habitat becomes unsuitable for the species, alteration of the physical habitat within the spring runs, or physical alteration of the spring orifices or of the subsurface pathways providing water to the springs);

(3) Discharge or dumping of chemicals, silt, pollutants, household or industrial waste, or other material into the springs or into areas that provide access to the aquifer and where such discharge or dumping could affect water quality; or

(4) Herbicide, pesticide, or fertilizer application in or near springs containing the species or areas that drain into the aquifer. Careful use of pesticides in the vicinity of the springs may be necessary in some instances.

The Service believes that a wide variety of activities would not harm these species if undertaken in the vicinity of their habitats and thus would not constitute taking. In general, any activity in the contributing, recharge, or artesian zones of the Edwards aquifer that would not have potential for cumulative or acute/catastrophic decrease in water quality within the aquifer and would not involve use of water from the aquifer should not harm these species. Inquiries concerning the possible effects of specific activities should be directed to the Service's Texas State Office (see **ADDRESSES**, above).

Public Comments Solicited

The Service intends that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments are particularly sought concerning:

(1) Biological, commercial trade, or relevant data concerning any threat (or lack thereof) to Peck's cave amphipod, the Comal Springs riffle beetle, and Comal Springs dryopid beetle;

(2) The location of any additional populations of these species and the reasons why any habitat should or should not be determined to be critical habitat as provided by Section 4 of the Act;

(3) Additional information concerning the ranges, distributions, and population sizes of these species;

(4) Current or planned activities in the subject area and their possible impacts on these species; and

Final promulgation of the regulations on these species will take into consideration the comments and any additional information received by the Service, and such communications may lead to a final regulation that differs from this proposal.

The Endangered Species Act provides for a public hearing on this proposal, if requested. Requests must be received within 45 days of the date of publication of the proposal. Such requests must be made in writing and addressed to State Administrator, U.S. Fish and Wildlife Service (see **ADDRESSES** section).

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to Section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

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Authors: The primary authors of this rule are Ruth Stanford and Alisa Shull (see **ADDRESSES** section) and George Drewry, Division of Endangered Species, U.S. Fish and Wildlife Service, 452 ARLSQ, Washington DC 20240.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulations Promulgation

PART 17—[AMENDED]

Accordingly, the Service hereby proposes to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

1. The authority citation for Part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Section 17.11(h) is amended by adding the following, in alphabetical order under Crustaceans and Insects, respectively, to the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
CRUSTACEANS:							
Amphipod, Peck's cave.	*Stygobromus (=Stygonectes) pecki.*	U.S.A. (TX)	NA	E		NA	NA
INSECTS:							
Beetle, Comal Springs dryopid.	*Stygoparnus comalensis.*	U.S.A. (TX)	NA	E		NA	NA
Beetle, Comal Springs riffle.	*Heterelmis comalensis.*	U.S.A. (TX)	NA	E		NA	NA

Dated: May 23, 1995.

Mollie H. Beattie,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 95–13457 Filed 6–1–95; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 630

[Docket No. 950522139–5139–01; I.D. 042495B]

RIN 0648–AH75

Atlantic Swordfish Fishery; 1995 Quotas

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration, Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to change the total allowable catch (TAC) for the Atlantic swordfish fishery in accordance with the framework procedure of the regulations. This rule proposes a reduction of the directed-fishery TAC to 1,365 metric tons (mt) dressed weight for each of two semiannual periods, each of which would be divided into a drift gillnet quota of 27 mt and a longline and harpoon quota of 1,338 mt. The amount of the semi-annual longline and harpoon quota allowed to be landed would be 1,225 mt—the semi-annual quota amount less 113 mt, the estimated weight of undersized swordfish that

Attachment 3

BRUCE BABBITT, SECRETARY OF THE INTERIOR, et al., PETITIONERS
v.
SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON et al.

No. 94-859

SUPREME COURT OF THE UNITED STATES

Argued April 17, 1995

Decided June 29, 1995

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Syllabus

As relevant here, the Endangered Species Act of 1973 (ESA or Act) makes it unlawful for any person to "take" endangered or threatened species, § 9(a)(1)(B), and defines ' 'take" to mean to ' 'harass, harm, pursue," ' 'wound," or ' 'kill," § 3(19). In 50 CFR § 17.3, petitioner Secretary of the Interior further defines ' 'harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife." Respondents, persons and entities dependent on the forest products industries and others, challenged this regulation on its face, claiming that Congress did not intend the word ' 'take" to include habitat modification. The District Court granted petitioners summary judgment, but the Court of Appeals ultimately reversed. Invoking the noscitur a sociis canon of statutory construction, which holds that a word is known by the company it keeps, the court concluded that ' 'harm," like the other words in the definition of ' 'take," should be read as applying only to the perpetrator's direct application of force against the animal taken.

Held: The Secretary reasonably construed Congress' intent when he defined ' 'harm" to include habitat modification. Pp. 7-21.

(a) The Act provides three reasons for preferring the Secretary's interpretation. First, the ordinary meaning of "harm" naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species. Unless ' 'harm" encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate that of other words that § 3 uses to define ' 'take." Second, the ESA's broad purpose of providing comprehensive protection for endangered and threatened species supports the reasonableness of the Secretary's definition. Respondents advance strong arguments that activities causing minimal or unforseeable harm will not violate the Act as construed in the regulation, but their facial challenge would require that the Secretary's understanding of harm be invalidated in every circumstance. Third, the fact that Congress in 1982 authorized the Secretary to issue permits for takings that § 9(a)(1)(B) would otherwise prohibit, ' 'if such taking is incidental to, and not for the purpose of, the carrying out of an otherwise lawful activity," § 10(a)(1)(B), strongly suggests that Congress understood § 9 to prohibit indirect as well as deliberate takings. No one could seriously request an ' 'incidental" take permit to avert § 9 liability for direct, deliberate action against a member of an endangered or threatened species. Pp. 7-13.

(b) The Court of Appeals made three errors in finding that ' 'harm" must refer to a direct application of force because the words around it do. First, the court's premise was flawed. Several of the words accompanying ' 'harm" in § 3's definition of ' 'take" refer to actions or effects that do not require direct applications of force. Second, to the extent that it read an intent or purpose requirement into the definition of ' 'take," it ignored § 9's express provision that a ' 'knowing" action is enough to violate the Act. Third, the court employed noscitur a sociis to give ' 'harm" essentially the same function as other words in the definition, thereby denying it independent

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meaning. Pp. 13-14.

(c) The Act's inclusion of land acquisition authority, § 5, and a directive to federal agencies to avoid destruction or adverse modification of critical habitat, § 7, does not alter the conclusion reached in this case. Respondents' argument that the Government lacks any incentive to purchase land under § 5 when it can simply prohibit takings under § 9 ignores the practical considerations that purchasing habitat lands may be less expensive than pursuing criminal or civil penalties and that § 5 allows for protection of habitat before any endangered animal has been harmed, whereas § 9 cannot be enforced until a killing or injury has occurred. Section 7's directive applies only to the Federal Government, whereas § 9 applies to ' 'any person." Pp. 14-15.

(d) The conclusion reached here gains further support from the statute's legislative history. Pp. 16-20.

17 F. 3d 1463, reversed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed a concurring opinion. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined.

JUSTICE STEVENS delivered the opinion of the Court.

The Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. § 1531 (1988 ed. and Supp. V) (ESA or Act), contains a variety of protections designed to save from extinction species that the Secretary of the Interior designates as endangered or threatened. Section 9 of the Act makes it unlawful for any person to "take" any endangered or threatened species. The Secretary has promulgated a regulation that defines the statute's prohibition on takings to include "significant habitat modification or degradation where it actually kills or injures wildlife." This case presents the question whether the Secretary exceeded his authority under the Act by promulgating that regulation.

I

Section 9(a)(1) of the Endangered Species Act provides the following protection for endangered species: [FN1]

"Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to-

..... "(B) take any such species within the United States or the territorial sea of the United States[.]" 16 U.S.C. § 1538(a)(1).

Section 3(19) of the Act defines the statutory term "take":

"The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The Act does not further define the terms it uses to define "take." The Interior Department regulations that implement the statute, however, define the statutory term "harm":

"Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 CFR § 17.3 (1994).

This regulation has been in place since 1975. [FN2]

A limitation on the § 9 "take" prohibition appears in § 10(a)(1)(B) of the Act, which Congress added by amendment in 1982. That section authorizes the Secretary to grant a permit for any taking otherwise prohibited by § 9(a)(1)(B) "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B).

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In addition to the prohibition on takings, the Act provides several other protections for endangered species. Section 4, 16 U.S.C. § 1533, commands the Secretary to identify species of fish or wildlife that are in danger of extinction and to publish from time to time lists of all species he determines to be endangered or threatened. Section 5, 16 U.S.C. § 1534, authorizes the Secretary, in cooperation with the States, see 16 U.S.C. § 1535, to acquire land to aid in preserving such species. Section 7 requires federal agencies to ensure that none of their activities, including the granting of licenses and permits, will jeopardize the continued existence of endangered species "or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary ... to be critical." 16 U.S.C. § 1536(a)(2).

Respondents in this action are small landowners, logging companies, and families dependent on the forest products industries in the Pacific Northwest and in the Southeast, and organizations that represent their interests. They brought this declaratory judgment action against petitioners, the Secretary of the Interior and the Director of the Fish and Wildlife Service, in the United States District Court for the District of Columbia to challenge the statutory validity of the Secretary's regulation defining "harm," particularly the inclusion of habitat modification and degradation in the definition. [FN3] Respondents challenged the regulation on its face. Their complaint alleged that application of the "harm" regulation to the red-cockaded woodpecker, an endangered species, [FN4] and the northern spotted owl, a threatened species, [FN5] had injured them economically. App. 17-23.

Respondents advanced three arguments to support their submission that Congress did not intend the word "take" in § 9 to include habitat modification, as the Secretary's "harm" regulation provides. First, they correctly noted that language in the Senate's original version of the ESA would have defined "take" to include "destruction, modification, or curtailment of [the] habitat or range" of fish or wildlife, [FN6] but the Senate deleted that language from the bill before enacting it. Second, respondents argued that Congress intended the Act's express authorization for the Federal Government to buy private land in order to prevent habitat degradation in § 5 to be the exclusive check against habitat modification on private property. Third, because the Senate added the term "harm" to the definition of "take" in a floor amendment without debate, respondents argued that the court should not interpret the term so expansively as to include habitat modification.

The District Court considered and rejected each of respondents' arguments, finding "that Congress intended an expansive interpretation of the word 'take,' an interpretation that encompasses habitat modification." 806 F. Supp. 279, 285 (1992). The court noted that in 1982, when Congress was aware of a judicial decision that had applied the Secretary's regulation, see Palila v. Hawaii Dept. of Land and Natural Resources, 639 F. 2d 495 (CA9 1981) (Palila I), it amended the Act without using the opportunity to change the definition of "take." 806 F. Supp., at 284. The court stated that, even had it found the ESA " 'silent or ambiguous" ' as to the authority for the Secretary's definition of "harm," it would nevertheless have upheld the regulation as a reasonable interpretation of the statute. Id., at 285 (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)). The District Court therefore entered summary judgment for petitioners and dismissed respondents' complaint.

A divided panel of the Court of Appeals initially affirmed the judgment of the District Court. 1 F. 3d 1 (CADC 1993). After granting a petition for rehearing, however, the panel reversed. 17 F. 3d 1463 (CADC 1994). Although acknowledging that "[t]he potential breadth of the word 'harm' is indisputable," id., at 1464, the majority concluded that the immediate statutory context in which "harm" appeared counseled against a broad reading; like the other words in the definition of "take," the word "harm" should be read as applying only to "the perpetrator's direct application of force against the animal

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taken.... The forbidden acts fit, in ordinary language, the basic model 'A hit B." ' Id., at 1465. The majority based its reasoning on a canon of statutory construction called noscitur a sociis, which holds that a word is known by the company it keeps. See Neal v. Clark, 95 U.S. 704, 708-709 (1878).

The majority claimed support for its construction from a decision of the Ninth Circuit that narrowly construed the word "harass" in the Marine Mammal Protection Act, 16 U.S.C. § 1372(a)(2)(A), see United States v. Hayashi, 5 F. 3d 1278, 1282 (1993); from the legislative history of the ESA; [FN7] from its view that Congress must not have intended the purportedly broad curtailment of private property rights that the Secretary's interpretation permitted; and from the ESA's land acquisition provision in § 5 and restriction on federal agencies' activities regarding habitat in § 7, both of which the court saw as evidence that Congress had not intended the § 9 "take" prohibition to reach habitat modification. Most prominently, the court performed a lengthy analysis of the 1982 amendment to § 10 that provided for "incidental take permits" and concluded that the amendment did not change the meaning of the term "take" as defined in the 1973 statute. [FN8]

Chief Judge Mikva, who had announced the panel's original decision, dissented. See 17 F. 3d, at 1473. In his view, a proper application of Chevron indicated that the Secretary had reasonably defined "harm," because respondents had failed to show that Congress unambiguously manifested its intent to exclude habitat modification from the ambit of "take." Chief Judge Mikva found the majority's reliance on noscitur a sociis inappropriate in light of the statutory language and unnecessary in light of the strong support in the legislative history for the Secretary's interpretation. He did not find the 1982 "incidental take permit" amendment alone sufficient to vindicate the Secretary's definition of "harm," but he believed the amendment provided additional support for that definition because it reflected Congress' view in 1982 that the definition was reasonable.

The Court of Appeals' decision created a square conflict with a 1988 decision of the Ninth Circuit that had upheld the Secretary's definition of "harm." See Palila v. Hawaii Dept. of Land and Natural Resources, 852 F. 2d 1106 (1988) (Palila II). The Court of Appeals neither cited nor distinguished Palila II, despite the stark contrast between the Ninth Circuit's holding and its own. We granted certiorari to resolve the conflict. 513 U.S. ___ (1995). Our consideration of the text and structure of the Act, its legislative history, and the significance of the 1982 amendment persuades us that the Court of Appeals' judgment should be reversed.

II

Because this case was decided on motions for summary judgment, we may appropriately make certain factual assumptions in order to frame the legal issue. First, we assume respondents have no desire to harm either the red-cockaded woodpecker or the spotted owl; they merely wish to continue logging activities that would be entirely proper if not prohibited by the ESA. On the other hand, we must assume arguendo that those activities will have the effect, even though unintended, of detrimentally changing the natural habitat of both listed species and that, as a consequence, members of those species will be killed or injured. Under respondents' view of the law, the Secretary's only means of forestalling that grave result-even when the actor knows it is certain to occur [FN9]-is to use his § 5 authority to purchase the lands on which the survival of the species depends. The Secretary, on the other hand, submits that the § 9 prohibition on takings, which Congress defined to include "harm," places on respondents a duty to avoid harm that habitat alteration will cause the birds unless respondents first obtain a permit pursuant to § 10.

The text of the Act provides three reasons for concluding that the Secretary's interpretation is reasonable. First, an ordinary understanding of the word "harm" supports it. The dictionary definition of the verb form of "harm" is "to cause hurt or damage to: injure." Webster's Third New

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International Dictionary 1034 (1966). In the context of the ESA, that definition naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species.

Respondents argue that the Secretary should have limited the purview of "harm" to direct applications of force against protected species, but the dictionary definition does not include the word "directly" or suggest in any way that only direct or willful action that leads to injury constitutes "harm." [FN10] Moreover, unless the statutory term "harm" encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that § 3 uses to define "take." A reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary's interpretation. See, e.g., Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 837, and n. 11 (1988). [FN11]

Second, the broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid. In TVA v. Hill, 437 U.S. 153 (1978), we described the Act as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Id., at 180. Whereas predecessor statutes enacted in 1966 and 1969 had not contained any sweeping prohibition against the taking of endangered species except on federal lands, see id., at 175, the 1973 Act applied to all land in the United States and to the Nation's territorial seas. As stated in § 2 of the Act, among its central purposes is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved...." 16 U.S.C. § 1531(b).

In Hill, we construed § 7 as precluding the completion of the Tellico Dam because of its predicted impact on the survival of the snail darter. See 437 U. S., at 193. Both our holding and the language in our opinion stressed the importance of the statutory policy. "The plain intent of Congress in enacting this statute," we recognized, "was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." Id., at 184. Although the § 9 "take" prohibition was not at issue in Hill, we took note of that prohibition, placing particular emphasis on the Secretary's inclusion of habitat modification in his definition of "harm." [FN12] In light of that provision for habitat protection, we could "not understand how TVA intends to operate Tellico Dam without 'harming' the snail darter." Id., at 184, n. 30. Congress' intent to provide comprehensive protection for endangered and threatened species supports the permissibility of the Secretary's "harm" regulation.

Respondents advance strong arguments that activities that cause minimal or unforeseeable harm will not violate the Act as construed in the "harm" regulation. Respondents, however, present a facial challenge to the regulation. Cf. Anderson v. Edwards, 514 U.S. ___, ___, n. 6 (1995) (slip op., at 11); INS v. National Center for Immigrants' Rights, Inc., 502 U.S. 183, 188 (1991). Thus, they ask us to invalidate the Secretary's understanding of "harm" in every circumstance, even when an actor knows that an activity, such as draining a pond, would actually result in the extinction of a listed species by destroying its habitat. Given Congress' clear expression of the ESA's broad purpose to protect endangered and threatened wildlife, the Secretary's definition of "harm" is reasonable. [FN13]

Third, the fact that Congress in 1982 authorized the Secretary to issue permits for takings that § 9(a)(1)(B) would otherwise prohibit, "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity," 16 U.S.C. § 1539(a)(1)(B), strongly suggests that Congress understood § 9(a)(1)(B) to prohibit indirect as well as deliberate takings. Cf. NLRB v. Bell Aerospace Co. of Textron, Inc., 416 U.S. 267, 274-275 (1974). The permit process requires the applicant to prepare a "conservation plan" that specifies how he intends to "minimize and mitigate" the "impact" of his activity on endangered and threatened species, 16 U.S.C.

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§ 1539(a)(2)(A), making clear that Congress had in mind foreseeable rather than merely accidental effects on listed species. [FN14] No one could seriously request an "incidental" take permit to avert § 9 liability for direct, deliberate action against a member of an endangered or threatened species, but respondents would read "harm" so narrowly that the permit procedure would have little more than that absurd purpose. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." Stone v. INS, 514 U.S. ___, ___ (1995) (slip op., at 10). Congress' addition of the § 10 permit provision supports the Secretary's conclusion that activities not intended to harm an endangered species, such as habitat modification, may constitute unlawful takings under the ESA unless the Secretary permits them.

The Court of Appeals made three errors in asserting that "harm" must refer to a direct application of force because the words around it do. [FN15] First, the court's premise was flawed. Several of the words that accompany "harm" in the § 3 definition of "take," especially "harass," "pursue," "wound," and "kill," refer to actions or effects that do not require direct applications of force. Second, to the extent the court read a requirement of intent or purpose into the words used to define "take," it ignored § 9's express provision that a "knowing" action is enough to violate the Act. Third, the court employed noscitur a sociis to give "harm" essentially the same function as other words in the definition, thereby denying it independent meaning. The canon, to the contrary, counsels that a word "gathers meaning from the words around it." Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961). The statutory context of "harm" suggests that Congress meant that term to serve a particular function in the ESA, consistent with but distinct from the functions of the other verbs used to define "take." The Secretary's interpretation of "harm" to include indirectly injuring endangered animals through habitat modification permissibly interprets "harm" to have "a character of its own not to be submerged by its association." Russell Motor Car Co. v. United States, 261 U.S. 514, 519 (1923). [FN16]

Nor does the Act's inclusion of the § 5 land acquisition authority and the § 7 directive to federal agencies to avoid destruction or adverse modification of critical habitat alter our conclusion. Respondents' argument that the Government lacks any incentive to purchase land under § 5 when it can simply prohibit takings under § 9 ignores the practical considerations that attend enforcement of the ESA. Purchasing habitat lands may well cost the Government less in many circumstances than pursuing civil or criminal penalties. In addition, the § 5 procedure allows for protection of habitat before the seller's activity has harmed any endangered animal, whereas the Government cannot enforce the § 9 prohibition until an animal has actually been killed or injured. The Secretary may also find the § 5 authority useful for preventing modification of land that is not yet but may in the future become habitat for an endangered or threatened species. The § 7 directive applies only to the Federal Government, whereas the § 9 prohibition applies to "any person." Section 7 imposes a broad, affirmative duty to avoid adverse habitat modifications that § 9 does not replicate, and § 7 does not limit its admonition to habitat modification that "actually kills or injures wildlife." Conversely, § 7 contains limitations that § 9 does not, applying only to actions "likely to jeopardize the continued existence of any endangered species or threatened species," 16 U.S.C. § 1536(a)(2), and to modifications of habitat that has been designated "critical" pursuant to § 4, 16 U.S.C. § 1533(b)(2). [FN17] Any overlap that § 5 or § 7 may have with § 9 in particular cases is unexceptional, see, e.g., Russello v. United States, 464 U.S. 16, 24, and n. 2 (1983), and simply reflects the broad purpose of the Act set out in § 2 and acknowledged in TVA v. Hill.

We need not decide whether the statutory definition of "take" compels the Secretary's interpretation of "harm," because our conclusions that Congress did not unambiguously manifest its intent to adopt respondents' view and that the Secretary's interpretation is reasonable suffice to decide this case. See generally Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,

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467 U.S. 837 (1984). The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation. See Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 373 (1986). [FN18]

III

Our conclusion that the Secretary's definition of "harm" rests on a permissible construction of the ESA gains further support from the legislative history of the statute. The Committee Reports accompanying the bills that became the ESA do not specifically discuss the meaning of "harm," but they make clear that Congress intended "take" to apply broadly to cover indirect as well as purposeful actions. The Senate Report stressed that " '[t]ake' is defined ... in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. Rep. No. 93-307, p. 7 (1973). The House Report stated that "the broadest possible terms" were used to define restrictions on takings. H.R. Rep. No. 93-412, p. 15 (1973). The House Report underscored the breadth of the "take" definition by noting that it included "harassment, whether intentional or not." Id., at 11 (emphasis added). The Report explained that the definition "would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young." Ibid. These comments, ignored in the dissent's welcome but selective foray into legislative history, see post, at 14-16, support the Secretary's interpretation that the term "take" in § 9 reached far more than the deliberate actions of hunters and trappers.

Two endangered species bills, S. 1592 and S. 1983, were introduced in the Senate and referred to the Commerce Committee. Neither bill included the word "harm" in its definition of "take," although the definitions otherwise closely resembled the one that appeared in the bill as ultimately enacted. See Hearings on S. 1592 and S. 1983 before the Subcommittee on Environment of the Senate Committee on Commerce, 93d Cong., 1st Sess., pp. 7, 27 (1973) (hereinafter Hearings). Senator Tunney, the floor manager of the bill in the Senate, subsequently introduced a floor amendment that added "harm" to the definition, noting that this and accompanying amendments would "help to achieve the purposes of the bill." 119 Cong. Rec. 25683 (July 24, 1973). Respondents argue that the lack of debate about the amendment that added "harm" counsels in favor of a narrow interpretation. We disagree. An obviously broad word that the Senate went out of its way to add to an important statutory definition is precisely the sort of provision that deserves a respectful reading.

The definition of "take" that originally appeared in S. 1983 differed from the definition as ultimately enacted in one other significant respect: It included "the destruction, modification, or curtailment of [the] habitat or range" of fish and wildlife. Hearings, at 27. Respondents make much of the fact that the Commerce Committee removed this phrase from the "take" definition before S. 1983 went to the floor. See 119 Cong. Rec. 25663 (1973). We do not find that fact especially significant. The legislative materials contain no indication why the habitat protection provision was deleted. That provision differed greatly from the regulation at issue today. Most notably, the habitat protection in S. 1983 would have applied far more broadly than the regulation does because it made adverse habitat modification a categorical violation of the "take" prohibition, unbounded by the regulation's limitation to habitat modifications that actually kill or injure wildlife. The S. 1983 language also failed to qualify "modification" with the regulation's limiting adjective "significant." We do not believe the Senate's unelaborated disavowal of the provision in S. 1983 undermines the reasonableness of the more moderate habitat protection in the Secretary's "harm" regulation. [FN19]

The history of the 1982 amendment that

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gave the Secretary authority to grant permits for "incidental" takings provides further support for his reading of the Act. The House Report expressly states that "[b]y use of the word 'incidental' the Committee intends to cover situations in which it is known that a taking will occur if the other activity is engaged in but such taking is incidental to, and not the purpose of, the activity." H.R. Rep. No. 97-567, p. 31 (1982). This reference to the foreseeability of incidental takings undermines respondents' argument that the 1982 amendment covered only accidental killings of endangered and threatened animals that might occur in the course of hunting or trapping other animals. Indeed, Congress had habitat modification directly in mind: both the Senate Report and the House Conference Report identified as the model for the permit process a cooperative state-federal response to a case in California where a development project threatened incidental harm to a species of endangered butterfly by modification of its habitat. See S. Rep. No. 97-418, p. 10 (1982); H.R. Conf. Rep. No. 97-835, pp. 30-32 (1982). Thus, Congress in 1982 focused squarely on the aspect of the "harm" regulation at issue in this litigation. Congress' implementation of a permit program is consistent with the Secretary's interpretation of the term "harm."

IV

When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary. See 16 U.S.C. §§ 1533, 1540(f). The task of defining and listing endangered and threatened species requires an expertise and attention to detail that exceeds the normal province of Congress. Fashioning appropriate standards for issuing permits under § 10 for takings that would otherwise violate § 9 necessarily requires the exercise of broad discretion. The proper interpretation of a term such as "harm" involves a complex policy choice. When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his. See Chevron, 467 U. S., at 865-866. In this case, that reluctance accords with our conclusion, based on the text, structure, and legislative history of the ESA, that the Secretary reasonably construed the intent of Congress when he defined "harm" to include "significant habitat modification or degradation that actually kills or injures wildlife."

In the elaboration and enforcement of the ESA, the Secretary and all persons who must comply with the law will confront difficult questions of proximity and degree; for, as all recognize, the Act encompasses a vast range of economic and social enterprises and endeavors. These questions must be addressed in the usual course of the law, through case-by-case resolution and adjudication.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE O'CONNOR, concurring.

My agreement with the Court is founded on two understandings. First, the challenged regulation is limited to significant habitat modification that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals. Second, even setting aside difficult questions of scienter, the regulation's application is limited by ordinary principles of proximate causation, which introduce notions of foreseeability. These limitations, in my view, call into question Palila v. Hawaii Dept. of Land and Natural Resources, 852 F. 2d 1106 (CA9 1988) (Palila II), and with it, many of the applications derided by the dissent. Because there is no need to strike a regulation on a facial challenge out of concern that it is susceptible of erroneous application, however, and because there are many habitat-related circumstances in which the regulation might validly apply, I join the opinion of the Court.

In my view, the regulation is limited by its terms to actions that actually kill or injure individual animals. JUSTICE SCALIA disagrees, arguing that the harm regulation "encompasses injury inflicted, not only upon individual animals, but upon populations of the protected species." Post, at 4-5. At one level, I could not reasonably quarrel with this

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observation; death to an individual animal always reduces the size of the population in which it lives, and in that sense, "injures" that population. But by its insight, the dissent means something else. Building upon the regulation's use of the word "breeding," JUSTICE SCALIA suggests that the regulation facially bars significant habitat modification that actually kills or injures hypothetical animals (or, perhaps more aptly, causes potential additions to the population not to come into being). Because "[i]mpairment of breeding does not 'injure' living creatures," JUSTICE SCALIA reasons, the regulation must contemplate application to "a population of animals which would otherwise have maintained or increased its numbers." Post, at 5, 22.

I disagree. As an initial matter, I do not find it as easy as JUSTICE SCALIA does to dismiss the notion that significant impairment of breeding injures living creatures. To raze the last remaining ground on which the piping plover currently breeds, thereby making it impossible for any piping plovers to reproduce, would obviously injure the population (causing the species' extinction in a generation). But by completely preventing breeding, it would also injure the individual living bird, in the same way that sterilizing the creature injures the individual living bird. To "injure" is, among other things, "to impair." Webster's Ninth New Collegiate Dictionary 623 (1983). One need not subscribe to theories of "psychic harm," cf. post, at 22, n. 5, to recognize that to make it impossible for an animal to reproduce is to impair its most essential physical functions and to render that animal, and its genetic material, biologically obsolete. This, in my view, is actual injury.

In any event, even if impairing an animal's ability to breed were not, in and of itself, an injury to that animal, interference with breeding can cause an animal to suffer other, perhaps more obvious, kinds of injury. The regulation has clear application, for example, to significant habitat modification that kills or physically injures animals which, because they are in a vulnerable breeding state, do not or cannot flee or defend themselves, or to environmental pollutants that cause an animal to suffer physical complications during gestation. Breeding, feeding, and sheltering are what animals do. If significant habitat modification, by interfering with these essential behaviors, actually kills or injures an animal protected by the Act, it causes "harm" within the meaning of the regulation. In contrast to JUSTICE SCALIA, I do not read the regulation's "breeding" reference to vitiate or somehow to qualify the clear actual death or injury requirement, or to suggest that the regulation contemplates extension to nonexistent animals.

There is no inconsistency, I should add, between this interpretation and the commentary that accompanied the amendment of the regulation to include the actual death or injury requirement. See 46 Fed. Reg. 54748 (1981). Quite the contrary. It is true, as JUSTICE SCALIA observes, post, at 5, that the Fish and Wildlife Service states at one point that "harm" is not limited to "direct physical injury to an individual member of the wildlife species," see 46 Fed. Reg. 54748 (1981). But one could just as easily emphasize the word "direct" in this sentence as the word "individual." [FN*] Elsewhere in the commentary, the Service makes clear that "section 9's threshold does focus on individual members of a protected species." Id., at 54749. Moreover, the Service says that the regulation has no application to speculative harm, explaining that its insertion of the word "actually" was intended "to bulwark the need for proven injury to a species due to a party's actions." Ibid.; see also ibid. (approving language that "Harm covers actions ... which actually (as opposed to potentially), cause injury"). That a protected animal could have eaten the leaves of a fallen tree or could, perhaps, have fruitfully multiplied in its branches is not sufficient under the regulation. Instead, as the commentary reflects, the regulation requires demonstrable effect (i.e., actual injury or death) on actual, individual members of the protected species.

By the dissent's reckoning, the regulation at issue here, in conjunction with 16 U.S.C. § 1540(1), imposes liability for any habitat-modifying conduct that ultimately results in

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the death of a protected animal, "regardless of whether that result is intended or even foreseeable, and no matter how long the chain of causality between modification and injury." Post, at 3-4; see also post, at 10. Even if § 1540(1) does create a strict liability regime (a question we need not decide at this juncture), I see no indication that Congress, in enacting that section, intended to dispense with ordinary principles of proximate causation. Strict liability means liability without regard to fault; it does not normally mean liability for every consequence, however remote, of one's conduct. See generally W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 559-560 (5th ed. 1984) (describing "practical necessity for the restriction of liability within some reasonable bounds" in the strict liability context). I would not lightly assume that Congress, in enacting a strict liability statute that is silent on the causation question, has dispensed with this well-entrenched principle. In the absence of congressional abrogation of traditional principles of causation, then, private parties should be held liable under § 1540(1) only if their habitat-modifying actions proximately cause death or injury to protected animals. Cf. Benefiel v. Exxon Corp., 959 F. 2d 805, 807-808 (CA9 1992) (in enacting the Trans-Alaska Pipeline Authorization Act, which provides for strict liability for damages that are the result of discharges, Congress did not intend to abrogate common-law principles of proximate cause to reach "remote and derivative" consequences); New York v. Shore Realty Corp., 759 F. 2d 1032, 1044, and n. 17 (CA2 1985) (noting that "[t]raditional tort law has often imposed strict liability while recognizing a causation defense," but that, in enacting CERCLA, Congress "specifically rejected including a causation requirement"). The regulation, of course, does not contradict the presumption or notion that ordinary principles of causation apply here. Indeed, by use of the word "actually," the regulation clearly rejects speculative or conjectural effects, and thus itself invokes principles of proximate causation.

Proximate causation is not a concept susceptible of precise definition. See Keeton, supra, at 280-281. It is easy enough, of course, to identify the extremes. The farmer whose fertilizer is lifted by tornado from tilled fields and deposited miles away in a wildlife refuge cannot, by any stretch of the term, be considered the proximate cause of death or injury to protected species occasioned thereby. At the same time, the landowner who drains a pond on his property, killing endangered fish in the process, would likely satisfy any formulation of the principle. We have recently said that proximate causation "normally eliminates the bizarre," Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. ___, ___ (1995) (slip op., at 9), and have noted its "functionally equivalent" alternative characterizations in terms of foreseeability, see Milwaukee & St. Paul R. Co. v. Kellogg, 94 U.S. 469, 475 (1877) ("natural and probable consequence"), and duty, see Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (1928). Consolidated Rail Corp. v. Gottshall, 512 U.S. ___, ___ (1994) (slip op., at 13). Proximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences. The task of determining whether proximate causation exists in the limitless fact patterns sure to arise is best left to lower courts. But I note, at the least, that proximate cause principles inject a foreseeability element into the statute, and hence, the regulation, that would appear to alleviate some of the problems noted by the dissent. See, e. g., post, at 8 (describing "a farmer who tills his field and causes erosion that makes silt run into a nearby river which depletes oxygen and thereby [injures] protected fish").

In my view, then, the "harm" regulation applies where significant habitat modification, by impairing essential behaviors, proximately (foreseeably) causes actual death or injury to identifiable animals that are protected under the Endangered Species Act. Pursuant to my interpretation, Palila II-under which the Court of Appeals held that a state agency committed a "taking" by permitting feral sheep to eat mamane-naio seedlings that, when full-grown, might have fed and sheltered endangered palila-was wrongly decided according to the regulation's own terms. Destruction of the seedlings did not proxi

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mately cause actual death or injury to identifiable birds; it merely prevented the regeneration of forest land not currently inhabited by actual birds.

This case, of course, comes to us as a facial challenge. We are charged with deciding whether the regulation on its face exceeds the agency's statutory mandate. I have identified at least one application of the regulation (Palila II) that is, in my view, inconsistent with the regulation's own limitations. That misapplication does not, however, call into question the validity of the regulation itself. One can doubtless imagine questionable applications of the regulation that test the limits of the agency's authority. However, it seems to me clear that the regulation does not on its terms exceed the agency's mandate, and that the regulation has innumerable valid habitat-related applications. Congress may, of course, see fit to revisit this issue. And nothing the Court says today prevents the agency itself from narrowing the scope of its regulation at a later date.

With this understanding, I join the Court's opinion.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

I think it unmistakably clear that the legislation at issue here (1) forbade the hunting and killing of endangered animals, and (2) provided federal lands and federal funds for the acquisition of private lands, to preserve the habitat of endangered animals. The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin-not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use. I respectfully dissent.

I

The Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq. (1988 ed. and Supp. V) (Act), provides that "it is unlawful for any person subject to the jurisdiction of the United States to take any [protected] species within the United States." § 1538(a)(1)(B). The term "take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." § 1532(19) (emphasis added). The challenged regulation defines "harm" thus:

" 'Harm' in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 CFR § 17.3 (1994).

In my view petitioners must lose-the regulation must fall-even under the test of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984), so I shall assume that the Court is correct to apply Chevron. See ante, at 15-16, and n. 18.

The regulation has three features which, for reasons I shall discuss at length below, do not comport with the statute. First, it interprets the statute to prohibit habitat modification that is no more than the cause-in- fact of death or injury to wildlife. Any "significant habitat modification" that in fact produces that result by "impairing essential behavioral patterns" is made unlawful, regardless of whether that result is intended or even foreseeable, and no matter how long the chain of causality between modification and injury. See, e.g., Palila v. Hawaii Dept. of Land and Natural Resources (Palila II), 852 F. 2d 1106, 1108-1109 (CA9 1988) (sheep grazing constituted "taking" of palila birds, since although sheep do not destroy full-grown mamane trees, they do destroy mamane seedlings, which will not grow to full-grown trees, on which the palila feeds and nests). See also Davison, Alteration of Wildlife Habitat as a Prohibited Taking under the Endangered Species Act, 10 J. Land Use & Envtl. L. 155, 190 (1995) (regulation requires only causation-in-fact).

Second, the regulation does not require an "act": the Secretary's officially stated position is that an omission will do. The previous

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version of the regulation made this explicit. See 40 Fed. Reg. 44412, 44416 (1975) (" 'Harm' in the definition of 'take' in the Act means an act or omission which actually kills or injures wildlife ..."). When the regulation was modified in 1981 the phrase "or omission" was taken out, but only because (as the final publication of the rule advised) "the [Fish and Wildlife] Service feels that 'act' is inclusive of either commissions or omissions which would be prohibited by section [1538(a)(1)(B)]." 46 Fed. Reg. 54748, 54750 (1981). In its brief here the Government agrees that the regulation covers omissions, see Brief for Petitioners 47 (although it argues that "[a]n 'omission' constitutes an 'act' ... only if there is a legal duty to act"), ibid.

The third and most important unlawful feature of the regulation is that it encompasses injury inflicted, not only upon individual animals, but upon populations of the protected species. "Injury" in the regulation includes "significantly impairing essential behavioral patterns, including breeding," 50 CFR § 17.3 (1994) (emphasis added). Impairment of breeding does not "injure" living creatures; it prevents them from propagating, thus "injuring" a population of animals which would otherwise have maintained or increased its numbers. What the face of the regulation shows, the Secretary's official pronouncements confirm. The Final Redefinition of "Harm" accompanying publication of the regulation said that "harm" is not limited to "direct physical injury to an individual member of the wildlife species," 46 Fed. Reg. 54748 (1981), and refers to "injury to a population," id., at 54749 (emphasis added). See also Palila II, 852 F. 2d, at 1108; Davison, supra, at 190, and n. 177, 195; M. Bean, The Evolution of National Wildlife Law 344 (1983). [FN1]

None of these three features of the regulation can be found in the statutory provisions supposed to authorize it. The term "harm" in § 1532(19) has no legal force of its own. An indictment or civil complaint that charged the defendant with "harming" an animal protected under the Act would be dismissed as defective, for the only operative term in the statute is to "take." If "take" were not elsewhere defined in the Act, none could dispute what it means, for the term is as old as the law itself. To "take," when applied to wild animals, means to reduce those animals, by killing or capturing, to human control. See, e.g., 11 Oxford English Dictionary (1933) ("Take ... To catch, capture (a wild beast, bird, fish, etc.)"); Webster's New International Dictionary of the English Language (2d ed. 1949) (take defined as "to catch or capture by trapping, snaring, etc., or as prey"); Geer v. Connecticut, 161 U.S. 519, 523 (1896) ("[A]ll the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them") (quoting the Digest of Justinian); 2 W. Blackstone, Commentaries 411 (1766) ("Every man ... has an equal right of pursuing and taking to his own use all such creatures as are ferae naturae "). This is just the sense in which "take" is used elsewhere in federal legislation and treaty. See, e.g., Migratory Bird Treaty Act, 16 U.S.C. § 703 (1988 ed., Supp. V) (no person may "pursue, hunt, take, capture, kill, [or] attempt to take, capture, or kill" any migratory bird); Agreement on the Conservation of Polar Bears, Nov. 15, 1973, Art. I, 27 U.S.T. 3918, 3921, T.I.A.S. No. 8409 (defining "taking" as "hunting, killing and capturing"). And that meaning fits neatly with the rest of § 1538(a)(1), which makes it unlawful not only to take protected species, but also to import or export them (§ 1538(a)(1)(A)); to possess, sell, deliver, carry, transport, or ship any taken species (§ 1538(a)(1)(D)); and to transport, sell, or offer to sell them in interstate or foreign commerce (§§ 1538(a)(1)(E), (F). The taking prohibition, in other words, is only part of the regulatory plan of § 1538(a)(1), which covers all the stages of the process by which protected wildlife is reduced to man's dominion and made the object of profit. It is obvious that "take" in this sense-a term of art deeply embedded in the statutory and common law concerning wildlife-describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals).

The Act's definition of "take" does expand the word slightly (and not unusually), so as to make clear that it includes not just a

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completed taking, but the process of taking, and all of the acts that are customarily identified with or accompany that process ("to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect"); and so as to include attempts. § 1532(19). The tempting fallacy-which the Court commits with abandon, see ante, at 9, n. 10-is to assume that once defined, "take" loses any significance, and it is only the definition that matters. The Court treats the statute as though Congress had directly enacted the § 1532(19) definition as a self-executing prohibition, and had not enacted § 1538(a)(1)(B) at all. But § 1538(a)(1)(B) is there, and if the terms contained in the definitional section are susceptible of two readings, one of which comports with the standard meaning of "take" as used in application to wildlife, and one of which does not, an agency regulation that adopts the latter reading is necessarily unreasonable, for it reads the defined term "take"-the only operative term-out of the statute altogether. [FN2]

That is what has occurred here. The verb "harm" has a range of meaning: "to cause injury" at its broadest, "to do hurt or damage" in a narrower and more direct sense. See, e.g., 1 N. Webster, An American Dictionary of the English Language (1828) ("Harm, v.t. To hurt; to injure; to damage; to impair soundness of body, either animal or vegetable") (emphasis added); American College Dictionary 551 (1970) ("harm ... n. injury; damage; hurt: to do him bodily harm "). In fact the more directed sense of "harm" is a somewhat more common and preferred usage; "harm has in it a little of the idea of specially focused hurt or injury, as if a personal injury has been anticipated and intended." J. Opdycke, Mark My Words: A Guide to Modern Usage and Expression 330 (1949). See also American Heritage Dictionary of the English Language (1981) ("Injure has the widest range.... Harm and hurt refer principally to what causes physical or mental distress to living things"). To define "harm" as an act or omission that, however remotely, "actually kills or injures" a population of wildlife through habitat modification, is to choose a meaning that makes nonsense of the word that "harm" defines-requiring us to accept that a farmer who tills his field and causes erosion that makes silt run into a nearby river which depletes oxygen and thereby "impairs [the] breeding" of protected fish, has "taken" or "attempted to take" the fish. It should take the strongest evidence to make us believe that Congress has defined a term in a manner repugnant to its ordinary and traditional sense.

Here the evidence shows the opposite. "Harm" is merely one of 10 prohibitory words in § 1532(19), and the other 9 fit the ordinary meaning of "take" perfectly. To "harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect" are all affirmative acts (the provision itself describes them as "conduct," see § 1532(19)) which are directed immediately and intentionally against a particular animal-not acts or omissions that indirectly and accidentally cause injury to a population of animals. The Court points out that several of the words ("harass," "pursue," "wound," and "kill") "refer to actions or effects that do not require direct applications of force." Ante, at 13 (emphasis added). That is true enough, but force is not the point. Even "taking" activities in the narrowest sense, activities traditionally engaged in by hunters and trappers, do not all consist of direct applications of force; pursuit and harassment are part of the business of "taking" the prey even before it has been touched. What the nine other words in § 1532(19) have in common-and share with the narrower meaning of "harm" described above, but not with the Secretary's ruthless dilation of the word-is the sense of affirmative conduct intentionally directed against a particular animal or animals.

I am not the first to notice this fact, or to draw the conclusion that it compels. In 1981 the Solicitor of the Fish and Wildlife Service delivered a legal opinion on § 1532(19) that is in complete agreement with my reading:

"The Act's definition of 'take' contains a list of actions that illustrate the intended scope of the term.... With the possible exception of 'harm,' these terms all represent forms of conduct that are directed against and likely to injure or kill individ ual wildlife. Under the

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principle of statutory construction, ejusdem generis, ... the term 'harm' should be interpreted to include only those actions that are directed against, and likely to injure or kill, individual wildlife." Memorandum of April 17, 1981, reprinted in 46 Fed. Reg. 29490, 29491 (emphasis in original). I would call it noscitur a sociis, but the principle is much the same: the fact that "several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well," Beecham v. United States, 511 U.S. ___, ___ (1994) (slip op., at 3). The Court contends that the canon cannot be applied to deprive a word of all its "independent meaning," ante, at 14. That proposition is questionable to begin with, especially as applied to long lawyers' listings such as this. If it were true, we ought to give the word "trap" in the definition its rare meaning of "to clothe" (whence "trappings")-since otherwise it adds nothing to the word "capture." See Moskal v. United States, 498 U.S. 103, 120 (1990) (SCALIA, J., dissenting). In any event, the Court's contention that "harm" in the narrow sense adds nothing to the other words underestimates the ingenuity of our own species in a way that Congress did not. To feed an animal poison, to spray it with mace, to chop down the very tree in which it is nesting, or even to destroy its entire habitat in order to take it (as by draining a pond to get at a turtle), might neither wound nor kill, but would directly and intentionally harm.

The penalty provisions of the Act counsel this interpretation as well. Any person who "knowingly" violates § 1538(a)(1)(B) is subject to criminal penalties under § 1540(b)(1) and civil penalties under § 1540(a)(1); moreover, under the latter section, any person "who otherwise violates" the taking prohibition (i.e., violates it un knowingly) may be assessed a civil penalty of $500 for each violation, with the stricture that "[e]ach such violation shall be a separate offense." This last provision should be clear warning that the regulation is in error, for when combined with the regulation it produces a result that no legislature could reasonably be thought to have intended: A large number of routine private activities-farming, for example, ranching, roadbuilding, construction and logging-are subjected to strict-liability penalties when they fortuitously injure protected wildlife, no matter how remote the chain of causation and no matter how difficult to foresee (or to disprove) the "injury" may be (e.g., an "impairment" of breeding). The Court says that "[the strict-liability provision] is potentially sweeping, but it would be so with or without the Secretary's 'harm' regulation." Ante, at 8, n. 9. That is not correct. Without the regulation, the routine "habitat modifying" activities that people conduct to make a daily living would not carry exposure to strict penalties; only acts directed at animals, like those described by the other words in § 1532(19), would risk liability.

The Court says that "[to] read a requirement of intent or purpose into the words used to define 'take' ... ignore[s] [§ 1540's] express provision that a 'knowing' action is enough to violate the Act." Ante, at 13. This presumably means that because the reading of § 1532(19) advanced here ascribes an element of purposeful injury to the prohibited acts, it makes superfluous (or inexplicable) the more severe penalties provided for a "knowing" violation. That conclusion does not follow, for it is quite possible to take protected wildlife purposefully without doing so knowingly. A requirement that a violation be "knowing" means that the defendant must "know the facts that make his conduct illegal," Staples v. United States, 511 U.S. ___, ___ (1994) (slip op., at 6). The hunter who shoots an elk in the mistaken belief that it is a mule deer has not knowingly violated § 1538(a)(1)(B)-not because he does not know that elk are legally protected (that would be knowledge of the law, which is not a requirement, see ante, at 8, n. 9), but because he does not know what sort of animal he is shooting. The hunter has nonetheless committed a purposeful taking of protected wildlife, and would therefore be subject to the (lower) strict-liability penalties for the violation.

So far I have discussed only the immediate statutory text bearing on the regulation. But the definition of "take" in § 1532(19) applies "[f]or the purposes of this chapter," that is, it governs the meaning of the word as used everywhere in the Act. Thus, the Secretary's

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interpretation of "harm" is wrong if it does not fit with the use of "take" throughout the Act. And it does not. In § 1540(e)(4)(B), for example, Congress provided for the forfeiture of "[a]ll guns, traps, nets, and other equipment ... used to aid the taking, possessing, selling, [etc.]" of protected animals. This listing plainly relates to "taking" in the ordinary sense. If environmental modification were part (and necessarily a major part) of taking, as the Secretary maintains, one would have expected the list to include "plows, bulldozers, and back- hoes." As another example, § 1539(e)(1) exempts "the taking of any endangered species" by Alaskan Indians and Eskimos "if such taking is primarily for subsistence purposes"; and provides that "[n]on-edible byproducts of species taken pursuant to this section may be sold ... when made into authentic native articles of handicrafts and clothing." Surely these provisions apply to taking only in the ordinary sense, and are meaningless as applied to species injured by environmental modification. The Act is full of like examples. See, e.g., § 1538(a)(1)(D) (prohibiting possession, sale, and transport of "species taken in violation" of the Act). "[I]f the Act is to be interpreted as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout," Gustafson v. Alloyd Co., 513 U.S. ___, ___ (1995) (slip op., at 6), the regulation must fall.

The broader structure of the Act confirms the unreasonableness of the regulation. Section 1536 provides:

"Each Federal agency shall ... insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary ... to be critical." 16 U.S.C. § 1536(a)(2) (emphasis added).

The Act defines "critical habitat" as habitat that is "essential to the conservation of the species," §§ 1532(5)(A)(i), (A)(ii), with "conservation" in turn defined as the use of methods necessary to bring listed species "to the point at which the measures provided pursuant to this chapter are no longer necessary." § 1532(3).

These provisions have a double significance. Even if §§ 1536(a)(2) and 1538(a)(1)(B) were totally independent prohibitions-the former applying only to federal agencies and their licensees, the latter only to private parties-Congress's explicit prohibition of habitat modification in the one section would bar the inference of an implicit prohibition of habitat modification in the other section. "[W]here Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Keene Corp. v. United States, 508 U.S. ___, ___ (1993) (slip op., at 7-8) (internal quotation marks omitted). And that presumption against implicit prohibition would be even stronger where the one section which uses the language carefully defines and limits its application. That is to say, it would be passing strange for Congress carefully to define "critical habitat" as used in § 1536(a)(2), but leave it to the Secretary to evaluate, willy-nilly, impermissible "habitat modification" (under the guise of "harm") in § 1538(a)(1)(B).

In fact, however, §§ 1536(a)(2) and 1538(a)(1)(B) do not operate in separate realms; federal agencies are subject to both, because the "person[s]" forbidden to take protected species under § 1538 include agencies and departments of the Federal Government. See § 1532(13). This means that the "harm" regulation also contradicts another principle of interpretation: that statutes should be read so far as possible to give independent effect to all their provisions. See Ratzlaf v. United States, 510 U.S. ___, ___ (slip op., at 6-8). By defining "harm" in the definition of "take" in § 1538(a)(1)(B) to include significant habitat modification that injures populations of wildlife, the regulation makes the habitat-modification restriction in § 1536(a)(2) almost wholly superfluous. As "critical habitat" is habitat "essential to the conservation of the species," adverse modification of "critical" habitat by a federal agency would also constitute habitat

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modification that injures a population of wildlife.

Petitioners try to salvage some independent scope for § 1536(a)(2) by the following contortion: because the definition of critical habitat includes not only "the specific areas within the geographical area occupied by the species [that are] essential to the conservation of the species," § 1532(5)(A)(i), but also "specific areas outside the geographical area occupied by the species at the time it is listed [as a protected species] ... [that are] essential to the conservation of the species," § 1532A(5)(ii), there may be some agency modifications of critical habitat which do not injure a population of wildlife. See Brief for Petitioners 41, and n. 27. This is dubious to begin with. A principal way to injure wildlife under the Secretary's own regulation is to "significantly impai[r] ... breeding," 50 CFR § 17.3 (1994). To prevent the natural increase of a species by adverse modification of habitat suitable for expansion assuredly impairs breeding. But even if true, the argument only narrows the scope of the superfluity, leaving as so many wasted words the § 1532(a)(5)(i) definition of critical habitat to include currently occupied habitat essential to the species' conservation. If the Secretary's definition of "harm" under § 1538(a)(1)(B) is to be upheld, we must believe that Congress enacted § 1536(a)(2) solely because in its absence federal agencies would be able to modify habitat in currently unoccupied areas. It is more rational to believe that the Secretary's expansion of § 1538(a)(1)(B) carves out the heart of one of the central provisions of the Act.

II

The Court makes four other arguments. First, "the broad purpose of the [Act] supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid." Ante, at 10. I thought we had renounced the vice of "simplistically ... assum[ing] that whatever furthers the statute's primary objective must be the law." Rodriguez v. United States, 480 U.S. 522, 526 (1987) (per curiam) (emphasis in original). Deduction from the "broad purpose" of a statute begs the question if it is used to decide by what means (and hence to what length) Congress pursued that purpose; to get the right answer to that question there is no substitute for the hard job (or in this case, the quite simple one) of reading the whole text. "The Act must do everything necessary to achieve its broad purpose" is the slogan of the enthusiast, not the analytical tool of the arbiter. [FN3]

Second, the Court maintains that the legislative history of the 1973 Act supports the Secretary's definition. See ante, at 16-18. Even if legislative history were a legitimate and reliable tool of interpretation (which I shall assume in order to rebut the Court's claim); and even if it could appropriately be resorted to when the enacted text is as clear as this, but see Chicago v. Environmental Defense Fund, 511 U.S. ___, ___ (1994) (slip op., at 9-10); here it shows quite the opposite of what the Court says. I shall not pause to discuss the Court's reliance on such statements in the Committee Reports as " '[t]ake' is defined ... in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." ' S. Rep. No. 93-307, p. 7 (1973) (quoted ante, at 17). This sort of empty flourish-to the effect that "this statute means what it means all the way"-counts for little even when enacted into the law itself. See Reves v. Ernst & Young, 507 U.S. ___, ___ (1993) (slip op., at 13-14).

Much of the Court's discussion of legislative history is devoted to two items: first, the Senate floor manager's introduction of an amendment that added the word "harm" to the definition of "take," with the observation that (along with other amendments) it would "help to achieve the purposes of the bill"; second, the relevant Committee's removal from the definition of a provision stating that "take" includes "the destruction, modification or curtailment of [the] habitat or range" of fish and wildlife. See ante, at 17-18. The Court inflates the first and belittles the second, even though the second is on its face far more pertinent. But this elaborate inference from various pre-enactment actions and inactions is quite unnecessary, since we have direct

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evidence of what those who brought the legislation to the floor thought it meant-evidence as solid as any ever to be found in legislative history, but which the Court banishes to a footnote. See ante, at 18-19, n. 19.

Both the Senate and House floor managers of the bill explained it in terms which leave no doubt that the problem of habitat destruction on private lands was to be solved principally by the land acquisition program of § 1534, while § 1538 solved a different problem altogether-the problem of takings. Senator Tunney stated:

"Through [the] land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction.

"Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to predation by man for commercial, sport, consumption, or other purposes. The provisions of [the bill] would prohibit the commerce in or the importation, exportation, or taking of endangered species...." 119 Cong. Rec. 25669 (1973) (emphasis added).

The House floor manager, Representative Sullivan, put the same thought in this way: "[T]he principal threat to animals stems from destruction of their habitat.... [The bill] will meet this problem by providing funds for acquisition of critical habitat. ... It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, but who are understandably unwilling to do so at excessive cost to themselves. Another hazard to endangered species arises from those who would capture or kill them for pleasure or profit. There is no way that Congress can make it less pleasurable for a person to take an animal, but we can certainly make it less profitable for them to do so." Id., at 30162 (emphasis added). Habitat modification and takings, in other words, were viewed as different problems, addressed by different provisions of the Act. The Court really has no explanation for these statements. All it can say is that "[n]either statement even suggested that [the habitat acquisition funding provision in § 1534] would be the Act's exclusive remedy for habitat modification by private landowners or that habitat modification by private landowners stood outside the ambit of [§ 1538]." Ante, at 18-19, n. 19. That is to say, the statements are not as bad as they might have been. Little in life is. They are, however, quite bad enough to destroy the Court's legislative-history case, since they display the clear understanding (1) that habitat modification is separate from "taking," and (2) that habitat destruction on private lands is to be remedied by public acquisition, and not by making particular unlucky landowners incur "excessive cost to themselves." The Court points out triumphantly that they do not display the understanding (3) that the land acquisition program is "the [Act's] only response to habitat modification." Ibid. Of course not, since that is not so (all public lands are subject to habitat-modification restrictions); but (1) and (2) are quite enough to exclude the Court's interpretation. They identify the land acquisition program as the Act's only response to habitat modification by private landowners, and thus do not in the least "contradic[t]," ibid., the fact that § 1536 prohibits habitat modification by federal agencies.

Third, the Court seeks support from a provision which was added to the Act in 1982, the year after the Secretary promulgated the current regulation. The provision states:

"[T]he Secretary may permit, under such terms and conditions as he shall prescribe-

..... "any taking otherwise prohibited by section 1538(a)(1)(B) ... if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B).

This provision does not, of course, implicate our doctrine that reenactment of a statutory provision ratifies an extant judicial or administrative interpretation, for neither the taking prohibition in § 1538(a)(1)(B) nor the

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definition in § 1532(19) was reenacted. See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N. A., 511 U.S. ___, ___ (1994) (slip op., at 21). The Court claims, however, that the provision "strongly suggests that Congress understood [§ 1538(a)(1)(B)] to prohibit indirect as well as deliberate takings." Ante, at 12. That would be a valid inference if habitat modification were the only substantial "otherwise lawful activity" that might incidentally and nonpurposefully cause a prohibited "taking." Of course it is not. This provision applies to the many otherwise lawful takings that incidentally take a protected species-as when fishing for unprotected salmon also takes an endangered species of salmon, see Pacific Northwest Generating Cooperative v. Brown, 38 F. 3d 1058, 1067 (CA9 1994). Congress has referred to such "incidental takings" in other statutes as well-for example, a statute referring to "the incidental taking of ... sea turtles in the course of ... harvesting [shrimp]" and to the "rate of incidental taking of sea turtles by United States vessels in the course of such harvesting," 103 Stat. 1038 § 609(b)(2), note following 16 U.S.C. § 1537 (1988 ed., Supp. V); and a statute referring to "the incidental taking of marine mammals in the course of commercial fishing operations," 108 Stat. 546, § 118(a). The Court shows that it misunderstands the question when it says that "[n]o one could seriously request an 'incidental' take permit to avert ... liability for direct, deliberate action against a member of an endangered or threatened species." Ante, at 12-13 (emphasis added). That is not an incidental take at all. [FN4]

This is enough to show, in my view, that the 1982 permit provision does not support the regulation. I must acknowledge that the Senate Committee Report on this provision, and the House Conference Committee Report, clearly contemplate that it will enable the Secretary to permit environmental modification. See S. Rep. No. 97-418, p. 10 (1982); H.R. Conf. Rep. No. 97-835, pp. 30-32 (1982). But the text of the amendment cannot possibly bear that asserted meaning, when placed within the context of an Act that must be interpreted (as we have seen) not to prohibit private environmental modification. The neutral language of the amendment cannot possibly alter that interpretation, nor can its legislative history be summoned forth to contradict, rather than clarify, what is in its totality an unambiguous statutory text. See Chicago v. Environ mental Defense Fund, 511 U.S. ___ (1994). There is little fear, of course, that giving no effect to the relevant portions of the Committee Reports will frustrate the real-life expectations of a majority of the Members of Congress. If they read and relied on such tedious detail on such an obscure point (it was not, after all, presented as a revision of the statute's prohibitory scope, but as a discretionary-waiver provision) the Republic would be in grave peril.

Fourth and lastly, the Court seeks to avoid the evident shortcomings of the regulation on the ground that the respondents are challenging it on its face rather than as applied. See ante, at 11; see also ante, at 1 (O'CONNOR, J., concurring). The Court seems to say that even if the regulation dispenses with the foreseeability of harm that it acknowledges the statute to require, that does not matter because this is a facial challenge: so long as habitat modification that would foreseeably cause harm is prohibited by the statute, the regulation must be sustained. Presumably it would apply the same reasoning to all the other defects of the regulation: the regulation's failure to require injury to particular animals survives the present challenge, because at least some environmental modifications kill particular animals. This evisceration of the facial challenge is unprecedented. It is one thing to say that a facial challenge to a regulation that omits statutory element x must be rejected if there is any set of facts on which the statute does not require x. It is something quite different-and unlike any doctrine of "facial challenge" I have ever encountered-to say that the challenge must be rejected if the regulation could be applied to a state of facts in which element x happens to be present. On this analysis, the only regulation susceptible to facial attack is one that not only is invalid in all its applications, but also does not sweep up any person who could have been held liable under a proper application of the statute. That is not the law. Suppose a statute that

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prohibits "premeditated killing of a human being," and an implementing regulation that prohibits "killing a human being." A facial challenge to the regulation would not be rejected on the ground that, after all, it could be applied to a killing that happened to be premeditated. It could not be applied to such a killing, because it does not require the factfinder to find premeditation, as the statute requires. In other words, to simplify its task the Court today confuses lawful application of the challenged regulation with lawful application of a different regulation, i.e., one requiring the various elements of liability that this regulation omits.

III

In response to the points made in this dissent, the Court's opinion stresses two points, neither of which is supported by the regulation, and so cannot validly be used to uphold it. First, the Court and the concurrence suggest that the regulation should be read to contain a requirement of proximate causation or foreseeability, principally because the statute does-and "[n]othing in the regulation purports to weaken those requirements [of the statute]." See ante, at 8, n. 9; 11-12, n. 13; see also ante, at 4-6 (O'CONNOR, J., concurring). I quite agree that the statute contains such a limitation, because the verbs of purpose in § 1538(a)(1)(B) denote action directed at animals. But the Court has rejected that reading. The critical premise on which it has upheld the regulation is that, despite the weight of the other words in § 1538(a)(1)(B), "the statutory term 'harm' encompasses indirect as well as direct injuries," ante, at 9. See also ante, at 9-10, n. 11 (describing "the sense of indirect causation that 'harm' adds to the statute"); ante, at 14 (stating that the Secretary permissibly interprets " 'harm" ' to include "indirectly injuring endangered animals"). Consequently, unless there is some strange category of causation that is indirect and yet also proximate, the Court has already rejected its own basis for finding a proximate-cause limitation in the regulation. In fact "proximate" causation simply means "direct" causation. See, e.g., Black's Law Dictionary 1103 (5th ed. 1979) (defining "[p]roximate" as "Immediate; nearest; direct ") (emphasis added); Webster's New International Dictionary of the English Language 1995 (2d ed. 1949) ("proximate cause. A cause which directly, or with no mediate agency, produces an effect") (emphasis added).

The only other reason given for finding a proximate- cause limitation in the regulation is that "by use of the word 'actually,' the regulation clearly rejects speculative or conjectural effects, and thus itself invokes principles of proximate causation." Ante, at 5 (O'CONNOR, J., concurring); see also ante, at 11-12, n. 13 (majority opinion). Non sequitur, of course. That the injury must be "actual" as opposed to "potential" simply says nothing at all about the length or foreseeability of the causal chain between the habitat modification and the "actual" injury. It is thus true and irrelevant that "the Secretary did not need to include 'actually' to connote 'but for' causation," ante, at 11-12, n. 13; "actually" defines the requisite injury, not the requisite causality.

The regulation says (it is worth repeating) that "harm" means (1) an act which (2) actually kills or injures wildlife. If that does not dispense with a proximate- cause requirement, I do not know what language would. And changing the regulation by judicial invention, even to achieve compliance with the statute, is not permissible. Perhaps the agency itself would prefer to achieve compliance in some other fashion. We defer to reasonable agency interpretations of ambiguous statutes precisely in order that agencies, rather than courts, may exercise policymaking discretion in the interstices of statutes. See Chevron, 467 U. S., at 843-845. Just as courts may not exercise an agency's power to adjudicate, and so may not affirm an agency order on discretionary grounds the agency has not advanced, see SEC v. Chenery Corp., 318 U.S. 80 (1943), so also this Court may not exercise the Secretary's power to regulate, and so may not uphold a regulation by adding to it even the most reasonable of elements it does not contain.

The second point the Court stresses in its response seems to me a belated mending of its

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hold. It appar ently concedes that the statute requires injury to par ticular animals rather than merely to populations of animals. See ante, at 11-12, n. 13; id., at 7, 9 (referring to killing or injuring "members of [listed] species" (emphasis added)). The Court then rejects my contention that the regulation ignores this requirement, since, it says, "every term in the regulation's definition of 'harm' is subservient to the phrase 'an act which actually kills or injures wildlife." ' Id., at 11-12, n. 13. As I have pointed out, see supra, at 3, this reading is incompatible with the regulation's specification of impairment of "breeding" as one of the modes of "kill[ing] or injur[ing] wildlife." [FN5]

But since the Court is reading the regulation and the statute incorrectly in other respects, it may as well introduce this novelty as well-law la carte. As I understand the regulation that the Court has created and held consistent with the statute that it has also created, habitat modification can constitute a "taking," but only if it results in the killing or harming of individual animals, and only if that consequence is the direct result of the modification. This means that the destruction of privately owned habitat that is essential, not for the feeding or nesting, but for the breeding, of butterflies, would not violate the Act, since it would not harm or kill any living butterfly. I, too, think it would not violate the Act-not for the utterly unsupported reason that habitat modifications fall outside the regulation if they happen not to kill or injure a living animal, but for the textual reason that only action directed at living animals constitutes a "take."

* * *

The Endangered Species Act is a carefully considered piece of legislation that forbids all persons to hunt or harm endangered animals, but places upon the public at large, rather than upon fortuitously accountable individual landowners, the cost of preserving the habitat of endangered species. There is neither textual support for, nor even evidence of congressional consideration of, the radically different disposition contained in the regulation that the Court sustains. For these reasons, I respectfully dissent.

FN1. The Act defines the term "endangered species" to mean "any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man." 16 U.S.C. § 1532(6).

FN2. The Secretary, through the Director of the Fish and Wildlife Service, originally promulgated the regulation in 1975 and amended it in 1981 to emphasize that actual death or injury of a protected animal is necessary for a violation. See 40 Fed. Reg. 44412, 44416 (1975); 46 Fed. Reg. 54748, 54750 (1981).

FN3. Respondents also argued in the District Court that the Secretary's definition of "harm" is unconstitutionally void for vagueness, but they do not press that argument here.

FN4. The woodpecker was listed as an endangered species in 1970 pursuant to the statutory predecessor of the ESA. See 50 CFR § 17.11(h) (1994), issued pursuant to the Endangered Species Conservation Act of 1969, 83 Stat. 275.

FN5. See 55 Fed. Reg. 26114 (1990). Another regulation promulgated by the Secretary extends to threatened species, defined in the ESA as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range," 16 U.S.C. § 1532(20), some but not all of the protections endangered species enjoy. See 50 CFR 17.31(a) (1994). In the District Court respondents unsuccessfully challenged that regulation's extension of § 9 to threatened species, but they do not press the challenge here.

FN6. Senate 1983, reprinted in Hearings on S. 1592 and S. 1983 before the Subcommittee on Environment of the Senate Committee on Commerce, 93d Cong., 1st Sess., 27 (1973).

FN7. Judge Sentelle filed a partial concurrence in which he declined to join the portions of the court's opinion that relied on legislative history. See 17 F. 3d 1463, 1472 (CADC 1994).

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FN8. The 1982 amendment had formed the basis on which the author of the majority's opinion on rehearing originally voted to affirm the judgment of the District Court. Compare 1 F. 3d 1, 11 (CADC 1993) (Williams, J., concurring in part), with 17 F. 3d, at 1467-1472.

FN9. As discussed above, the Secretary's definition of "harm" is limited to "act[s] which actually kil[l] or injur[e] wildlife." 50 CFR § 17.3 (1994). In addition, in order to be subject to the Act's criminal penalties or the more severe of its civil penalties, one must "knowingly violat[e]" the Act or its implementing regulations. 16 U.S.C. §§ 1540(a)(1),(b)(1). Congress added "knowingly" in place of "willfully" in 1978 to make "criminal violations of the act a general rather than a specific intent crime." H.R. Conf. Rep. No. 95-1804, p. 26 (1978). The Act does authorize up to a $500 civil fine for "[a]ny person who otherwise violates" the Act or its implementing regulations. 16 U.S.C. § 1540(a)(1). That provision is potentially sweeping, but it would be so with or without the Secretary's "harm" regulation, making it unhelpful in assessing the reasonableness of the regulation. We have imputed scienter requirements to criminal statutes that impose sanctions without expressly requiring scienter, see, e.g., Staples v. United States, 511 U.S. ___ (1994), but the proper case in which we might consider whether to do so in the § 9 provision for a $500 civil penalty would be a challenge to enforcement of that provision itself, not a challenge to a regulation that merely defines a statutory term. We do not agree with the dissent that the regulation covers results that are not "even foreseeable ... no matter how long the chain of causality between modification and injury." Post, at 2. Respondents have suggested no reason why either the "knowingly violates" or the "otherwise violates" provision of the statute-or the "harm" regulation itself-should not be read to incorporate ordinary requirements of proximate causation and foreseeability. In any event, neither respondents nor their amici have suggested that the Secretary employs the "otherwise violates" provision with any frequency.

FN10. Respondents and the dissent emphasize what they portray as the "established meaning" of "take" in the sense of a "wildlife take," a meaning respondents argue extends only to "the effort to exercise dominion over some creature, and the concrete effect of [sic] that creature." Brief for Respondents 19; see post, at 4-5. This limitation ill serves the statutory text, which forbids not taking "some creature" but "tak[ing] any [endangered] species "-a formidable task for even the most rapacious feudal lord. More importantly, Congress explicitly defined the operative term "take" in the ESA, no matter how much the dissent wishes otherwise, see post, at 4-7, 11-12, thereby obviating the need for us to probe its meaning as we must probe the meaning of the undefined subsidiary term "harm." Finally, Congress' definition of "take" includes several words-most obviously "harass," "pursue," and "wound," in addition to "harm" itself-that fit respondents' and the dissent's definition of "take" no better than does "significant habitat modification or degradation."

FN11. In contrast, if the statutory term "harm" encompasses such indirect means of killing and injuring wildlife as habitat modification, the other terms listed in § 3-"harass," "pursue," "hunt," "shoot," "wound," "kill," "trap," "capture," and "collect"-generally retain independent meanings. Most of those terms refer to deliberate actions more frequently than does "harm," and they therefore do not duplicate the sense of indirect causation that "harm" adds to the statute. In addition, most of the other words in the definition describe either actions from which habitat modification does not usually result (e.g., "pursue," "harass") or effects to which activities that modify habitat do not usually lead (e.g., "trap," "collect"). To the extent the Secretary's definition of "harm" may have applications that overlap with other words in the definition, that overlap reflects the broad purpose of the Act. See infra, at 9-11.

FN12. We stated: "The Secretary of the Interior has defined the term 'harm' to mean 'an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; significant envi ronmental modification or degradation which has such effects is included within the meaning of "harm."' " TVA v. Hill, 437 U.S. 153, 184-185, n. 30 (1978) (citations omitted; emphasis in original).

FN13. The dissent incorrectly asserts that the Secretary's regulation (1) "dispenses with the foreseeability of harm" and (2) "fail[s] to require injury to particular animals," post, at 19. As to the

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first assertion, the regulation merely implements the statute, and it is therefore subject to the statute's "knowingly violates" language, see 16 U.S.C. §§ 1540(a)(1), (b)(1), and ordinary requirements of proximate causation and foreseeability. See n. 9, supra. Nothing in the regulation purports to weaken those requirements. To the contrary, the word "actually" in the regulation should be construed to limit the liability about which the dissent appears most concerned, liability under the statute's "otherwise violates" provision. See n. 9, supra; post, at 8-9, 19-20. The Secretary did not need to include "actually" to connote "but for" causation, which the other words in the definition obviously require. As to the dissent's second assertion, every term in the regulation's definition of "harm" is subservient to the phrase "an act which actually kills or injures wildlife."

FN14. The dissent acknowledges the legislative history's clear indication that the drafters of the 1982 amendment had habitat modification in mind, see post, at 18, but argues that the text of the amendment requires a contrary conclusion. This argument overlooks the statute's requirement of a "conservation plan," which must describe an alternative to a known, but undesired, habitat modification.

FN15. The dissent makes no effort to defend the Court of Appeals' reading of the statutory definition as requiring a direct application of force. Instead, it tries to impose on § 9 a limitation of liability to "affirmative conduct intentionally directed against a particular animal or animals." Post, at 7. Under the dissent's interpretation of the Act, a developer could drain a pond, knowing that the act would extinguish an endangered species of turtles, without even proposing a conservation plan or applying for a permit under § 9(a)(1)(B); unless the developer was motivated by a desire "to get at a turtle," post, at 8, no statutory taking could occur. Because such conduct would not constitute a taking at common law, the dissent would shield it from § 9 liability, even though the words "kill" and "harm" in the statutory definition could apply to such deliberate conduct. We cannot accept that limitation. In any event, our reasons for rejecting the Court of Appeals' interpretation apply as well to the dissent's novel construction.

FN16. Respondents' reliance on United States v. Hayashi, 22 F. 3d 859 (CA9 1993) is also misplaced. Hayashi construed the term "harass," part of the definition of "take" in the Marine Mammal Protection Act of 1972, 16 U.S.C. § 1361 et seq., as requiring a "direct intrusion" on wildlife to support a criminal prosecution. 22 F. 3d, at 864. Hayashi dealt with a challenge to a single application of a statute whose "take" definition includes neither "harm" nor several of the other words that appear in the ESA definition. Moreover, Hayashi was decided by a panel of the Ninth Circuit, the same court that had previously upheld the regulation at issue here in Palila v. Hawaii Dept. of Land and Natural Resources, 852 F. 2d 1106 (1988) (Palila II). Neither the Hayashi majority nor the dissent saw any need to distinguish or even to cite Palila II.

FN17. Congress recognized that §§ 7 and 9 are not coextensive as to federal agencies when, in the wake of our decision in Hill in 1978, it added § 7(o), 16 U.S.C. § 1536(o), to the Act. That section provides that any federal project subject to exemption from § 7, 16 U.S.C. § 1536(h), will also be exempt from § 9.

FN18. Respondents also argue that the rule of lenity should foreclose any deference to the Secretary's interpretation of the ESA because the statute includes criminal penalties. The rule of lenity is premised on two ideas: first, " 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed" '; second, "legislatures and not courts should define criminal activity." United States v. Bass, 404 U.S. 336, 347-350 (1971) (quoting McBoyle v. United States, 282 U.S. 25, 27 (1931)). We have applied the rule of lenity in a case raising a narrow question concerning the application of a statute that contains criminal sanctions to a specific factual dispute-whether pistols with short barrels and attachable shoulder stocks are short-barreled rifles-where no regulation was present. See United States v. Thompson/Center Arms Co., 504 U.S. 505, 517-518, and n. 9 (1992). We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement. Even if there exist regulations whose interpretations of statutory criminal penalties provide such inadequate notice of potential liability as to offend the rule of lenity, the "harm" regulation, which has existed for two

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decades and gives a fair warning of its consequences, cannot be one of them.

FN19. Respondents place heavy reliance for their argument that Congress intended the § 5 land acquisition provision and not § 9 to be the ESA's remedy for habitat modification on a floor statement by Senator Tunney: "Many species have been inadvertently exterminated by a negligent destruction of their habitat. Their habitats have been cut in size, polluted, or otherwise altered so that they are unsuitable environments for natural populations of fish and wildlife. Under this bill, we can take steps to make amends for our negligent encroachment. The Secretary would be empowered to use the land acquisition authority granted to him in certain existing legislation to acquire land for the use of the endangered species programs.... Through these land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction. "Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to predation by man for commercial, sport, consumption, or other purposes. The provisions in S. 1983 would prohibit the commerce in or the importation, exportation, or taking of endangered species...." 119 Cong. Rec. 25669 (1973). Similarly, respondents emphasize a floor statement by Representative Sullivan, the House floor manager for the ESA: "For the most part, the principal threat to animals stems from destruction of their habitat.... H.R. 37 will meet this problem by providing funds for acquisition of critical habitat.... It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, but who are understandably unwilling to do so at excessive cost to themselves. "Another hazard to endangered species arises from those who would capture or kill them for pleasure or profit. There is no way that Congress can make it less pleasurable for a person to take an animal, but we can certainly make it less profitable for them to do so." Id., at 30162. Each of these statements merely explained features of the bills that Congress eventually enacted in § 5 of the ESA and went on to discuss elements enacted in § 9. Neither statement even suggested that § 5 would be the Act's exclusive remedy for habitat modification by private landowners or that habitat modification by private landowners stood outside the ambit of § 9. Respondents' suggestion that these statements identified § 5 as the ESA's only response to habitat modification contradicts their emphasis elsewhere on the habitat protections in § 7. See supra, at 14.

FN*. JUSTICE SCALIA suggests that, if the word "direct" merits emphasis in this sentence, then the sentence should be read as an effort to negate principles of proximate causation. See post, at 22, n. 5. As this case itself demonstrates, however, the word "direct" is susceptible of many meanings. The Court of Appeals, for example, used "direct" to suggest an element of purposefulness. See Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 17 F. 3d 1463, 1465 (CADC 1994). So, occasionally, does the dissent. See post, at 7 (describing "affirmative acts ... which are directed immediately and intentionally against a particular animal") (emphasis added). It is not hard to imagine conduct that, while "indirect" (i.e., nonpurposeful), proximately causes actual death or injury to individual protected animals, cf. post, at 20; indeed, principles of proximate cause routinely apply in the negligence and strict liability contexts.

FN1. The Court and JUSTICE O'CONNOR deny that the regulation has the first or the third of these features. I respond to their arguments in Part III, infra.

FN2. The Court suggests halfheartedly that "take" cannot refer to the taking of particular animals, because § 1538(a)(1)(B) prohibits "tak[ing] any [endangered] species." Ante, at 9, n. 10. The suggestion is halfhearted because that reading obviously contradicts the statutory intent. It would mean no violation in the intentional shooting of a single bald eagle-or, for that matter, the intentional shooting of 1,000 bald eagles out of the extant 1,001. The phrasing of § 1538(a)(1)(B), as the Court recognizes elsewhere, see, e.g., ante, at 7, is shorthand for "take any member of [an endangered] species."

FN3. This portion of the Court's opinion, see ante, at 11, n. 12, discusses and quotes a footnote in TVA v. Hill, 437 U.S. 153, 184-185, n. 30 (1978), in which we described the then-current version of the Secretary's regulation, and said that the habitat modification undertaken by the federal agency in the case would have violated the regulation. Even if we had said that the Secretary's regulation was authorized by § 1538, that would have been utter

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dictum, for the only provision at issue was § 1536. See 437 U. S., at 193. But in fact we simply opined on the effect of the regulation while assuming its validity, just as courts always do with provisions of law whose validity is not at issue.

FN4. The statutory requirement of a "conservation plan" is as consistent with this construction as with the Court's. See ante, at 12, and n. 14. The commercial fisherman who is in danger of incidentally sweeping up protected fish in his nets can quite reasonably be required to "minimize and mitigate" the "impact" of his activity. 16 U.S.C. § 1539(a)(2)(A).

FN5. JUSTICE O'CONNOR supposes that an "impairment of breeding" intrinsically injures an animal because "[t]o make it impossible for an animal to reproduce is to impair its most essential physical functions and to render that animal, and its genetic material, biologically obsolete." Ante, at 2 (concurring opinion). This imaginative construction does achieve the result of extending "impairment of breeding" to individual animals; but only at the expense of also expanding "injury" to include elements beyond physical harm to individual animals. For surely the only harm to the individual animal from impairment of that "essential function" is not the failure of issue (which harms only the issue), but the psychic harm of perceiving that it will leave this world with no issue (assuming, of course, that the animal in question, perhaps an endangered species of slug, is capable of such painful sentiments). If it includes that psychic harm, then why not the psychic harm of not being able to frolic about-so that the draining of a pond used for an endangered animal's recreation, but in no way essential to its survival, would be prohibited by the Act? That the concurrence is driven to such a dubious redoubt is an argument for, not against, the proposition that "injury" in the regulation includes injury to populations of animals. Even more so with the concurrence's alternative explanation: that "impairment of breeding" refers to nothing more than concrete injuries inflicted by the habitat modification on the animal who does the breeding, such as "physical complications [suffered] during gestation," ante, at 3. Quite obviously, if "impairment of breeding" meant such physical harm to an individual animal, it would not have had to be mentioned. The concurrence entangles itself in a dilemma while attempting to explain the Secretary's commentary to the harm regulation, which stated that "harm" is not limited to "direct physical injury to an individual member of the wildlife species," 46 Fed. Reg. 54748 (1981). The concurrence denies that this means that the regulation does not require injury to particular animals, because "one could just as easily emphasize the word 'direct' in this sentence as the word 'individual.' " Ante, at 3. One could; but if the concurrence does, it thereby refutes its separate attempt to exclude indirect causation from the regulation's coverage, see ante, at 4-6. The regulation, after emerging from the concurrence's analysis, has acquired both a proximate-cause limitation and a particular-animals limitation-precisely the one meaning that the Secretary's quoted declaration will not allow, whichever part of it is emphasized.

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Toxic Tort

"You Ain't Nothin' But a Hound Dog"

Michael Gibson

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MMG\BIO

YOU AIN'T NOTHING BUT A HOUND DOG,

OR

DID JUNK SCIENCE REALLY KILL THE KING?

DEFENDING TOXIC TORT CLAIMS IN THE 1990'S AND BEYOND

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YOU AIN'T NOTHING BUT A HOUND DOG, OR DID JUNK SCIENCE REALLY KILL THE KING?

DEFENDING TOXIC TORT CLAIMS IN THE 1990'S AND BEYOND

By Michael M. Gibson and John M. Quinlan

I. THE EXPLOSION OF TOXIC TORT LITIGATION

A. The Relationship Between Regulatory and Scientific Development and the Growth of Toxic Tort Litigation:

1. The type of litigation known as "toxic tort" litigation has continued to increase. This growth has been fueled by increased regulation, public attention (including extensive media treatment), and developments in science and technology (as, for example, greater medical understanding of exposure risks and the development of better monitoring devices and control technology).

2. In fact, not only have scientific and technological advances served as a catalyst for regulatory initiative, but it is perhaps even more true today that ever-increasing regulatory developments drive technology and science, contributing further to the more stringent standards of care imposed on industry.

3. Toxic tort litigation has been impacted by the proliferation of "junk science" that has grown out of these cases. Along with the valid scientific and technological advances that have occurred and the concomitant increase in the standard of care imposed through regulation (and, actually,

rulings in prior toxic tort cases), has come an outpouring of unsound "scientific" expertise which complicates these cases tremendously.

II. ADMISSIBILITY OF EXPERT TESTIMONY IN TOXIC TORT CASES

A. Causation Standard in Toxic Torts:

1. A plaintiff must prove that the defendant's negligence or other misfeasance caused his or her exposure to toxic chemicals, and that the exposure caused the subject injuries.

2. In a toxic tort action brought in either federal or state court, the determination of whether exposure to a toxic substance caused a plaintiff's injury will invariably be made through expert testimony which must be based on reasonable medical probability. *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir. 1985); *Maritime Overseas Corp. v. Ellis*, 886 S.W.2d 780 (Tex. App.--Houston [14th Dist.] 1994, writ pending) ; *Duff v. Yelin*, 751 S.W.2d 175 (Tex. 1988).

B. Admissibility of Expert Testimony Regarding Causation

1. Defense counsel must vigorously seek to exclude plaintiff's proffered expert testimony pre-trial, during trial, and post-trial.

2. Under both the Federal and Texas rules of evidence, the proponent of expert testimony must establish its admissibility if objection to the testimony is made.

3. *Daubert v. Merril Dow Pharmaceuticals, Inc.*, _____ U.S. _____, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) governs the admissibility of expert testimony in federal cases.

4. Summary of *Daubert*

a. The *Frye* "general acceptance" standard for determining the admissibility or expert scientific testimony held superseded by the Federal Rules of Evidence. *See Frye v. United States*, 293 F. 1013 (D.C. 1923).

b. A federal judge must act as gatekeeper by ensuring that all scientific testimony or evidence is both relevant and reliable.

c. Fed. R. Evid. 702 allows a medical expert to testify if such expert's "scientific knowledge" will assist the trier of fact to understand the evidence or to determine a fact in issue. Pursuant to Fed. R. Evid.104(a), when faced with a proffer of expert scientific testimony, the court must determine whether the expert satisfies this requirement. Rule 702's "overarching subject" is the scientific validity - and thus the evidentiary relevance and reliability - of the principles that underlie an expert's testimony.

5. *E.I. Du Pont de Nemours & Company, Inc. v. Robinson*, 38 Tex. Sup. Ct. J. 852 (June 15, 1995) governs the admissibility of expert medical testimony in Texas state court cases. By a 5-4 vote, the Texas Supreme Court, citing often to *Daubert*, adopted a test for determining the admissibility of proffered medical expert testimony based on that set forth in *Daubert*.

C. Conclusion

Defense of a toxic tort will often center on attacking the plaintiff's proffered expert testimony. *Daubert* and *Robinson* provide a guideline for attacking not only "junk science," but all proffered expert testimony which lacks a sufficient basis in science or fact. LBJ's advice on voting to win elections, i.e., "early and often"

works well for defense counsel who wish to win evidentiary battles - object early and often to plaintiff's expert testimony.

III. EFFECT OF NEW LEGISLATION ON TOXIC TORT LITIGATION

A. Introduction:

The Texas legislature recently passed several laws which will affect toxic tort trials greatly. The new statutes modify the rules governing joint and several liability in a manner favorable to defendants, change the venue rules to greatly reduce abusive form shopping, place limitations on the amount of punitive damages which can be recovered, raise the standard for proving liability for punitive damages to clear and convincing evidence, and provide a means for defendants sued in frivolous lawsuits to recover their fees and expenses.

B. The Texas Environmental, Health, and Safety Audit Privilege Act

1. On May 23, 1995, the Texas Environmental, Health, and Safety Audit Privilege Act became law. The statute provides that an environmental or health and safety audit, as defined in the statute, is privileged from discovery and not admissible in a civil action, criminal proceeding, or administrative proceeding.

2. Before commencing an environmental audit, it is necessary to review the statute's provisions in detail, prepare a plan for complying with the statute's requirements, and implement a plan to ensure compliance in order to avoid losing the limited privilege provided in the statute. Great care must be given that all concerned understand the information and documents which will be covered by the privilege and those that will not to avoid the natural tendency to assume "so long as it's in the audit report, it's privileged." If that is not done, an audit report might later serve as a discoverable case

outline for plaintiffs suing the facility which conducted the audit. Furthermore, the impact of the EPA's existing environmental audit policy (or lack thereof), the effect of the EPA's anticipated change in policy, legislation pending in the U.S. Congress, and the questionable validity of the privilege in a RCRA citizen suit, a CERCLA cost recovery action, an EPA enforcement action, or a case brought in federal court based on federal substantive law raise the question of whether the limited audit privilege creates an incentive to self regulate as intended.

3. Operative Date - covers actions undertaken on and after May 23, 1995.

C. Summary of Senate Bill 28 (Joint and Several Liability):

1. The law amends Tex. Civ. Prac. & Rem. Code Ch. 33.

2. The law provides that a toxic tort defendant may be held jointly and severally liable with its co-defendants only if its percentage of responsibility is 15% or more. Under existing law, a toxic tort defendant may be held jointly and severally liable if its percentage of responsibility is 1% or more.

3. Under existing law, the primary jury question regarding liability to the plaintiff includes only the plaintiff, defendants, and settling persons. Heretofore, plaintiffs could control the defendants submitted to the jury on the primary liability questions by dismissing claims against shallow pocket defendants and either pursuing or settling claims against the remaining defendants.

Under the amended statute, in addition to determining the percentage of fault for all claimants, defendants, and settling persons, the jury must also determine the percentage of fault for all responsible third parties (defined as parties who are or may be liable to the plaintiff for all or part of the

plaintiff's damages claimed against the named defendant or defendants) in the primary liability questions thus preventing the scenario outlined above. By properly naming such responsible third parties, defendants become entitled to have the percentage of responsibility of such parties submitted to the jury along with that of the plaintiff and the named defendants thus eliminating the possibility of "excess" fault being attributed to them and also reducing the likelihood of a joint and several liability finding. *See* Tex. Civ. Prac. & Rem. Code § 33.003 in its current form and as amended.

4. Operative Date - all tort actions that accrue on or after September 1, 1995 or all tort actions that are filed after September 1, 1996 (regardless of when claim accrued).

D. Senate Bill 32 (Venue)

1. The venue statutes (codified in Tex. Civ. Prac. & Rem. Code Ch. 15) have been revised in a manner that should impact toxic torts greatly by reducing forum shopping.

2. The amendments require suits against a business entity to be brought either (a) in the county in which all, or at least a substantial part of the events or omissions made the basis of the claim occurred, or (b) in the county in which the entity's principal office (defined as its office at which its decision makers conduct the daily affairs of the business) is located. If neither of those provisions apply, the plaintiff may file suit in its county of residence at the time the cause of action accrued. The restrictive definition of principal office should eliminate the practice of suing a defendant in the most favorable county in which it has an employee and arguing that such employee is an agent or representative sufficient to support venue. See e.g. *Conoco v. Ruiz*, 868 S.W.2d 752 (Tex. 1993).

3. The new law requires each plaintiff in a multi-plaintiff case to establish proper venue independently of the other plaintiffs (though there are exceptions to this rule).

4. The mandatory venue provision regarding real property has been expanded to include all suits for recovery of damages to such property.

5. Operative Date - September 1, 1995 (except Jones Act or FELA, which are January 1, 1996).

E. Senate Bill 25 (Punitive Damages)

1. Liability for punitive damages must be established by clear and convincing evidence rather than a mere preponderance. *See* Tex. Civ. Prac. & Rem. Code Section 41.003 as amended.

2. To obtain punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant acted with fraud, malice, or, in wrongful death actions, with gross neglect or by willful act or omission. *See* Tex. Civ. Prac. & Rem. Code Section 41.003 as amended. The definition of gross negligence from *Moriel* is incorporated into the definition of malice under the amended statute. *See Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994); Tex. Civ. Prac. & Rem. Code Section 41.001 as amended.

3. The amount of punitive damages is limited to the greater of two times the economic damages (defined as pecuniary loss) plus up to $750,000 of non-economic damages found by the jury. (This cap is not applicable to intentional torts specified and defined by the penal code which in most instances would be completely inapplicable in the toxic tort context).

4. *Moriel's* requirement that the amount of punitive damages be bifurcated from the first phase of the trial is codified.

5. Operative Date - all causes of action that accrue on or after September 1, 1995.

IV. SPECIAL CASE MANAGEMENT ISSUES FOR TOXIC TORT ACTIONS

A. Use of "Lone Pine" Orders to Address Lack of Proof of Causation:

1. Named after a toxic tort case arising out of a hazardous waste facility in New Jersey, a "Lone Pine" order requires the plaintiffs in a toxic tort case to come forward with prima facie proof of their claims prior to proceeding to full-blown discovery. *Lore v. Lone Pine Corp.*, 1 Tox.L.Rep. (BNA) 726 (N.J.Super.Ct., Monmouth County, Nov. 18, 1986, Docket No. L3306-85). This type of case management order can be very beneficial for defendants in toxic tort litigation. *See, In re Love Canal Actions*, 547 N.Y.S.2d 174 (Sup.Ct.N.Y. 1989).

   a. Plaintiffs' attorneys generally cry foul in opposing this type of order, claiming that a Lone Pine approach puts the cart before the horse by requiring plaintiffs to prove their case before they have had access to all of the information under the defendants' control regarding substances involved and releases of those substances.

   b. The focus of a Lone Pine order is typically on medical causation and, thus, this type of order can be used to address successfully cases in which the plaintiffs have flimsy causation evidence. Under a Lone Pine order, plaintiffs are required to establish causation to a reasonable degree of medical probability before being permitted to proceed with their case.

2. Lone Pine orders, however, are generally used only in mass toxic tort litigation where the arguments supporting such an order are stronger (costs, etc.). Use of the summary judgment procedure is another effective way of addressing a plaintiff's lack of proof of causation, and this method may be more often utilized in cases involving individual plaintiffs or small groups of plaintiffs.

B. Document Management:

1. As is true in most cases, toxic tort plaintiffs often attempt to use the defendant's own documents in making their case. In the areas of internal procedures and regulatory compliance, there is a potential wealth of material available to plaintiffs.

   a. Regulations mandate that companies report to various agencies information relevant to the handling of potentially hazardous materials. These reports will come into the hands of plaintiffs in these cases whether through disclosure from the agencies themselves or through discovery of records in the hands of the defendant.

   b. The defendant's own internal compliance and investigative documents, to the extent that they cannot be successfully identified as protected from discovery by the attorney-client privilege, under the attorney work product exemption, or under the new environmental audit privilege, will also be relied upon heavily by toxic tort plaintiffs.

2. An overriding issue in these cases is regulatory compliance in handling potentially hazardous materials and safety issues. This gives rise to a special "apples and oranges" problem.

Because of the latency of many injuries associated with exposure, the time period for which discovery is sought may be broad. As a result, procedures and practices from many years ago may be examined. Defendants must be certain that those practices and procedures, which may have been largely unregulated at the time, are not judged by today's more stringent regulatory standards.

3. These cases can be extraordinarily document-intensive. Because of the myriad of ways and contexts in which exposure can be alleged to have occurred, the lack of specificity with which toxic tort plaintiffs often allege exposure, the proliferation of junk science, and the potentially broad time period involved, the scope of discovery can be very broad. The number of documents involved, as a result, can be staggering. Thus, the use of a computerized document database can be beneficial in these cases.

C. Development of Uniform Discovery Materials:

1. If a defendant is faced with toxic tort claims on a repeated basis, consider development of uniform discovery materials. Uniform requests for admissions, interrogatories, and requests for production can be used as a foundation for discovery in this type of case. It is generally more efficient to begin with these documents and tailor them to the particular facts of a case than to begin from scratch each time.

V. CONCLUSION

Defense of a toxic tort is a complex process requiring counsel to review and master the contents of thousands of documents, to identify and interview key witnesses out of potentially hundreds of possible witnesses, to defend his or her client's conduct over a long period of time often spanning decades, and to master the science applicable to a

plaintiff's theories of liability. While this task often appears insurmountable to a lawyer handling his first toxic tort case, development of a database for relevant documents, proper standardized case management techniques, standardized discovery, and a mastery of the law regarding the admissibility of expert testimony in the toxic tort context will allow defense counsel to turn the inherent difficulties in defending a toxic tort into advantages and perhaps create an insurmountable task for the plaintiffs' bar. Without such effort and pre-planning, effective defense of a toxic tort will be difficult and often impossible, although recent tort reform should improve matters for defendants.

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TNRCC GUIDANCE DOCUMENT

HB 2473

TEXAS ENVIRONMENTAL, HEALTH, AND SAFETY AUDIT PRIVILEGE ACT

July 24, 1995

This Guidance Document is intended to assist persons in submitting notice to the Texas Natural Resource Conservation Commission (TNRCC) that a environmental or health and safety audit will be initiated pursuant to the Texas Environmental, Health, and Safety Audit Privilege Act. This guidance is not regulation and should not be used as such.

I.
INTRODUCTION

A. GENERAL INTRODUCTION

On May 23, 1995, Texas joined thirteen other states that have enacted some form of legislation which provides an environmental privilege and/or immunity. This statute primarily affects litigation between non-TNRCC parties, however, the TNRCC is also affected. This document will examine HB 2473 and give guidance to TNRCC staff and persons contemplating its use.

B. BACKGROUND

HB 2473 was proposed to encourage the voluntary compliance with health and safety and environmental laws by granting an incentive, privilege and immunity, to entities that voluntarily seek to determine the environmental, health and safety compliance status of their facility.

The following is an excerpt from the Background Section of the Bill Analysis prepared by Representative Chisum's staff.

> ***In order to ensure compliance with increasingly complex health and safety and environmental laws, voluntary compliance audits can be a useful tool for businesses to determine if their practices conform to all applicable regulations. However, regulatory agencies and third parties can gain access to the information from a voluntarily conducted audit through discovery and use the information against the business in court. Because the nature of an audit is to discover not only if any violations inadvertently have occurred, but also what management systems led to the violation, sensitive personnel information is frequently included in the audits. This bill offers protection from discovery for information compiled during the voluntary audit and from such information being used against the company in court if certain conditions are met. To ensure that the information has been derived through a good faith audit, the privilege would not apply if it is waived, if an audit was conducted for a fraudulent purpose, or if the entity did not take appropriate efforts to comply with the law upon discovery of noncompliance. Additionally, most violations voluntarily reported to a regulatory agency could not be used as grounds for penalizing an entity for the violation if the disclosure is made promptly and the entity makes efforts to cooperate with the agency to correct the violation. However, a disclosure is not voluntary if the person making the disclosure acted with intent or knowingly regarding the commission of the***

violation, or if the person's reckless disregard resulted in off-site harm.

II.
HB2473'S INFLUENCE UPON THE TNRCC

The TNRCC should encounter a slight to moderate effect from this legislation. These effects will be most noticeable in the regions and in the enforcement programs.

A. GIVING NOTICE OF A PLANNED ENVIRONMENTAL OR HEALTH AND SAFETY AUDIT.

An entity which undertakes an environmental audit is not required to give notice to the TNRCC. However, in order to take advantage of the immunity offered by HB 2473, the entity must give at least one notice to the agency.

There are two "notices" contemplated by HB 2473:

1. The notice a facility gives to the appropriate regulatory agency when it plans an audit. Although the facility is not required to give this notice to the TNRCC, it cannot take advantage of the immunity provision of the act if it fails to give notice to the TNRCC of its intention to conduct an audit. The notice must: specify the facility or portion of the facility to be audited; the audit's beginning time; and, the scope of the audit. Also, the notice may provide notification of more than one scheduled audit. (Section 10 (g)) (see also Attachment A).

2. The notice or "disclosure" made by a person to the appropriate agency when it discovers a violation as a result of an audit. A person wishing to take advantage of the immunity from penalty must make a voluntary disclosure of the violation. Among other things, a disclosure is voluntary only if it is made in writing by certified mail to the agency.

GUIDANCE - All notices regarding HB 2473 should be sent to Joe Vogel, Deputy Director, Office of Regulatory Services, P.O. Box 13087, Austin, Texas 78711-3087, MC-172. The Deputy Director's Office will then route these notices to all program areas and field operations and central records. In addition, an entity giving notice to the TNRCC of an audit may "cc" the regional office. Regional inspectors are cautioned not to schedule an inspection based solely upon the receipt of such a notice.

B. ISSUES RELATING TO THE PRIVILEGE SECTION OF HB 2473

> The purpose of ordinary rules of evidence is to promote the ascertainment of the truth. Another group of rules, however, permit the exclusion of evidence for reasons wholly unconnected with the ascertainment of the truth. These reasons are found in the desire to protect an interest or relationship. The term "privilege" is used broadly to describe such rules of exclusion. Since the effect of the privilege is to bar the admission of relevant evidence, and thereby suppress the truth, privileges are recognized at common law only if the interest or relationship is of an outstanding social importance and would undoubtedly be harmed by denying recognition of the privilege. Graham, Evidence (1983).

Section 5 of HB 2473 grants a privilege from admissibility and discovery to audit reports developed according to the statute. The privilege applies to civil, criminal and administrative proceedings. The privilege does not apply to documents, reports, etc. that are required by the TNRCC to be reported under state or federal law or to information obtained independent of the audit process.

Disclosure of the audit to TNRCC staff does not waive the privilege if it is made under the terms of a confidentiality agreement between the owner/operator or the person for whom the report was prepared and the TNRCC or if the audit is submitted to the TNRCC under a claim of confidentiality. **FURTHERMORE, NO AGENCY EMPLOYEE MAY REQUEST, REVIEW, OR OTHERWISE USE AN AUDIT REPORT DURING AN AGENCY INSPECTION OF THE FACILITY.**

A party who violates the terms of a confidentiality agreement will be liable for damages caused as a result of the disclosure. **Additionally, information submitted under a claim of confidentiality is not subject to disclosure under the Texas Open Records Act and any agency employee who discloses information in violation of the confidentiality agreement is subject to criminal prosecution and up to six months in JAIL!**

GUIDANCE - Because of the substantial risks to the agency and agency staff, the TNRCC shall not agree to receive any information offered under an environmental audit privilege. If such a document or documents are submitted to the TNRCC they should be returned

immediately, without review. Also, no employee should request, review, accept, or use an audit report during a facility inspection.

C. ISSUES RELATING TO THE IMMUNITY SECTION OF HB 2473

The Section 10 immunity is an immunity from an administrative, civil, or criminal penalty for the violation disclosed. This immunity does not extend to injunctive relief, compliance or technical recommendations.

GUIDANCE - TNRCC enforcement programs should take appropriate steps when a violation is disclosed as a result of an environmental audit. Staff should not alter their enforcement process for the situations, except for the exclusion of a penalty. THE PENALTY CALCULATION IS THE ONLY ISSUE WHICH WILL BE EXCLUDED AS A RESULT OF THIS LEGISLATION.

D. QUESTIONS AND ANSWERS

Q1. Will a company be able to place all documents, correspondence and records that are not specifically required by regulation under the protection of the audit "privilege" status, limiting the field inspector to looking only at records which are mandated by rule?

A1. ***No, the audit contemplated under this legislation is a systematic event with a start date and completion date. Only the documents communications, etc. produced from an environmental audit are privileged.***

Q2. If there are arguments during an inspection over what is privileged and what should be available to the inspector, where and when is this resolved?

A2. ***First, the company should not make audit reports available to inspectors. If an argument does arise during the inspection, the inspector should not insist that he be given these documents. The inspector should note, as specifically as possible, the type of documents he has been denied and refer the issue to the Enforcement Coordination and Litigation division for response.***

Q3. If, in the course of an inspection, the inspector notes an apparent violation and the company representative says "Yes, we found that during our audit.", how should the inspector proceed?

A3. ***Proceed as they normally would. The only thing that has changed is the application***

of a penalty. The decision of whether the disclosure was voluntary and preceded the inspector's discovery can be made at a later time. Meanwhile, the company should cooperate with the inspector in connection with an investigation of the issues identified in the disclosure.

Q4. Is it the inspector's responsibility to clearly inform the company that he doesn't want to see or know about any audit and the company should refrain from mention of anything dealing with an audit during the inspection?

A4. Although it may not be their responsibility, the inspector should take the initiative to insure that they do not request or use a privileged audit report during an inspection.

Q5. Who will receive and review the audits? How will an inspector know if his/her findings are already exempted by an audit?

A5. The TNRCC will not receive or review a privileged audit.

Q6. Does this bill apply to EPA inspectors operating in Texas?

A6. No.

Q7. If an EPA inspector requests a copy of an audit during a joint inspection, should the TNRCC inspector continue to participate?

A7. Yes, but the TNRCC inspector should not review or use this document during the inspection.

Q8. How does an inspector document a verbal disclosure of audit information during the inspection, or do we ignore it?

A8. The inspector should not receive or use privileged audit information.

Q9. Should the region be aware that an audit is ongoing or has been conducted at a facility under review?

A9. Yes, the process of notification should provide information to the regions.

Q10. If an inspector documents a violation independent of any knowledge of an environmental audit, what documentation will be needed to satisfy enforcement policy makers if the

entity alleges otherwise?

A10. There will be a certified letter which will verify that disclosure occurred before TNRCC discovery.

Q11. Does the definition of "audit report" include such routine reports as stack tests, CEM data reviews, etc so that the company, reviewing this data before it is submitted to the agency, could declare all violations before submittal and gain immunity?

A11. Stack tests, data reviews, etc. may be privileged under HB 2473 if the are included in the scope of the environmental audit. They may also be immune from penalties if voluntarily disclosed. However, reports, tests, etc. that are required by law are not privileged and are not immune from penalties.

Q12. Is there going to be a better mechanism than we currently use for storing and transmitting the "privileged information" of an audit within the agency and between the field and Central Office? Can we guarantee confidentiality with current procedures?

A12. The TNRCC will emphasize that this sort of information should not be submitted to the agency.

Q13. If a company notifies us of an upset condition and declares that it probably created a "nuisance" violation (or actually conducts a survey and declares a nuisance was created) and claims this as part of their environmental audit, does this preclude enforcement?

A13. No, nor does it preclude a penalty if appropriate.

Q14. Will anything other than certified mail be accepted for notification of audit results (telephone, fax, verbal communication)?

A14. You probably mean disclosure of a violation. The answer is No.

Q15. Can a company be in continuous audit? The bill limits an audit period to no more than 6 months, but can a company conduct two six month audits per year? If the company is in continuous audit, how do we handle their audit preceding or accompanying us during our inspection?

A15. It is doubtful that a company can be in a continuous audit and not raise the suspicion that it is conducting its audits in bad faith. However, a company may conduct several

audits of different facilities during the year and certainly take advantage of the act.

Q16. Section 10 seems to say that any violation reported by the company during the audit period is automatically immune from enforcement. Is this true?

A16. No, a company is not immune from enforcement, however, it may be immune from a penalty. Also, the disclosure of the violation(s) must arise out of a voluntary environmental audit.

Q17. The bill appears to give the company the authority to set their compliance plan and schedule without approval from the agency. Does immunity really mean this or will we still enter "no penalty" orders with technical requirements, schedules, etc. on the violations reported in the audits?

A17. The immunity only applies to a penalty, the TNRCC will still bring enforcement actions containing technical recommendations when appropriate.

Q18. Many inspectors reviewing the bill questioned the need for field inspectors under this legislation. Many clever companies will be able to declare almost everything as immune from enforcement, making annual inspections look pretty meaningless.

A18. This bill provides an incentive for companies to take steps beyond those required to comply with the law. This bill will likely not be responsible for reducing TNRCC enforcement actions.

Q19. This bill does not make much sense and impacts the evaluation of sites for Superfund. Is this retroactive? Does this mean that no self reporting or environmental assessment by these companies can be used as data for the scoring (HRS) of these sites, even when the contamination is obvious. Do we close our eyes to historical information that falls under this category when we do Superfund investigations? I don't understand how this affects us and Superfund Site Discovery and Assessment.

A19. This bill was effective on May 23, 1995 and is not retroactive. The bill is designed to provide companies an incentive to perform environmental audits and to use that information to improve their operations and correct violations. The TNRCC or its contractor may independently develop this information.

Q20. How will the TNRCC address claims of confidentiality accompanying the self-reporting

of a noncompliance discovered as a result of a privileged environmental audit?

A20. The notice or disclosure of an environmental violation will not be considered privileged under the act. In order for the disclosing party to be immune, it must cooperate with the TNRCC in connection with an investigation of the issues identified in the disclosure.

Q21. Will all voluntarily disclosed violations be required to be listed on a regulated facility's compliance history, or will the TNRCC apply its existing rules, consistent with SB 1660, in determining which violations should be listed?

A21. Not all voluntarily disclosed violations must be listed on a company's compliance history. The enforcement process remains the same, with the exception of penalties, for voluntarily disclosed violations. Therefore, SB 1660 and the settlement/negotiation process between the TNRCC and the disclosing company will effect the "listing" of compliance history. In addition, a violation that has been voluntarily disclosed and to which immunity applies must be identified in a compliance history report as being voluntarily disclosed.

Q22. When is an audit voluntary instead of required by state law? If a company chooses to conduct an environmental audit in order to collect information necessary for an operating permit application and complete the application compliance certification, is this audit considered voluntary under HB 2473? If, after a permit is issued, a company conducts an environmental audit in preparation for the submittal of the annual compliance certification, is this audit considered voluntary under HB 2473.

A22. An environmental audit will be eligible for the HB 2473 privilege if it is conducted according to the terms of the legislation. Reports, records, data, communication, etc. that is required by state or federal law to be reported must be reported notwithstanding the occurrence of the audit. In addition some of the state and federal laws require a company to perform an environmental audit for compliance purposes. If a company performs a federal or state mandated audit, the information collected is not privileged according to HB 2473.

III.
SECTION BY SECTION ANALYSIS

HB 2473, which contains fourteen sections, will be added to the Vernon's Texas Codes. The bill also amends the Texas Open Records Act at Texas Government Code, Subchapter C, Section 552, adding 552.124.

SECTION 1. SHORT TITLE. Designates short title as the Texas Environmental, Health, and Safety Audit Privilege Act.

SECTION 2. PURPOSE. States legislative purpose to encourage voluntary compliance with environmental and occupational health and safety laws.

SECTION 3. DEFINITIONS:

(a)

(1) "Audit report" means a report described by Section 4 of this Act.

(2) "Environmental or health and safety law" means a federal or state environmental or occupational health and safety law or rules, regulations, or regional or local law adopted in conjunction with such laws.

(3) "Environmental or health and safety audit" means a voluntary assessment of compliance with environmental and health and safety laws or permits issued thereunder conducted by an owner or operator, employee, or independent contractor; the audit can be of a regulated facility or operation or an activity at a regulated facility or operation.

(4) "Owner or operator" means a person who owns or operates a regulated facility or operation.

(5) "Penalty" means an administrative, civil, or criminal sanction imposed by the state to punish a person for a violation, but does not include technical or remedial provisions ordered by a regulatory authority.

(6) "Person" means an individual or any legal entity.

(7) "Regulated facility or operation" means a facility that is regulated under an

environmental or health and safety law.

(b) A person acts intentionally if the person acts intentionally within the meaning of Section 6.03, Penal Code.

(c) For purposes of this Act, a person acts knowingly with respect to the nature of his conduct when he is aware of his physical acts. A person acts knowingly with respect to the result of his conduct when he is aware that the conduct will cause the result.

(d) For purposes of this Act, "reckless" has the meaning assigned in Section 6.03 of the Penal Code.

(e) The term "environmental or health and safety law" shall be construed broadly.

SECTION 4. AUDIT REPORT. Description of general components of an audit report:

(a) Includes each document and communication produced from an environmental or health and safety audit other than those set forth in Section 8 of this act.

(b) Lists components that may be contained in a completed audit report including:

(1) a report prepared by an auditor or similar person that may include the scope of the audit, information gained and findings and conclusions and recommendations, and exhibits and appendices;

(2) memoranda and documents analyzing applicable materials or discussing implementation issues; and

(3) an implementation plan or tracking system to correct past noncompliance, improve current compliance or prevent future noncompliance.

(c) Stipulates that types of exhibits and appendices that may be contained in an audit include supporting information if it was collected or developed for the primary purpose of and in the course of an audit, including interviews with employees, field notes and records of observations, findings, opinions, suggestions, conclusions, guidance, notes, drafts, memoranda, legal analysis, drawings, photographs, laboratory data, computer or electronically generated information, maps, charts, graphs, and surveys, and other communications associated with an audit.

(d) Each document in an audit report should be labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT" or other similar language; failure to label does not constitute a waiver of audit privilege or create a presumption that the document is or is not privileged.

(e) An audit shall be completed within a reasonable time not to exceed six months unless an extension is approved, based on reasonable grounds, by the governmental entity.

SECTION 5. PRIVILEGE.

(a) This section outlines when an audit report is privileged.

(b) Gives any part of an audit report privileged status which will not be admissible as evidence or subject to discovery in a civil action, criminal proceeding, or an administrative proceeding, except as provided by Sections 6, 7, 8, and 9 of this act.

(c) Provides that a person cannot be compelled to testify or produce a document related to an audit if:

(1) the testimony or production would disclose any item listed in Section 4 which was made as part of the preparation of an audit report and is addressed in a privileged part of an audit report; and

(2) the person conducted any portion of the audit but did not personally observe the physical events, the person learned of the information under Section 6, or the person is a custodian of the audit results.

(d) A person who conducts or participates in the preparation of an environmental or health and safety audit and who has actually observed physical events of violation, may testify about those events but may not be compelled to testify about or produce documents related to the preparation of or any privileged part of an environmental or health and safety audit or any item listed in Section 4 of this Act.

(e) Prohibits a state agency from requesting, reviewing, or using an audit report in any inspection of a regulated facility or operation.

(f) A person asserting an audit privilege carries the burden of proof that the privilege applies.

SECTION 6. EXCEPTION: WAIVER.

(a) The privilege does not exist if it is expressly waived by the owner or operator who prepared, or caused to be prepared, the audit report.

(b) Disclosure of a report or related information does not waive the privilege if the disclosure is made:

(1) to address or correct a matter raised by the audit and is made only to an employee or contract employee, a legal representative, an officer or director of the regulated facility or a partner of the owner or operator, an independent contractor retained by the owner or operator;

(2) under the terms of a confidentiality agreement between the person for whom the report was prepared or the owner or operator of the regulated facility and:

(A) a partner or potential partner of the owner or operator of the regulated facility;
(B) a present or future transferee of the facility of operation;
(C) a present or future lending institution;
(D) a governmental official or a state or federal agency; or
(E) a person or entity engaged in the business of insuring, underwriting, or indemnifying the facility or operation; or

(3) is made under a claim of confidentiality to a governmental official or agency by the person for whom the audit report was prepared or by the owner or operator.

(c) A party to a confidentiality agreement under (b)(2) of this section who violates the confidentiality agreement is liable for damages caused and for any penalties stipulated in the agreement.

(d) Information disclosed to the government under (b)(3) of this section is not subject to the Open Records Act; if a public official, entity or employee of the government discloses such information, a Class B misdemeanor is committed.

SECTION 7. EXCEPTION: DISCLOSURE REQUIRED BY COURT OR ADMINISTRATIVE HEARINGS OFFICIAL.

(a) Allows a court or administrative hearings official to conduct an in camera review and allow disclosure of a portion of an audit report in a civil, criminal or administrative hearing if the determination is made that the privilege is asserted for a fraudulent purpose, the report is not subject to the privilege under Section 8 of this Act, or the portion of the audit shows evidence of noncompliance and appropriate efforts to achieve compliance were not promptly initiated after noncompliance was discovered.

(b) The party seeking disclosure under (a) of this section carries the burden of proof.

(c) Provides for an appeal from an administrative hearings official's decision in (a) of this section to a court of competent jurisdiction.

(d) A person claiming the privilege is subject to sanctions as provided by Rule 215 of the Texas Rules of Civil Procedure if the court finds that the person intentionally or knowingly claimed the privilege for unprotected information as provided in Section 8 of this Act.

(e) A determination of a court under this section is subject to interlocutory appeal to an appropriate appellate court.

SECTION 8. NONPRIVILEGED MATERIALS.

(a) The privilege in this Act does not apply to information already required to be collected or reported under a federal or state environmental or health and safety law, information obtained by a regulatory agency through observation or sampling, or information obtained from a source not involved in the preparation of the audit report.

(b) Allows a person to agree to conduct and disclose an audit report.

SECTION 9. COURT REVIEW AND DISCLOSURE.

(a) Allows an attorney representing the state to obtain an audit report by criminal subpoena, discovery, or search warrant if there is reasonable cause to believe that a criminal offense has been committed under applicable law.

(b) Requires the attorney representing the state to seal any audit report received and prohibits review or disclosure of the contents.

(c) Gives the owner or operator 30 days to request an in camera review to determine if all

or a part of a report received under (a) of this section is privileged; after 30 days any privilege is waived.

(d) Under a request pursuant to (c) of this section, the court shall schedule an in camera review within 45 days, and authorize the attorney representing the state to review the report subject to appropriate limitations specified in the court order to protect against unnecessary disclosure.

(e) Allows the attorney representing the state to consult with enforcement agencies regarding the contents of a report as necessary to prepare for in camera review.

(f) Information used under (e) of this section is confidential, may not be used in an investigation or legal proceeding, and is not subject to the Open Records Act.

(g) States that (f) of this section does not apply to information a court finds to be subject to disclosure.

(h) Requires a court or an administrative official to suppress evidence offered that arises from or is derived from review, disclosure or use of information obtained under this section if not authorized under this section; a party failing to comply with this section has the burden of proof that the evidence offered did not arise from and was not derived from the unauthorized review, disclosure, or use.

(i) Allows the parties to stipulate whether information is or is not privileged.

(j) Allows a court to compel disclosure only of parts of an audit report which are relevant to issues in dispute.

(k) Allows a court to find any person disclosing information in violation of this section in contempt and to order appropriate relief.

SECTION 10. VOLUNTARY DISCLOSURE; IMMUNITY.

(a) Except as provided as follows, a person making a voluntary disclosure of a violation of an environmental or health and safety law is immune from administrative, civil, or criminal penalty for the violation disclosed.

(b) A disclosure is voluntary only if the disclosure was made promptly after the information was obtained, the disclosure is in writing to the appropriate regulatory authority by

certified mail, the violation was not independently discovered by an agency with enforcement jurisdiction before the disclosure was made, the disclosure arises out of a voluntary audit, the person making the disclosure takes appropriate efforts to achieve compliance by pursing an effort with due diligence and correct the noncompliance within a reasonable time, the person making the disclosure cooperates with the appropriate agency in an investigation of the issues in the disclosure and the violation did not result in injury to one or more persons at the site or substantial off-site harm to persons, property, or the environment.

(c) Any disclosure is not voluntary if it is a report to a regulatory agency required solely by a specific condition of an enforcement order or decree.

(d) The immunity under (a) of this section does not apply and an applicable administrative, civil, or criminal penalty may be imposed if:

(1) the person who made the disclosure intentionally or knowingly committed or was responsible within the meaning of Section 7.02 of the Penal Code for the commission of the disclosed violation;

(2) the person making the disclosure recklessly committed or was responsible within the meaning of Section 7.02 of the Penal Code for the commission of the disclosed violation and the violation resulted in substantial off-site harm to persons, property, or the environment.

(3) the offense was committed intentionally or knowingly by a member of the person's management and the person's policies or lack of prevention systems contributed materially to the occurrence of the violation.

(4) the offense was committed recklessly by a member of the person's management, the person's policies or lack of prevention systems contributed materially to the occurrence of the violation, and the violation resulted in substantial injury to persons at the site or off-site harm to persons, property, or the environment.

(e) Any penalty imposed under (d) of this section should be mitigated by factors such as voluntariness of the disclosure, efforts to conduct audits, remediation, cooperation with government officials investigating the disclosed violation, or other relevant considerations.

(f) In an action brought against a person for a violation for which the person claims to have

made a voluntary disclosure, the person claiming the immunity has the burden to establish a prima facie case that the disclosure was voluntary; after a prima facie case of voluntary disclosure is established, other than a case in which, under subsection (d) of this section immunity does not apply, the enforcement authority has the burden of rebutting the presumption by a preponderance of the evidence or in a criminal case by proof beyond a reasonable doubt.

(g) In order to receive immunity, a facility conducting an environmental audit under this Act must give notice to an appropriate regulatory agency of the fact that it is planning to commence the audit. The notice shall specify the facility or portion of the facility to be audited, the anticipated time the audit will begin, and the general scope of the audit. The notice may provide notification of more than one scheduled environmental or health and safety audit at a time.

(h) The immunity under this section does not apply if a court or administrative law judge finds that the person claiming the immunity has, after the effective date of this Act, (1) repeatedly or continuously committed serious violations, and (2) not attempted to bring the facility or operation into compliance, so as to constitute a pattern of disregard of environmental or health and safety laws. In order to be considered a "pattern," the person must have committed a series of violations that were due to separate and distinct events within a three-year period at the same facility or operation.

(i) A violation that has been voluntarily disclosed and to which immunity applies must be identified in a compliance history report as being voluntarily disclosed.

SECTION 11. CIRCUMVENTION BY RULE PROHIBITED. Prohibits a regulatory agency from adopting a rule or imposing a condition that circumvents this Act.

SECTION 12. APPLICABILITY. This Act applies to any audit conducted on or after the effective date of this Act.

SECTION 13. RELATIONSHIP TO OTHER RECOGNIZED PRIVILEGES. This Act does not change any privilege already established under statutory or common law.

SECTION 14. AMENDMENT. This section adds Section 552.124 to the Texas Open Records Act. The added section specifically excepts any privileged information or documents from "Public Information." (Section 552.021).

ATTACHMENT A

July 24, 1995

Mr. Joe Vogel
Office of Regulatory Services
Texas Natural Resource Conservation Commission
P.O. Box 13087, MC-172
Austin, Texas 78711,

Re: ABC Corporation; Elgin Plant - Scheduled Environmental, Health and Safety Audit

Dear Mr. Vogel:

Please be advised that in accordance with Environmental, Health and Safety Audit Privilege Act (the "Act"), the ABC Corporation's Corporate Audit Group intends to conduct an Environmental, Health and Safety compliance audit at its Elgin Plant located at 800 N. Main, Elgin, Texas.

Pursuant to Section 10(g) of the Act, permitting immunity for violations voluntarily disclosed as a result of a compliance audit, ABC is hereby notifying you that the planned audit will commence on May 23, 1995 at approximately 9:00 A.M. and will cover _____. The scope of the audit will be to evaluate compliance with all applicable Environmental, Health and Safety regulations as well as attached permits.

Please do not hesitate to contact me at (512) 239-3420 if you have any questions or require further information regarding this matter.

Sincerely,

Manager, Environmental,
Health & Safety Affairs

cc: Region 12

Bill Number: TX74RHB 2473 Date: 5/12/95
ENROLLED

AN ACT

relating to audits to determine compliance with certain laws, rules, and regulations; providing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. SHORT TITLE. This Act may be cited as the Texas Environmental, Health, and Safety Audit Privilege Act.

SECTION 2. PURPOSE. The purpose of this Act is to encourage voluntary compliance with environmental and occupational health and safety laws.

SECTION 3. DEFINITIONS. (a) In this Act:

(1) "Audit report" means an audit report described by Section 4 of this Act.

(2) "Environmental or health and safety law" means:

(A) a federal or state environmental or occupational health and safety law; or

(B) a rule, regulation, or regional or local law adopted in conjunction with a law described by Paragraph (A) of this subdivision.

(3) "Environmental or health and safety audit" means a systematic voluntary evaluation, review, or assessment of

compliance with environmental or health and safety laws or any permit issued under those laws conducted by an owner or operator, an employee of the owner or operator, or an independent contractor of:

(A) a regulated facility or operation; or

(B) an activity at a regulated facility or operation.

(4) "Owner or operator" means a person who owns or operates a regulated facility or operation.

(5) "Penalty" means an administrative, civil, or criminal sanction imposed by the state to punish a person for a violation of a statute or rule. The term does not include a technical or remedial provision ordered by a regulatory authority.

(6) "Person" means an individual, corporation, business trust, partnership, association, and any other legal entity.

(7) "Regulated facility or operation" means a facility or operation that is regulated under an environmental or health and safety law.

(b) A person acts intentionally for purposes of this Act if the person acts intentionally within the meaning of Section 6.03, Penal Code.

(c) For purposes of this Act, a person acts knowingly, or with knowledge, with respect to the nature of the person's conduct when the person is aware of the person's physical acts. A person acts knowingly, or with knowledge, with respect to the result of the person's conduct when the person is aware that the conduct will cause the result.

(d) A person acts recklessly or is reckless for purposes of this Act if the person acts recklessly or is reckless within the meaning of Section 6.03, Penal Code.

(e) To fully implement the privilege established by this Act, the term "environmental or health and safety law" shall be construed broadly.

SECTION 4. AUDIT REPORT. (a) An audit report is a report that includes each document and communication, other than those set forth in Section 8 of this Act, produced from an environmental or health and safety audit.

(b) General components that may be contained in a completed audit report include:

(1) a report prepared by an auditor, monitor, or similar person, which may include:

(A) a description of the scope of the audit;

(B) the information gained in the audit and findings, conclusions, and recommendations; and

(C) exhibits and appendices;

(2) memoranda and documents analyzing all or a portion of the materials described by Subdivision (1) of this subsection or discussing implementation issues; and

(3) an implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance.

(c) The types of exhibits and appendices that may be contained in an audit report include supporting information that is collected or developed for the primary purpose of and in the course of an environmental or health and safety audit, including:

(1) interviews with current or former employees;

(2) field notes and records of observations;

(3) findings, opinions, suggestions, conclusions, guidance, notes, drafts, and memoranda;

(4) legal analyses;

(5) drawings;

(6) photographs;

(7) laboratory analyses and other analytical data;

(8) computer-generated or electronically recorded information;

(9) maps, charts, graphs, and surveys; and

(10) other communications associated with an

environmental or health and safety audit.

(d) To facilitate identification, each document in an audit report should be labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT," or labeled with words of similar import. Failure to label a document under this section does not constitute a waiver of the audit privilege or create a presumption that the privilege does or does not apply.

(e) Once initiated, an audit shall be completed within a reasonable time not to exceed six months unless an extension is approved by the governmental entity with regulatory authority over the regulated facility or operation based on reasonable grounds.

SECTION 5. PRIVILEGE. (a) An audit report is privileged as provided in this section.

(b) Except as provided in Sections 6, 7, 8, and 9 of this Act, any part of an audit report is privileged and is not admissible as evidence or subject to discovery in:

(1) a civil action, whether legal or equitable;

(2) a criminal proceeding; or

(3) an administrative proceeding.

(c) A person, when called or subpoenaed as a witness, cannot be compelled to testify or produce a document related to an environmental or health and safety audit if:

(1) the testimony or document discloses any item listed in Section 4 of this Act that was made as part of the preparation of an environmental or health and safety audit report and that is addressed in a privileged part of an audit report; and

(2) for purposes of this subsection only, the person is:

(A) a person who conducted any portion of the audit but did not personally observe the physical events;

(B) a person to whom the audit results are disclosed under Section 6(b) of this Act; or

(C) a custodian of the audit results.

(d) A person who conducts or participates in the preparation of an environmental or health and safety audit and who has actually observed physical events of violation, may testify about those events but may not be compelled to testify about or produce documents related to the preparation of or any privileged part of an environmental or health and safety audit or any item listed in Section 4 of this Act.

(e) An employee of a state agency may not request, review, or otherwise use an audit report during an agency inspection of a regulated facility or operation, or an activity of a regulated facility or operation.

(f) A party asserting the privilege described in this section has the burden of establishing the applicability of the privilege.

SECTION 6. EXCEPTION: WAIVER. (a) The privilege described by Section 5 of this Act does not apply to the extent the privilege is expressly waived by the owner or operator who prepared the audit report or caused the report to be prepared.

(b) Disclosure of an audit report or any information generated by an environmental or health and safety audit does not waive the privilege established by Section 5 of this Act if the disclosure:

(1) is made to address or correct a matter raised by the environmental or health and safety audit and is made only to:

(A) a person employed by the owner or operator, including temporary and contract employees;

(B) a legal representative of the owner or operator;

(C) an officer or director of the regulated facility or operation or a partner of the owner or operator; or

(D) an independent contractor retained by the owner or operator;

(2) is made under the terms of a confidentiality agreement between the person for whom the audit report was

prepared or the owner or operator of the audited facility or operation and:

(A) a partner or potential partner of the owner or operator of the facility or operation;

(B) a transferee or potential transferee of the facility or operation;

(C) a lender or potential lender for the facility or operation;

(D) a governmental official or a state or federal agency; or

(E) a person or entity engaged in the business of insuring, underwriting, or indemnifying the facility or operation; or

(3) is made under a claim of confidentiality to a governmental official or agency by the person for whom the audit report was prepared or by the owner or operator.

(c) A party to a confidentiality agreement described in Subsection (b)(2) of this section who violates that agreement is liable for damages caused by the disclosure and for any other penalties stipulated in the confidentiality agreement.

(d) Information that is disclosed under Subsection (b)(3) of this section is confidential and is not subject to disclosure under Chapter 552, Government Code. A public entity, public

employee, or public official who discloses information in violation of this subsection commits an offense. An offense under this subsection is a Class B misdemeanor. It is an affirmative defense to the clerical dissemination of a privileged audit report that the report was not clearly labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT" or words of similar import. The lack of labeling may not be raised as a defense if the entity, employee, or official knew or had reason to know that the document was a privileged audit report.

SECTION 7. EXCEPTION: DISCLOSURE REQUIRED BY COURT OR ADMINISTRATIVE HEARINGS OFFICIAL. (a) A court or administrative hearings official with competent jurisdiction may require disclosure of a portion of an audit report in a civil, criminal, or administrative proceeding if the court or administrative hearings official determines, after an in camera review consistent with the appropriate rules of procedure, that:

(1) the privilege is asserted for a fraudulent purpose;

(2) the portion of the audit report is not subject to the privilege under Section 8 of this Act; or

(3) the portion of the audit report shows evidence of noncompliance with an environmental or health and safety law and appropriate efforts to achieve compliance with the law were

not promptly initiated and pursued with reasonable diligence after discovery of noncompliance.

(b) A party seeking disclosure under this section has the burden of proving that Subsection (a)(1), (2), or (3) of this section applies.

(c) Notwithstanding Chapter 2001, Government Code, a decision of an administrative hearings official under Subsection (a)(1), (2), or (3) of this section is directly appealable to a court of competent jurisdiction without disclosure of the audit report to any person unless so ordered by the court.

(d) A person claiming the privilege is subject to sanctions as provided by Rule 215 of the Texas Rules of Civil Procedure if the court finds that the person intentionally or knowingly claimed the privilege for unprotected information as provided in Section 8 of this Act.

(e) A determination of a court under this section is subject to interlocutory appeal to an appropriate appellate court.

SECTION 8. NONPRIVILEGED MATERIALS. (a) The privilege described in this Act does not apply to:

(1) a document, communication, datum, or report or other information required by a regulatory agency to be collected, developed, maintained, or reported under a federal or

state environmental or health and safety law;

(2) information obtained by observation, sampling, or monitoring by a regulatory agency; or

(3) information obtained from a source not involved in the preparation of the environmental or health and safety audit report.

(b) This section does not limit the right of a person to agree to conduct and disclose an audit report.

SECTION 9. COURT REVIEW AND DISCLOSURE. (a) If there is reasonable cause to believe a criminal offense has been committed under an environmental or health and safety law, the attorney representing the state may obtain an audit report for which a privilege is asserted under this Act under a search warrant, criminal subpoena, or discovery as allowed by the Code of Criminal Procedure and the Texas Rules of Criminal Procedure.

(b) On receipt of the audit report, the attorney representing the state shall seal the report and may not review or disclose the contents of the report.

(c) Not later than the 30th day after the date an audit report is received under Subsection (a), the owner or operator who prepared the report or for whom the report was prepared may file with a court of competent jurisdiction a petition requesting an in camera review to determine whether all or a portion of the

report is privileged or is subject to disclosure under this Act. An owner or operator who fails to file a petition under this subsection within the period specified by this subsection waives the privilege.

(d) On the filing of a petition under Subsection (c) of this section, the court shall issue an order that:

(1) schedules the in camera review for a date not later than the 45th day after the date the petition is filed; and

(2) authorizes the attorney representing the state to remove the seal from the report to review the report, subject to appropriate limitations on distribution or disclosure of the report that are specified in the order to protect against unnecessary disclosure.

(e) The attorney representing the state may consult with enforcement agencies regarding the contents of the report as necessary to prepare for the in camera review.

(f) Information used in preparation for the in camera review under Subsection (e) of this section:

(1) is confidential;

(2) may not be used in any investigation or legal proceeding; and

(3) is not subject to disclosure under Chapter 552, Government Code.

(g) Subsection (f) of this section does not apply to information a court finds to be subject to disclosure.

(h) On the motion of a party, a court or the appropriate administrative official shall suppress evidence offered in any civil, criminal, or administrative proceeding that arises or is derived from review, disclosure, or use of information obtained under this section if the review, disclosure, or use is not authorized under this section. A party allegedly failing to comply with this section has the burden of proving that the evidence offered did not arise and was not derived from the unauthorized review, disclosure, or use.

(i) The parties may stipulate to entry of an order directing that specific information contained in an audit report is or is not subject to the privilege.

(j) A court may compel the disclosure of only those portions of an audit report relevant to issues in dispute in the proceeding.

(k) A court may find a person who discloses information in violation of this section in contempt of court and may order other appropriate relief.

SECTION 10. VOLUNTARY DISCLOSURE; IMMUNITY. (a) Except as provided by this section, a person who makes a voluntary disclosure of a violation of an environmental or health and

safety law is immune from an administrative, civil, or criminal penalty for the violation disclosed.

(b) A disclosure is voluntary only if:

(1) the disclosure was made promptly after knowledge of the information disclosed is obtained by the person;

(2) the disclosure was made in writing by certified mail to an agency that has regulatory authority with regard to the violation disclosed;

(3) an investigation of the violation was not initiated or the violation was not independently detected by an agency with enforcement jurisdiction before the disclosure was made using certified mail;

(4) the disclosure arises out of a voluntary environmental or health and safety audit;

(5) the person who makes the disclosure initiates an appropriate effort to achieve compliance, pursues that effort with due diligence, and corrects the noncompliance within a reasonable time;

(6) the person making the disclosure cooperates with the appropriate agency in connection with an investigation of the issues identified in the disclosure; and

(7) the violation did not result in injury to one or more persons at the site or substantial off-site harm to persons,

property, or the environment.

(c) A disclosure is not voluntary for purposes of this section if it is a report to a regulatory agency required solely by a specific condition of an enforcement order or decree.

(d) The immunity established by Subsection (a) of this section does not apply and an administrative, civil, or criminal penalty may be imposed under applicable law if:

(1) the person who made the disclosure intentionally or knowingly committed or was responsible within the meaning of Section 7.02, Penal Code, for the commission of the disclosed violation;

(2) the person who made the disclosure recklessly committed or was responsible within the meaning of Section 7.02, Penal Code, for the commission of the disclosed violation and the violation resulted in substantial injury to one or more persons at the site or off-site harm to persons, property, or the environment;

(3) the offense was committed intentionally or knowingly by a member of the person's management or an agent of the person and the person's policies or lack of prevention systems contributed materially to the occurrence of the violation; or

(4) the offense was committed recklessly by a member

of the person's management or an agent of the person, the person's policies or lack of prevention systems contributed materially to the occurrence of the violation, and the violation resulted in substantial injury to one or more persons at the site or off-site harm to persons, property, or the environment.

(e) A penalty that is imposed under Subsection (d) of this section should, to the extent appropriate, be mitigated by factors such as:

(1) the voluntariness of the disclosure;

(2) efforts by the disclosing party to conduct environmental or health and safety audits;

(3) remediation;

(4) cooperation with government officials investigating the disclosed violation; or

(5) other relevant considerations.

(f) In a civil, administrative, or criminal enforcement action brought against a person for a violation for which the person claims to have made a voluntary disclosure, the person claiming the immunity has the burden of establishing a prima facie case that the disclosure was voluntary. After the person claiming the immunity establishes a prima facie case of voluntary disclosure, other than a case in which under Subsection (d) of this section immunity does not apply, the enforcement authority

has the burden of rebutting the presumption by a preponderance of the evidence or, in a criminal case, by proof beyond a reasonable doubt.

(g) In order to receive immunity under this section, a facility conducting an environmental or health and safety audit under this Act must give notice to an appropriate regulatory agency of the fact that it is planning to commence the audit. The notice shall specify the facility or portion of the facility to be audited, the anticipated time the audit will begin, and the general scope of the audit. The notice may provide notification of more than one scheduled environmental or health and safety audit at a time.

(h) The immunity under this section does not apply if a court or administrative law judge finds that the person claiming the immunity has, after the effective date of this Act,

(1) repeatedly or continuously committed serious violations, and

(2) not attempted to bring the facility or operation into compliance, so as to constitute a pattern of disregard of environmental or health and safety laws. In order to be considered a "pattern," the person must have committed a series of violations that were due to separate and distinct events within a three-year period at the same facility or operation.

(i) A violation that has been voluntarily disclosed and to

which immunity applies must be identified in a compliance history report as being voluntarily disclosed.

SECTION 11. CIRCUMVENTION BY RULE PROHIBITED. A regulatory agency may not adopt a rule or impose a condition that circumvents the purpose of this Act.

SECTION 12. APPLICABILITY. The privilege created by this Act applies to environmental or health and safety audits that are conducted on or after the effective date of this Act.

SECTION 13. RELATIONSHIP TO OTHER RECOGNIZED PRIVILEGES. This Act does not limit, waive, or abrogate the scope or nature of any statutory or common law privilege, including the work product doctrine and the attorney-client privilege.

SECTION 14. AMENDMENT. Subchapter C, Chapter 552, Government Code, is amended by adding Section 552.124 to read as follows:

Sec. 552.124. EXCEPTION: CERTAIN AUDITS. Any documents or information privileged under the Texas Environmental, Health, and Safety Audit Privilege Act are excepted from the requirements of Section 552.021.

SECTION 15. EMERGENCY. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several

days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

_____ _____

President of the Senate Speaker of the House

I certify that H.B. No. 2473 was passed by the House on April 26, 1995, by the following vote: Yeas 123, Nays 14, 3 present, not voting.

_____

Chief Clerk of the House

I certify that H.B. No. 2473 was passed by the Senate on May 9, 1995, by the following vote: Yeas 30, Nays 1.

_____

Secretary of the Senate

APPROVED: _____

Date

_____

Governor

RECENT DEVELOPMENTS IN

CRIMINAL ENVIRONMENTAL LAW - FEDERAL

BY HARLESS R. BENTHUL

GILPIN, PAXSON & BERSCH

I. INTRODUCTION

II. EPA INTERIM POLICY ON VOLUNTARY ENVIRONMENTAL SELF-POLICING AND SELF-DISCLOSURE

III. DEPARTMENT OF JUSTICE RULE ON COMMUNICATION WITH REPRESENTED PERSONS

I. INTRODUCTION

During the last 12 months, there have been a number of significant developments in environmental criminal law at the federal level, especially on the regulatory and policy fronts. Noteworthy among these are the new EPA interim policy on audits and disclosure[1] and the Department of Justice rule dealing with communications with represented persons[2] (which ironically was promulgated on August 4, 1994 while the last Environmental Super Conference was underway).

II. U.S. ENVIRONMENTAL PROTECTION AGENCY INTERIM AUDIT POLICY

A. General Considerations

The U.S. Environmental Protection Agency (hereafter "EPA") on April 3, 1995 promulgated its Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy (hereafter, Interim Policy), a copy of which is attached hereto as Attachment 1.[3] In very broad terms, the policy sets forth seven conditions which, if met, may result in reduced civil penalties[4] and three additional conditions which, if also met, may result in no referral to the Department of Justice for criminal prosecution where criminal conduct is involved.[5] There are important limitations on application of both policies.

The Administrator of EPA in May, 1994, requested the Office of Enforcement and Compliance Assurance to ascertain whether additional incentives might be needed to encourage voluntary disclosure and correction of violations uncovered during environmental audits[6]. In developing the interim policy, the EPA conducted a limited public process, including a two day public meeting, published a Restatement of Policies Relating to Environmental auditing[7] (hereafter, Restatement), considered written comments and held a subsequent focus group

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[1]60 FR 16875, April 3, 1995

[2]59 FR 39910 August 4, 1994

[3]60 FR 16175

[4]60 FR 16877, Interim Policy at IIC

[5]60 FR 16877, Interim Policy at IID

[6]60 FR 16876

[7]59 FR 38455, July 28, 1994

meeting with key stake holders from industry trade groups, environmental commissions, state attorneys general and others.[8]

It is probably fair to say that the Interim Policy was stimulated (1) by the adoption or consideration for adoption by numerous states of various kinds of audit policy, some of which include immunity provisions, such as was adopted by the State of Texas in the just concluded state legislative session and which has been reported on by the previous speaker and (2) the underlying groundswell of sentiment among the regulated community, the States and Congress favoring such policies.

The Interim Policy does represent some broadening of the 1986 EPA Environmental Auditing Policy Statement[9] in the respects noted above. However the Interim Policy includes a strong EPA statement that, to establish a certain minimum consistency in federal enforcement of environmental laws (so that the sanctions which a business entity faces for violating federal law does not depend on where the business is located) EPA will scrutinize enforcement more closely in states with audit privilege and/or penalty immunity laws[10]. Further, EPA may find it necessary to increase federal enforcement where environmental self-evaluation privileges or penalty immunities prevent a state from obtaining:

1. information needed to establish criminal liability;

2. facts needed to establish the nature and extent of a violation;

3. appropriate penalties for eminent substantial endangerment or serious harm or recovering economic benefit;

4. appropriate sanctions or penalties for criminal conduct and repetitive violations; or

5. prompt correction of violations and expeditious remediation of those that involve substantial endangerment.[11]

The stated purpose of the policy is to promote environmental compliance by providing greater certainty about EPA's enforcement response to voluntary self-

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[8]60 FR 16876

[9]51 FR 25004

[10]60 FR 16878, Interim Policy at IV

[11]*id.*

evaluations, voluntary disclosure and prompt correction of violations.[12] The policy is based on seven principles:[13]

1. Self-policing by regulated entities can play a crucial role in finding, fixing and preventing violations;

2. Violations discovered through self-policing should be disclosed and promptly corrected;

3. Regulated entities that self-police and voluntarily disclose and self-correct violations should be assessed penalties that are consistently and predictably lower than penalties for others;

4. Regulated entities that self-police and voluntarily disclose and self-correct should also not be recommended for criminal prosecution;

5. Providing predictable incentives for voluntary disclosure and correction of violations identified through self-policing offers a positive alternative to across-the-board privileges and immunities that could be used to shield criminal misconduct, etc.;

6. EPA should not seek voluntary environmental audit information to trigger investigation of the civil or criminal violation; and

7. To preserve a level playing field, EPA should recover any economic benefit realized from violations of environmental law.

B. SPECIFIC PROVISIONS OF THE POLICY

1. Definitions

a. The definition of environmental auditing has the same definition given it in EPA's 1986 policy on environmental auditing which is "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."[14]

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[12]60 FR 16876

[13]*id.*, Interim Policy ID

[14]60 FR 16877, Interim Policy IIA

b. Other defined terms include environmental audit report, regulated entity, self-evaluation (defined to mean an assessment which may be less than all the criteria of a full environmental audit, by a regulated entity of its compliance with one or more environmental requirements), and the term, voluntary, which means not required by statute, regulation, permit, order or agreement.[15]

2. Incentives

EPA provides in the interim policy for three major incentives resulting from voluntary disclosure and prompt correction of violations. Those are reduced civil penalties and limited criminal referrals.

a. Reduced civil penalties are dealt with in Part IIC of the interim policy and consists of elimination of *all* of the gravity component of the penalty for violations that meet conditions 1-7 (discussed below), except:

(1) violations involving criminal conduct by the regulated entity or any employees; or

(2) imminent substantial endangerment, serious actual harm to the human health or the environment.

Further, EPA may mitigate up to *75%* of the unadjusted gravity component of the penalty, taking into account the seven conditions discussed below in three cases. These three cases are:

(1) those which meet most, but not all of the seven conditions;

(2) cases involving an imminent substantial endangerment, but not serious actual harm in which all of the seven conditions are met; or

(3) cases involving the disclosure of criminal conduct in which all of the seven conditions are met.

Note, however, that EPA retains full discretion to recover any economic benefit gain as a result of non-compliance in order to preserve a level playing field. This is further qualified, however, by a provision that EPA

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[15]Ibid.

may forgive the entire penalty for violations in which all seven conditions are met and in EPA's discretion, do not merit penalty due to insignificant amount of economic benefit.

b. EPA will not recommend to the Department of Justice that criminal charges be brought where the seven conditions are met for a reduction of civil penalties *and* the violation does not demonstrate or involve:

(1) prevalent corporate management philosophy or practice that concealed or condoned violations;

(2) high level corporate officials or managers' conscious involvement in or woeful blindness to violations;

(3) serious actual harm to human health or the environment.

An important limitation on abstention from criminal referral is that the policy does not apply to criminal acts of individual managers or employees. Where it is determined, pursuant to this part of the policy that criminal referral is not justified, EPA, nonetheless, may proceed with civil enforcement in accordance with the policy.[16]

c. The EPA will not request a voluntary environmental audit report to trigger a civil or criminal investigation.[17] However, EPA continues to the policy that, once it has reason to believe that a violation has occurred, it may seek any information relevant to identifying violations or determining liability.[18]

3. Threshold Conditions

The seven conditions for reducing civil penalties and limiting criminal referrals are as follows[19]:

a. voluntary self-policing;

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[16]60 FR 16877, Interim Policy at IID

[17]60 FR 16878, Interim Policy at IIE

[18]*id.*

[19]60 FR 16877, Interim Policy at IIB

b. voluntary disclosure, meaning fully and voluntarily disclosing the violation in writing to all appropriate federal, state and local agencies[20] as soon as it is discovered and prior to commencement to federal, state or local agency inspections and other triggering mechanisms, as well;

c. prompt correction, meaning either within 60 days of discovering the violation or if more time is needed, as expeditiously as practical;

d. remediation of immediate and substantial endangerments;

e. remediation of harm and prevention of repeat violations;

f. no lack of appropriate preventive measures; and

g. cooperation, meaning that regulated entity cooperates as required by EPA and provides such information as reasonably necessary and required by EPA to determine applicability of the policy.

h. The EPA discusses those reasons supporting its view of an appropriate policy, as opposed to a broader privileges and immunities approach.[21]

i. The Interim Policy is clearly "guidance" as opposed to a regulation with the result that its application to particular cases is said to be discretionary with EPA.[22] Also, the Interim Policy "...sets forth internal guidelines which modifies EPA's penalty policies in situations involving voluntary self-policing, disclosure and correction."[23]

C. OBSERVATIONS

Much can be said about the Interim Policy; to the extent it acknowledges up front that EPA will make specific concessions on civil penalties and forego criminal

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[20]Compare with Section 10(g) of the Texas Environmental, Health, and Safety Audit Privilege Act wherein immunity from prosecution is conditioned on (among other things) notice to "...*an* appropriate regulatory agency..." (emphasis supplied).

[21]60 FR 16878, Interim Policy at III

[22]*id.*, Interim Policy at V

[23]*id.*

referral in certain identified situations, the Policy is a liberalization of the 1986 policy. Application of the Policy remains to be seen and will tell much about how the reserved discretion and generality will play out. Similarly, the impact of the Interim Policy on specific penalty policies will be interesting to observe.

The status of the 1986 EPA policy is somewhat unclear. The Restatement (July 28,1994) declared the 1986 policy to remain in effect[24]. The interim Policy refers to the 1986 policy[25] and states that it is superseded as to "...any conflicting or inconsistent provisions...".[26] The quoted statement also applies to EPA penalty or enforcement response policies.[27]

Finally, and most importantly for Texas practitioners, it is absolutely essential to read and interpret together the EPA Interim Policy and the Texas Environmental, Health, and Safety Act. These two are at once complementary and overlapping. For example, they share a common idea that to obtain their benefits, some form of notification is required, but they have different notification requirements.[28] The opportunities for being caught up in some inconsistency between the two appears great. In addition, the Department of Justice Policy, Factors in Decisions on Criminal Prosecutions For Environmental Violations in the Context of Significant Voluntary Compliance Or Disclosure Efforts By the Violator (July 1, 1991), is highly relevant and must similarly be considered in connection with the new EPA Interim Policy and the new Texas legislation. As of mid-July, the Department of Justice had not taken any action to modify its July 1st, 1991 policy. The EPA/Department of Justice dynamic, especially in connection with potential criminal cases, deserves close attention.

III. DEPARTMENT OF JUSTICE RULE ON COMMUNICATION WITH REPRESENTED PERSONS

A. INTRODUCTION

The Department of Justice (hereafter, "the Department") Rule (hereafter, "the rule") on Communication with Represented Persons was promulgated on August

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[24]59 FR 38455

[25]e.g., see definition of "environmental auditing", 60 FR 16877, Interim Policy at IIA.

[26]60 FR 16878, Interim Policy at IIF

[27]*id.*

[28]See footnote 20

4, 1994.[29] It governs the circumstances under which attorneys employed by the Department may communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings.[30] The rule is in Part 77 of Title 28, Code of Federal Regulations. A copy of the rule is attached as Attachment 2.

The rule is, in the author's opinion, a significant and profound document given not only its purpose, but also, and perhaps more importantly, the scope of the rule and its avowed attention to pre-empt the field of regulation of the conduct of attorneys for the Department [31]. By the promulgation of this rule, the Department purports to pre-empt and supersede both local bar rules governing contact with represented parties by attorneys for the Department and Local Rules of Federal District Court dealing with the same subject[32]. "...[T]his part is intended to pre-empt and supersede the application of state laws and rules and local federal court rules to the extent that they relate to contact by attorneys for the government, and those acting at their direction or under their supervision."[33]

B. PURPOSE AND AUTHORITY

The stated purpose of the rule is to provide a comprehensive, clear and uniform set of rules governing circumstances under which Department of Justice attorneys may communicate or cause others to communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings.[34] A collateral purpose is to eliminate uncertainty and confusion arising from the variety of interpretations given to Rule 4.2 of the American Bar Association Model Rules of Professional Conduct and State Analogs and by Rules of Federal Courts and Bar Associations.[35] A variety of authorities are cited in the Regulation for the promulgation of this regulation; these have to do principally with the general authority of the Attorney General to prescribe regulations for the governance of the department, the conduct of its employees to

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[29]See footnote 2

[30]*id.*

[31]"Attorney for the government" is a defined term which is discussed below. See Section 77.2(a).

[32]See Section 77.12. Relationship to State and Local Regulation. See also, 59 FR 39916 (Preamble discussion of rule).

[33]*id.*

[34]Section 77.1

[35]Ibid.

secure evidence and conduct litigation, to direct officers of the department to conduct grand jury proceedings and other civil and criminal legal proceedings, to supervise litigation and in general, to direct department officers to detect and prosecute crimes, etc.[36]

C. DEFINITIONS

There are a number of definitions[37] found in the Rule prominent among which is the definition of "Attorney for the government" which includes a number of high level Department persons and the Assistant Attorneys General for and any attorney employed in the traditional divisions of the Department of Justice, including specifically the Environment and Natural Resources Division.[38] Included in the definition is any Special Assistant United States Attorney duly appointed pursuant to 28 U.S.C. Section 543 who is authorized to conduct criminal or civil law enforcement investigations on behalf of the government. This includes specifically as an example, EPA attorneys who are appointed Special Assistant United States Attorneys for the purpose of assisting United States Attorneys' offices or the Department of Justice in the prosecution of specific cases.

An important exclusion from the term "Attorney for the Government" is an attorney employed by the Department of Justice as an investigator or other law enforcement agent who is not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings.[39]

"Civil Law enforcement proceeding" is a defined term and means a civil action or proceeding before any court or tribunal brought by the Department under police or regulatory powers of the government to enforce federal laws including specifically environment and natural resource protection.[40]

The preamble states that there is a basis for distinguishing, for the purpose of this regulation, between Department attorneys engaged in law enforcement activities who are covered by the regulation and Department attorneys engaged in civil suits in which the government is not acting under its police regulatory powers, the

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[36]Section 77.1(b)

[37]Section 77.2

[38]Section 77.2(a)

[39]Section 77.2(a)

[40]Section 77.2(c)1(vi)

latter attorneys not being covered by this rule.[41] Also included within the definition of attorneys for the government are the Chief Counsel of the Drug Enforcement Administration and any attorney employed in that office, the General Counsel of the FBI and any attorney employed in that office or in the Legal Counsel Division of the FBI.[42]

D. GENERAL RULES REGARDING CONTACTS

1. Contact with represented parties. The general rule about contact with a represented party is, except as provided in the regulation or otherwise authorized by law, an attorney for the government may not communicate or cause another to communicate with a represented party whom the attorney for the government knows is represented concerning the subject matter without the consent of the lawyer representing such party.[43] There exceptions specified in the rule which are discussed below.

2. Contact with represented persons. The general rule regarding represented persons is, except as otherwise provided in the rule, an attorney for the government may communicate or cause another to communicate with a represented person (as opposed to party) in the process of conducting an investigation, including but not limited to, an undercover investigation.[44]

E. REPRESENTED PARTIES VS. REPRESENTED PERSONS

The regulation distinguishes importantly between represented parties and represented persons. The consequences for contacts by attorneys for the government with each of these classes of entities or persons is very significant.

A person[45] shall be considered a "represented party" within the rule only if three conditions exist:

1. the person has retained counsel or accepted counsel by appointment or otherwise;

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[41]59 FR 39914, 15

[42]Section 77.2(a)

[43]Section 77.5

[44]Section 77.7

[45]Defined at Section 77.2(g) as any individual or organization

2. the representation is ongoing and concerns the subject matter in question; and

3. the person has been arrested or charged in a federal criminal case or is a defendant in a civil law enforcement proceeding concerning the subject matter of the representation.[46]

By contrast, a person is considered a represented person within the meaning of the rule if the first two criteria for a represented party exist but the third does not.[47] Section 77.6 sets forth exceptions to the general prohibition against contact with a represented party; those exceptions are:

1. to determine if representation exists;

2. pursuant to discovery or judicial or administrative process, including but not limited to, testimony before a grand jury, the taking of a deposition or the service of a grand jury or trial subpoena; and

3. initiation of communication by a represented party[48] *and*

   a. prior to commencement of substantive discussions and following advice of the attorney for the government of the client's right to speak through his or her attorney and/or to have the attorney present for the communication the represented part manifests that his or her waiver of counsel for the communication is voluntary, knowing and informed (and signs a written statement to that effect if he or she is willing); *and*

   b. the Federal District Judge, Magistrate Judge or other court has concluded that the represented party has:

      (1) waived the presence of counsel voluntarily, knowingly and on an informed basis; or

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[46]Section 77.3(a)

[47]Section 77.3(b)

[48]Section 77.6(a)-(c)

(2) obtained substitute counsel or received substitute counsel by appointment and substitute counsel has consented to the communication.[49]

4. waiver at the time of arrest[50] and investigation of additional, different or ongoing crimes or civil violations such as simply additional, different or ongoing criminal activity separate from or committed after the activity for which the represented party has been arrested or charged and criminal activity that is intended to impede or invade the administration of justice, including for example, obstruction or perjury.[51]

5. the attorney for the government in good faith believes that there may be a threat to the safety or life of any person and the purpose of the communication is to obtain or provide information to protect against the risk of injury or death and the attorney for the government believes that communication is necessary to protect against such risk.[52]

Exceptions to the general rule *allowing* contact with represented persons (Section 77.8) include, for example, a prohibition against initiation or engaging in negotiations that the plea agreement, settlement, statutory or non-statutory immunity agreement or sentence or penalty with a represented person (or represented party) who the attorney for the government knows is represented without the consent of the attorney representing such person or party. This restriction, however, does not apply if the communication satisfies the requirements of Section 77.6(c) (communication initiated by represented party discussed above).

Section 77.9 imposes some restrictions on communication between an attorney for the government or a law enforcement agent with a represented person or party without consent of counsel among which are:

a. prohibition against inquiring about lawful defense strategy or legal arguments of counsel;

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[49]Section 77.6(c)(1) & (2)

[50]Section 77.6(d)

[51]Section 77.6(e)

[52]Section 77.6(f)

b. disparaging counsel or otherwise seeking to induce the person to forego representation or to disregard his or her attorney's advice; and

c. otherwise improperly seeking to disrupt the relationship between the represented person or party and their counsel.

Notwithstanding the restrictions just described, if the Attorney General, the Deputy Attorney General, the Associate Attorney General, the Assistant Attorney General, or the United States Attorney finds a substantial likelihood that there exists a significant conflict of interest between the represented person or party and his or her attorney and it is not feasible to obtain a judicial order challenging the representation, then an attorney for the government with prior written authorization from one of the officials just listed may apprise the person of the nature of the perceived conflict unless the exigencies of the situation permit only prior oral authorization, in which case the oral authorization shall be memorialized as soon as possible thereafter.

Another restriction is found in Section 77.9(b) dealing with attorney/client meetings. An attorney for the government may not direct or cause an undercover enforcement agent or cooperating witness to attend or participate in lawful attorney/client meetings or communications except when the agent or witness is requested to do so by the represented person or party, defense counsel or another person affiliated with the defense and when reasonably necessary to protect the safety of the agent or witness or the confidentiality of an undercover operation.[53] Further, if the agent or witness attends such a meeting, the rule provides that information regarding lawful defense strategy or trial preparation imparted to the agent or witness shall not be communicated to the attorneys for the government or law enforcement agents.[54]

F. ORGANIZATIONS AND EMPLOYEES

Significant portions of the rule deal with communications between an attorney for the government and a former or current employee of an organization that qualifies as a represented party or person. In general, communication with a current employee of an organization that qualifies as a represented party or person is considered a communication with the organization only if the employee is what

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[53]Defined in Section 77.2(d) as any person other than a law enforcement agent who is acting to assist the government in an undercover or confidential capacity.

[54]*id.*

is called a controlling individual.[55] A controlling individual is current high level employee known by the government to be participating as a decision maker in the determination of the organization's legal position in the subject matter.[56]

By contrast, a communication with a former employee of an organization represented by counsel is *not* considered communication with the organization.[57]

Communications with current or former employees regarding individual representation is dealt with in the following way. A communication with a former or current employee who is individually represented may occur only to the extent otherwise permitted by the rule. However, a claim by an attorney that he or she represents all or a large number of individual current and/or former employees *does not suffice to establish that those employees are represented persons or parties.* In this situation, prior to engaging in communications that would otherwise be prohibited because of individual representation, the attorney for the government shall communicate with the individual current or former employees to determine if that person is represented by counsel concerning the subject matter.

The regulation also deals with communications with separately represented controlling individuals.[58] When the regulation would preclude discussions with a controlling individual as previously defined and a controlling individual has retained separate counsel, an attorney for the government may communicate with that individual if:

1. the controlling individual's separate counsel consents;

2. the communication falls with one of the exceptions identified in Section 77.6 or 77.9; or

3. in the case where the individual does not qualify as a represented party, if the individual initiates the communication and states that he or she is communicating exclusively in his or her personal capacity, not on behalf of the represented organization or party and manifests that his or her waiver of counsel for the communication is voluntary, knowing and informed, then the communication may take place.

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[55]Section 77.10(a)

[56]Ibid.

[57]Section 77.10(b)

[58]Section 77.10(d)

Finally, an attorney for the government may communicate with the controlling individual who is not individually represented when the controlling individual initiates the communication, states that he or she is communicating exclusively in his or her personal capacity, not on behalf of the represented organizational party and, again, manifests that his or her waiver of counsel is voluntary, knowing and informed.

Also, the rule states that nothing therein (Section 77.10) is intended or shall be construed to affect the requirements of Rule 44(c) of the Federal Rules of Criminal Procedure or to permit multiple representation of an organization and any of its employees or multiple representation of more than one such employee if prohibited by any applicable rule of ethics or applicable law.

G. ENFORCEMENT

The rule state that the Attorney General shall have exclusive authority over this regulation and any violations of it [59] except where the Attorney General finds a woeful violation of any of the rules in which case sanctions for the woeful conduct or woeful violation may be applied if warranted by the appropriate state disciplinary authority.[60] Otherwise, allegations of violations of the rule are to be reviewed by the Office of Professional Responsibility of the Department and addressed, when appropriate, as matters of attorney discipline by the Department. The Office of Professional Responsibility is to review any complaint alleging the violation made by a state or federal judge, bar entity or ethics committee and the findings of the attorney General as to compliance or non-compliance are to be final and conclusive, subject to any right of review on the part of the attorney for the government.[61] The rule also negates the creation of any private substantive rights on behalf of criminal or civil defendants, targets or subjects to investigations, etc.[62]

H. ADDITIONAL COMMENTS

1. There is significant discussion in the preamble of the regulation about reliance on DR7-104(A)(1) of the ABA Model Code of Professional Responsibility:

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[59]Section 77.11

[60]Section 77.12

[61]Section 77.11(a)

[62]Section 77.11(b)

> During the course of the representation of the client, a lawyer shall not communicate or cause another to communicate on the subject of the representation of the party he knows to be represented by a lawyer in that matter, unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Also, Rule 4.2 of the ABA Model Rule states that in representing a client, a lawyer shall not communicate about the subject matter of representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. The preamble notes that disciplinary authorities in all 50 states and the District of Columbia have adopted one of the rules or a similar prohibition. Further, it is noted[63] that since nearly all of the states have adopted rules that include an "authorized by law" exception to the general prohibition, *the final rule as a duly promulgated regulation is intended to constitute "law" within the meaning of those exceptions*. The rule is stated to be an attempt to reconcile the purposes underlying DR7-104, Model Rule 4.2 and effective law enforcement.[64] The preamble further states that, notwithstanding the widespread adoption by states of an "authorized by law" exception to state and local federal court rules and that the regulation constitutes legal authorization for such communications, it is recognized that some situations may arise in which the power of the regulation to displace state rules will depend on its preemptive force under the supremacy clause. One such example is where the applicable ethics rule has no "authorized by law exception", where the regulation is deemed not to constitute law for the purposes of such exception or where communication is held to violate applicable ethics rules and not be authorized by the regulation. In such situations, an important feature of the regulation is its express intention to preempt and supersede the operation of state and local federal court rules as they relate to contacts by department attorneys regardless of the consistency or inconsistency between such rules and the regulation.[65]

2. Light is shed on the foregoing discussion (Comment 1, preceding) and the rule itself by United States District Court opinions which predate the rule.

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[63] 59 FR 39911

[64] *id.*

[65] 59 FR 39916

In *U.S. v. Ferrara*, 847 F. Supp. 964 (D.D.C. 1993), the United States sued the Chief Disciplinary Counsel of the Disciplinary Board (the Board) of the Supreme Court of New Mexico. Relief sought was to enjoin an inquiry by the Board into the conduct of an Assistant United States Attorney (AUSA) who, although licensed in New Mexico, was employed in the District of Columbia.

The District Court granted the defendant's motion to dismiss on the ground that the Court lacked jurisdiction over the defendant under the District of Columbia's long arm statute. The court additionally stated that the Supremacy Clause of the United States Constitution was not an impediment to the maintenance of the disciplinary proceeding. The AUSA had prosecuted a criminal defendant in 1988 and, during the prosecution, contacted the defendant despite knowing that he was represented by the public defender without the latter's knowledge or consent.

The United States relied on a June 1989 directive from then Attorney General Thornbugh (the "Thornbugh Memorandum") as the authorization for the AUSA's conduct. The Thornbugh Memorandum asserted (1) that contacts with a represented individual in the course of authorized law enforcement activity did not violate Disciplinary Rule 7-104 of the ABA Model code of Professional Conduct and (2) that the Department of Justice could resist, on Supremacy Clause ground", local attempts to curb legitimate federal law enforcement techniques.[66]

The *Ferrara* opinion rejects the claim that the Thornbugh Memorandum constituted "law" for the purpose of preempting state regulation of attorney ethics, noting that first, the AUSA's conduct pre-dated the memorandum and secondly, that a policy memorandum issued by the head of an agency is not the equivalent of "federal law".

3. The future history of the rule is difficult to predict, but controversy seems a certainty. The rule has significant implication for environmental protection, particularly those who represent corporations. Scenarios can be envisioned involving a corporate client in which the rule could be implicated; for example, the rule's treatment of non-control corporate employees as persons (not parties) notwithstanding their asserted representation by a general counsel or designated outside counsel. This provision of the rule may force a re-thinking of response to a criminal

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[66]847 F. Supp. at 969. The Thornbugh Memorandum is appended to the opinion in *Matter of John Doe*, 801 F. Supp. 478 (D.N.M. 1992), a related case. The opinion in *Matter of John Doe* explores in vigorous terms, the arguments against judicial interference with the disciplinary proceedings in the circumstances presented. See also, *Matter of Gorence*, F. Supp. 1234 (D.N.M. 1992).

investigation. At the least, it suggests that corporate counsel re-assess previous strategies for the day when EPA criminal investigator (working under the direction of an AUSA) appears to question witnesses.

ATTACHMENT 1

[FRL-5184-4]

Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim policy statement and request for comment.

SUMMARY: The Environmental Protection Agency (EPA) announces and requests comment on an interim policy to provide incentives for regulated entities that conduct voluntary compliance evaluations and also disclose and correct violations. These incentives include eliminating or substantially reducing the gravity component of civil penalties and not referring cases for criminal prosecution where specified conditions are met. The policy also states that EPA will not request voluntary audit reports to trigger enforcement investigations. This interim policy was developed in close consultation with EPA's regional offices and the Department of Justice, and will be applied uniformly by the Agency's enforcement programs.

DATES: This interim policy statement is effective as interim guidance 15 days after publication, in order to give the Agency time to coordinate implementation of the policy throughout EPA Headquarters and the Regions. EPA urges interested parties to comment on this interim policy in writing. Comments must be received by EPA at the address below by June 2, 1995.

ADDRESSES: Submit three copies of comments to the U.S. EPA Air Docket, Mail Code 6102, 401 M Street, SW, Washington, D.C. 20460, attention: Docket #C-94-01.

FOR FURTHER INFORMATION CONTACT: Additional documentation relating to the development of this interim policy is contained in the environmental auditing public docket. Documents from the docket may be requested by calling (202) 260-7548, requesting an index to docket #C-94-01, and faxing document requests to (202) 260-4400. Hours of operation are 8 a.m. to 5:30 p.m., Monday through Friday, except legal holidays. Additional contacts are Geoff Garver or Brian Riedel, at (202) 564-4187.

SUPPLEMENTARY INFORMATION:

I. Background

A. Introduction

One of the Environmental Protection Agency's most important responsibilities is obtaining compliance with federal laws that protect public health and safeguard the environment. That goal can be achieved only with the voluntary cooperation of thousands of businesses and other regulated entities subject to these requirements. Today, EPA is announcing incentives for those who take responsibility for voluntarily evaluating, disclosing and correcting violations. These incentives, developed after nine months of public meetings and empirical analysis, are set forth in detail below and take effect in 15 days. At the same time, EPA expects to continue a dialogue with stakeholders and consider further refinements to this interim policy. The incentives that EPA is offering fall into three distinct categories.

First, the Agency will completely eliminate gravity-based (or "punitive") penalties for companies or public agencies that voluntarily identify, disclose and correct violations according to the conditions outlined in this policy. EPA will also reduce punitive penalties by up to 75% for

companies that meet most, but not all, of these conditions. Second, EPA will not recommend to the Department of Justice that criminal charges be brought against a company acting in good faith to identify, disclose, and correct violations, so long as no serious actual harm has occurred. Finally, the Agency will not request voluntary environmental audits to trigger enforcement investigations.

The incentives offered in this policy have been structured above all to protect human health and the environment. For example, even where the conditions for mitigated enforcement are met, EPA will reserve the right to collect full civil penalties for criminal conduct, violations that present an imminent and substantial endangerment or result in serious actual harm, or repeat violations. Sources will not be allowed to gain an economic advantage over their competitors by delaying their investment in compliance. Nor will EPA hesitate to bring a criminal action against individuals responsible for criminal conduct.

EPA is considering additional incentives for voluntary compliance beyond the benefits offered in the policy today. On April 7, 1995, the Agency will announce 12 Environmental Leadership Program (ELP) pilot projects with companies and public agencies to test criteria for auditing and certification of voluntary compliance programs. If successful, standards developed through Environmental Leadership could lead to reduced inspections and public recognition for companies or agencies with state-of-the-art compliance programs. In keeping with the President's announcement on March 16, 1995, EPA also will shortly be announcing additional compliance incentives for small businesses.

The Agency is especially interested in comments relating to whether this interim policy appropriately defines the criteria for determining whether a self-audit, self-evaluation or disclosure is voluntary; whether the interim policy adequately preserves the Agency's authority to assess a gravity penalty component in appropriate cases; and whether, and according to what criteria, the Agency should consider giving credit against the economic benefit component of a penalty for state-of-the-art environmental management systems.

B. Public Process

In May 1994, the Administrator asked the Office of Enforcement and Compliance Assurance to determine whether additional incentives are needed to encourage voluntary disclosure and correction of violations uncovered during environmental audits and self-evaluations.

In developing this interim policy, the Agency held a major two-day public meeting in July 1994 announced in the Federal Register on June 20, 1994 (59 FR 31914); published a Restatement of Policies Related to Environmental Auditing in the Federal Register on July 28, 1994 (59 FR 38455); considered over 80 written comments submitted to the environmental auditing policy docket; held a focus group meeting in San Francisco on January 19, 1995 with key stakeholders from industry, trade groups, State environmental commissions, State attorneys general offices, district attorneys' offices, environmental and public interest groups, and professional environmental auditing groups; and held a public comment session in San Francisco on January 20, 1995.

In addition to considering opinion from stakeholders, EPA conducted its own analysis of relevant facts. For example, the Agency considered EPA and other Federal policies relating to environmental auditing, self-disclosure, and correction, as well as incentives suggested by State and local policies and legislation, and by applications submitted for the ELP pilot program. The Agency also considered relevant surveys on auditing practices and incentives.

C. Purpose

This interim policy is intended to promote environmental compliance by providing greater certainty as to EPA's enforcement response to voluntary self-evaluations, and voluntary disclosure and prompt correction of violations. The policy further provides guidance for States and local authorities in encouraging this behavior among regulated entities.

Federal laws and regulations set minimum standards for protecting human health and achieving environmental protection goals such as clean air and clean water. EPA will continue to uphold these laws through vigorous enforcement actions that appropriately penalize violators. Penalties help ensure a level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary investment in compliance. Penalties also promote protection of the environment and public health by encouraging adoption of pollution prevention and recycling practices that limit exposure to liability for pollutant discharges and deterring future violations by the violator and others.

At the same time, the Agency recognizes that we cannot achieve maximum compliance without the cooperation of a regulated community willing to act responsibly by detecting, disclosing, and correcting violations. Already, regulated entities have many compelling incentives to implement environmental management/auditing systems, as noted in EPA's 1986 auditing policy. Indeed, recent surveys show that the vast majority of large companies engage in environmental auditing and/or have environmental management systems in place. Nonetheless, EPA has concluded that the additional incentives in this interim policy will further promote the regulated community's commitment to adopting systems for maximizing compliance.

D. Principles for Voluntary Compliance

The interim policy that EPA is announcing today is based on seven principles:

1. Self-policing by regulated entities can play a crucial role in finding, fixing and preventing violations.

2. Violations discovered through self-policing should be disclosed and promptly corrected.

3. Regulated entities that self-police and that voluntarily disclose and self-correct violations in accordance with this policy should be assessed penalties that are consistently and predictably lower than penalties for those who do not.

4. Regulated entities that self-police and voluntarily disclose and self-correct violations in accordance with this policy should also not be recommended for criminal prosecution.

5. Providing predictable incentives for voluntary disclosure and correction of violations identified through self-policing offers a positive alternative to across-the-board privileges and immunities that could be used to shield criminal misconduct, drive up litigation costs and create an atmosphere of distrust between regulators, industry and local communities.

6. EPA should not seek voluntary environmental audit information to trigger an investigation of a civil or criminal violation of environmental laws.

7. To preserve a level playing field, EPA should recover any economic benefit realized from violations of environmental law.

E. Relationship to Emerging Standards

EPA also recognizes the development of and growing reliance on international voluntary environmental management standards in the U.S. and other

countries. These standards, if properly crafted and implemented, can provide a powerful tool for organizations to improve their overall compliance with environmental requirements and move beyond compliance through innovative approaches to pollution prevention. In addition to issuing this interim policy, EPA will continue to pursue a dialogue with interested parties and to pilot policy approaches through programs such as the ELP to determine how EPA can make use of and encourage these standards.

II. Interim Policy

A. Definitions

For purposes of this interim policy, the following definitions apply:

"Environmental auditing" has the definition given to it in EPA's 1986 policy on environmental auditing, i.e. "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."

"Environmental audit report" means all documentation of information relating to an environmental audit, but not including the factual information underlying or testimonial evidence relating to such information.

"Regulated entity" means any entity, including a federal, state, and municipal facility, regulated under the federal environmental laws that EPA administers.

"Self-evaluation" means an assessment, not necessarily meeting all the criteria of a full environmental audit, by a regulated entity of its compliance with one or more environmental requirements.

"Voluntary" means not required by statute, regulation, permit, order, or agreement.

B. Conditions

The conditions for reducing civil penalties and not making criminal referrals in accordance with Sections II.C. and II.D. of this interim policy are as follows:

1. *Voluntary self-policing.* The regulated entity discovers a violation through a voluntary environmental audit or voluntary self-evaluation appropriate to the size and nature of the regulated entity; and

2. *Voluntary disclosure.* The regulated entity fully and voluntarily discloses the violation in writing to all appropriate federal, state and local agencies as soon as it is discovered (including a reasonable time to determine that a violation exists), and prior to (1) the commencement of a federal, state or local agency inspection, investigation or information request; (2) notice of a citizen suit; (3) legal complaint by a third party; or (4) the regulated entity's knowledge that the discovery of the violation by a regulatory agency or third party was imminent; and

3. *Prompt correction.* The regulated entity corrects the violation either within 60 days of discovering the violation or, if more time is needed, as expeditiously as practicable; and

4. *Remediation of imminent and substantial endangerment.* The regulated entity expeditiously remedies any condition that has created or may create an imminent and substantial endangerment to human health or the environment; and

5. *Remediation of harm and prevention of repeat violations.* The regulated entity implements appropriate measures to remedy any environmental harm due to the violation and to prevent a recurrence of the violation; and

6. *No lack of appropriate preventive measures.* The violation does not indicate that the regulated entity has failed to take appropriate steps to avoid repeat or recurring violations; and

7. *Cooperation.* The regulated entity cooperates as required by EPA and provides such information as is reasonably necessary and required by EPA to determine applicability of this policy. Cooperation may include providing all requested documents and access to employees and assistance in any further investigations into the violation.

Where appropriate, EPA may require that to satisfy any of these conditions, a regulated entity must enter into a written agreement, administrative consent order or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required.

C. Reduce Civil Penalties for Voluntarily Disclosed and Promptly Corrected Violations

1. Incentive

Regulated entities will be eligible for the following reductions in civil penalties:

a. EPA will eliminate all of the gravity component of the penalty for violations by regulated entities that meet conditions 1 through 7 outlined in Section II.B., except for violations involving (i) criminal conduct by the regulated entity or any of its employees, or (ii) an imminent and substantial endangerment, or serious actual harm, to human health or the environment.

b. EPA may mitigate up to 75% of the unadjusted gravity component of the penalty, taking into account any of conditions 1–7 in Section II.B. that are met, in the following cases:

(i) cases in which most but not all of the conditions in Section II.B. are met; or

(ii) cases involving an imminent and substantial endangerment, but not serious actual harm, in which all the conditions in Section II.B. are met; or

(iii) cases involving the disclosure of criminal conduct in which all the conditions in Section II.B. are met.

c. EPA will retain its full discretion to recover any economic benefit gained as a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage through noncompliance. However, EPA may forgive the entire penalty for violations which meet conditions 1 through 7 outlined in Section II.B. and, in EPA's discretion, do not merit any penalty due to the insignificant amount of any economic benefit.

2. Discussion

a. Providing a clear and significant reduction in civil penalties for companies that assume responsibility for finding, disclosing and correcting violations will create a strong incentive for regulated entities to prevent or fix violations before EPA expends enforcement resources. The policy states clearly the conditions under which EPA will forgive all or part of the gravity component of a penalty for voluntary disclosure and correction;

b. The policy appropriately preserves the concept of recovering economic benefit, except where it is insignificant, as recommended by a broad spectrum of commenters, including industry commenters;

c. Retaining EPA's discretion to collect the gravity component of the penalty in appropriate cases, such as where a violation involves criminal conduct, or imminent and substantial endangerment, will help to deter the most egregious environmental violations. At the same time, by preserving flexibility to reduce the gravity element by up to 75% for good faith efforts to disclose and promptly comply even in those cases, the policy will retain an appropriate compliance incentive.

D. Limit Criminal Referrals for Voluntary Disclosure and Correction of Violations

1. Incentive

EPA will not recommend to the Department of Justice that criminal

charges be brought against a regulated entity where EPA determines that conditions 1–7 in Section II.B. above for reduction of civil penalties are met, and the violation does not demonstrate or involve (1) a prevalent corporate management philosophy or practice that concealed or condoned environmental violations; (2) high-level corporate officials' or managers' conscious involvement in or willful blindness to the violation; or (3) serious actual harm to human health or the environment. This policy does not apply to criminal acts of individual managers or employees. Where EPA determines pursuant to this Section that a criminal referral to the Department of Justice is unwarranted, EPA may nonetheless proceed with civil enforcement in accordance with Section II.C. of this policy or other applicable enforcement response and penalty policies.

2. Discussion

The policy will promote candid and thorough self-policing by providing greater certainty as to how EPA will exercise its criminal investigative discretion to encourage voluntary disclosure and prompt correction by regulated entities.

E. Eliminate Routine Requests for Audit Reports in Pre-Enforcement Proceedings

1. Incentive

EPA will not request a voluntary environmental audit report to trigger a civil or criminal investigation. For example, EPA will not request an audit in routine inspections. Once the Agency has reason to believe a violation has been committed, EPA may seek through an investigation or enforcement action any information relevant to identifying violations or determining liability or extent of harm.

2. Discussion

a. This policy makes clear that EPA will not routinely request audit reports. At the same time, the policy in no way limits the right of regulated entities to claim common law privileges (e.g., attorney-client and work product) as appropriate. EPA believes that this clarification, along with the other incentives in this interim policy, should greatly reduce any perception that environmental audits may be used unfairly in environmental enforcement.

b. With respect to federal facilities, although federal facility environmental audit reports may be accessible to the public under the Freedom of Information Act (FOIA) in certain circumstances, EPA cannot utilize FOIA to request information from other federal agencies. Thus, EPA will apply this policy on requests for audit reports to federal (and state and municipal) facilities the same as it does for other regulated entities.

F. Applicability

This interim policy applies to violations under all of the federal environmental statutes that EPA administers and supersedes (unless otherwise noted) any conflicting or inconsistent provisions in the media-specific penalty or enforcement response policies and EPA's 1986 Environmental Auditing Policy Statement. Existing enforcement policies will continue to apply in conjunction with this interim policy, except where inconsistent with this policy. In addition, where appropriate, EPA's Supplemental Environmental Project Policy may at EPA's discretion be applied in conjunction with this policy.

III. Favor These Incentives Over Broad Privileges and Immunities

This interim policy offers a positive alternative to across-the-board privileges and immunities that could be used to shield criminal misconduct, drive up litigation costs and create an atmosphere of distrust between regulators, industry and local communities.

A. Discussion

1. Penalty immunity provisions for voluntary disclosures of violations can give lawbreakers an economic advantage over their law-abiding competitors. It makes sense to give substantial penalty reductions for those who come forward with their violations and promptly correct them, but to maintain a level playing field, the federal and state governments must be able to recoup the economic benefit of violations.

2. A principal rationale for environmental audit privileges and penalty immunities for voluntary disclosures is to reduce the exposure of regulated entities that conduct self-evaluations *and act on the findings by immediately correcting violations.* EPA has addressed this concern with the incentives for disclosure and correction outlined above.

3. Privilege runs counter to efforts to open up environmental decisionmaking and encourage public participation in matters that affect people's homes, workplaces and communities.

4. An environmental audit privilege could be misused to shield bad actors or to frustrate access to crucial factual information.

5. Environmental audit privileges and penalty immunities could encourage increased litigation as opposing lawyers battle over what is privileged or immune from penalties and what is not. Litigation over the scope of the privileges and immunities could burden our already taxed judicial system, drain government and private resources, and in some cases prevent quick action to address environmental emergencies.

6. The Supreme Court has noted, "privileges are not lightly created nor expansively construed for they are in derogation of the search for the truth." *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). Moreover, the self-evaluation privilege has regularly and uniformly been rejected by the courts in cases where documents were sought by a governmental agency.

IV. Consequences for States

EPA recognizes that states are important partners in federal enforcement, and that it is desirable to create a climate in which states can be innovative. At the same time, EPA is required to establish a certain minimum consistency in federal enforcement, so that the sanctions a business faces for violating federal law do not depend on where the business is located.

Accordingly, to maintain national consistency:

A. EPA will scrutinize enforcement more closely in states with audit privilege and/or penalty immunity laws and may find it necessary to increase federal enforcement where environmental self-evaluation privileges or penalty immunities prevent a state from obtaining:

1. information needed to establish criminal liability;

2. facts needed to establish the nature and extent of a violation;

3. appropriate penalties for imminent and substantial endangerment or serious harm to human health or the environment, or from recovering economic benefit;

4. appropriate sanctions or penalties for criminal conduct and repeat violations; or

5. prompt correction of violations, and expeditious remediation of those that involve imminent and substantial endangerment to human health or the environment.

B. EPA will bring to the state's attention any provisions of state audit privilege and/or penalty immunity statutes that raise any of the concerns outlined above, and will work with the state to address those concerns and ensure that federal requirements are satisfied.

V. Limitations on Applicability of This Policy

This interim policy sets forth internal guidelines which amend EPA's penalty policies in situations involving voluntary self-policing, disclosure and correction. In conjunction with the applicable penalty policy, these guidelines will aid EPA personnel in proposing appropriate penalties or negotiating settlements in administrative and judicial enforcement actions. The interim policy also serves to structure the Agency's enforcement authority and states the Agency's view as to the proper allocation of its enforcement resources. Deviations from these guidelines, where merited, are authorized so long as the reasons for the deviations are documented.

This interim policy is not final agency action, but is intended solely as guidance. It is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials may decide to follow the guidance provided in this interim policy or to act at variance with the guidance based on analysis of case-specific facts and circumstances. Application of this policy to the facts of any individual case is at the sole discretion of EPA and is not subject to review by any court. In addition, the policy has no effect on the calculation of any cleanup costs, remedial costs, natural resources damages or emergency response costs associated with a violation. EPA reserves the right to change this interim policy at any time without public notice.

Dated: March 30, 1995.

Steven A. Herman,

Assistant Administrator for Enforcement and Compliance Assurance.

[FR Doc. 95–8218 Filed 3–31–95; 8:45 am]

BILLING CODE 6560–60–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Information Collection Submitted to OMB for Review

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Extension of comment period on proposed revisions to Country Exposure Report (FFIEC 009).

SUMMARY: On March 16, 1995, the FDIC requested comment on proposed revisions to the Country Exposure Report (FFIEC 009). The Federal Financial Institutions Examination Council (FFIEC) proposed to implement the report as of March 31, 1995. However, the FBIEC has asked that the comment period be extended to give the public additional time to provide comment. In addition, the implementation date of the proposed revisions to the reporting form will be delayed until not earlier than September 30, 1995, to provide institutions with additional time to modify their systems and to resolve conceptual issues related to the report.

DATES: Comments must be received by April 21, 1995.

OMB REVIEWER: Milo Sunderhauf, (202) 395–7340, Office of Management and Budget, Paperwork Reduction Project 3064–0017, Washington, DC 20503.

FDIC CONTACT: Steven F. Hanft, (202) 898–3907, Office of the Executive Secretary, room F–400, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

ADDRESSES: A copy of the submission may be obtained by calling or writing the FDIC contact identified above. Comments regarding the submission should be addressed to both the OMB reviewer and the FDIC contact.

SUPPLEMENTARY INFORMATION: On March 16, 1995 (60 FR 14285), the FDIC invited comment on proposed revisions to the Country Exposure Report (FFIEC 009). The FFIEC has received a request to extend the comment period and delay the implementation date of the proposed revisions. In view of the significance of the new items that are proposed in the report, the FDIC is extending the comment period to April 21, 1995, and delaying the proposed implementation date to not earlier than September 30, 1995.

Dated: March 29, 1995.

Federal Deposit Insurance Corporation.

Steven F. Hanft,

Assistant Executive Secretary (Administration).

[FR Doc. 95–8106 Filed 3–31–95; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental Research; Notice of Closed Meetings

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following National Institute of Dental Research Special Emphasis Panel (SEP) meetings:

Name of SEP: National Institute of Dental Research Special Emphasis Panel—Minority Oral Health Study.

Dates: May 2–3, 1995.

Time: 9:00 a.m.

Place: Marriott Pooks Hill, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Dr. Philip Washko, Scientific Review Administrator, 4500 Center Drive, Natcher Building, room 4AN–38J, Bethesda, MD 20892, (301) 594–2372.

Purpose/Agenda

To evaluate and review grant applications and/or contract proposals.

Name of SEP: National Institute of Dental Research Special Emphasis Panel—Research on Pulp Biology.

Dates: June 1–2, 1995.

Time: 9:00 a.m.

Place: Marriott Pooks Hill, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Dr. Philip Washko, Scientific Review Administration, 4500 Center Drive, Natcher Building, room 4AN–38J, Bethesda, MD 20892, (301) 594–2372.

Purpose/Agenda

To evaluate and review grant applications and/or contract proposals.

Name of SEP: National Institute of Dental Research Special Emphasis Panel—Dentist Scientist Award.

Dates: June 5–6, 1995.

Time: 9:00 a.m.

Place: Marriott Pooks Hill, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Dr. George Hausch, Chief, Review Section, 4500 Center Drive, Natcher Building, room 4AN–38J, Bethesda, MD 20892, (301) 594–2372.

Purpose/Agenda

To evaluate and review grant applications and/or contract proposals.

The meetings will be closed in accordance with the provision set forth in secs. 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program No. 93.121, Oral Diseases and Disorders Research)

Dated: March 28, 1995.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 95–8119 Filed 3–31–95; 8:45 am]

BILLING CODE 4140–01–M

National Institute of Mental Health; Notice of Cancellation of Meeting

Notice is hereby given of the cancellation of one meeting of the

ATTACHMENT 2

PART 77—COMMUNICATIONS WITH REPRESENTED PERSONS

Sec.

77.1 Purpose and authority.
77.2 Definitions.
77.3 Represented party; represented person.
77.4 Constitutional and other limitations.
77.5 General rule for civil and criminal enforcement; represented parties.
77.6 Exceptions; represented parties.
77.7 Represented persons; investigations.
77.8 Represented persons and represented parties; plea negotiations and other specified legal agreements.
77.9 Represented persons and represented parties; respect for attorney-client relationships.
77.10 Organizations and employees.
77.11 Enforcement of this part.
77.12 Relationship to state and local regulation.

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515(a), 516, 519, 533, 547.

§ 77.1 Purpose and authority.

(a) The Department of Justice is committed to ensuring that its attorneys perform their duties in accordance with the highest ethical standards. The purpose of this part is to provide a comprehensive, clear, and uniform set of rules governing the circumstances under which Department of Justice attorneys may communicate or cause others to communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings. This part ensures the Department's ability to enforce federal law effectively and ethically, consistent with the principles underlying Rule 4.2 of the American Bar Association Model Rules of Professional Conduct, while eliminating the uncertainty and confusion arising from the variety of interpretations given to that rule and analogous rules by state

and federal courts and by bar association organizations and committees. (Copies of the Bar rules are on file in most law libraries, and through on-line legal research services).

(b) This part is issued under the authority of the Attorney General to prescribe regulations for the government of the Department of Justice, the conduct of its employees, and the performance of its business, pursuant to 5 U.S.C. 301; to direct officers of the Department of Justice to secure evidence and conduct litigation, pursuant to 28 U.S.C. 516; to direct officers of the Department to conduct grand jury proceedings and other civil and criminal legal proceedings, pursuant to 28 U.S.C. 515(a); to supervise litigation and to direct Department officers in the discharge of their duties, pursuant to 28 U.S.C. 519; and otherwise to direct Department officers to detect and prosecute crimes, to prosecute offenses against the United States, to prosecute civil actions, suits, and proceedings in which the United States is concerned, and to perform such other functions in an appropriate and ethical manner as may be provided by law, pursuant to 28 U.S.C. 509, 510, 533, and 547.

§ 77.2 Definitions.

As used in this part, the following terms shall have the following meanings, unless the context indicates otherwise:

(a) *Attorney for the government* means the Attorney General; the Deputy Attorney General; the Associate Attorney General; the Solicitor General; the Assistant Attorneys General for, and any attorney employed in, the Antitrust Division, Civil Division, Civil Rights Division, Criminal Division, Environment and Natural Resources Division, or Tax Division; the Chief Counsel of the DEA and any attorney employed in that office, the General Counsel of the FBI and any attorney employed in that office or in the Legal Counsel Division of the FBI, and, in addition, any attorney employed in, or head of, any other legal office in a Department of Justice agency; any United States Attorney; any Assistant United States Attorney; any Special Assistant to the Attorney General or Special Attorney duly appointed pursuant to 28 U.S.C. 515; any Special Assistant United States Attorney duly appointed pursuant to 28 U.S.C. 543 who is authorized to conduct criminal or civil law enforcement investigations or proceedings on behalf of the United States; or any other attorney employed by the Department of Justice who is authorized to conduct criminal or civil law enforcement proceedings on behalf of the United States. The term *attorney for the government* does not include any attorney employed by the Department of Justice as an investigator or other law enforcement agent who is not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings.

(b) *Civil law enforcement investigation* means an investigation of possible civil violations of, or claims under, federal law that may form the basis for a civil law enforcement proceeding.

(c) (1) *Civil law enforcement proceeding* means a civil action or proceeding before any court or other tribunal brought by the Department of Justice under the police or regulatory powers of the United States to enforce federal laws, including, but not limited to, civil actions or proceedings brought to enforce the laws relating to:

(i) Antitrust;

(ii) Banking and financial institution regulation;

(iii) Bribery, kickbacks, and corruption;

(iv) Civil rights;

(v) Consumer protection;

(vi) Environment and natural resource protection;

(vii) False claims against the United States;

(viii) Food, drugs, and cosmetics regulation;

(ix) Forfeiture of property;

(x) Fraud;

(xi) Internal revenue;

(xii) Occupational safety and health;

(xiii) Racketeering; or

(xiv) Money-laundering.

(2) The term *civil law enforcement proceeding* shall not include proceedings related to the enforcement of an administrative subpoena or summons or a civil investigative demand. An action or proceeding shall be considered "brought by the United States" only if it involves a claim asserted by the Department of Justice on behalf of the United States, whether the claim is asserted by complaint, counterclaim, cross-claim, or otherwise.

(d) *Cooperating witness or individual* means any person, other than a law enforcement agent, who is acting to assist the government in an undercover or confidential capacity.

(e) *Employee* means any employee, officer, director, partner, member, or trustee.

(f) *Organization* means any corporation, partnership, association, joint-stock company, union, trust, pension fund, unincorporated association, state or local government or political subdivision thereof, or non-profit organization.

(g) *Person* means any individual or organization.

(h) *Undercover investigation* means any investigation undertaken in good faith to fulfill law enforcement objectives, in which a person communicates with a federal, state or local law enforcement agent or a cooperating witness or individual whose identity as an official of the government or a person acting at the behest thereof is concealed or is intended to be concealed.

§ 77.3 Represented party; represented person.

(a) A person shall be considered a "represented party" within the meaning of this part only if all three of the following circumstances exist:

(1) The person has retained counsel or accepted counsel by appointment or otherwise;

(2) The representation is ongoing and concerns the subject matter in question;

(3) The person has been arrested or charged in a federal criminal case or is a defendant in a civil law enforcement proceeding concerning the subject matter of the representation.

(b) A person shall be considered a "represented person" within the meaning of this part if circumstances set forth in paragraphs (a) (1) and (2) of this section exist, but the circumstance set forth in paragraph (a)(3) does not exist.

§ 77.4 Constitutional and other limitations.

Notwithstanding any other provision of this part, any communication that is prohibited by the Sixth Amendment right to counsel, by any other provision of the United States Constitution, by any federal statute, by the Federal Rules of Criminal Procedure (18 U.S.C. App.) or by the Federal Rules of Civil Procedure (28 U.S.C. App.) shall be likewise prohibited under this part.

§ 77.5 General rule for civil and criminal enforcement; represented parties.

Except as provided in this part or as otherwise authorized by law, an attorney for the government may not communicate, or cause another to communicate, with a represented party who the attorney for the government knows is represented by an attorney concerning the subject matter of the representation without the consent of the lawyer representing such party.

§ 77.6 Exceptions; represented parties.

An attorney for the government may communicate, or cause another to communicate, with a represented party without the consent of the lawyer representing such party concerning the subject matter of the representation if

one or more of the following circumstances exist:

(a) *Determination if representation exists.* The communication is to determine if the person is in fact represented by counsel concerning the subject matter of the investigation or proceeding.

(b) *Discovery or judicial or administrative process.* The communication is made pursuant to discovery procedures or judicial or administrative process in accordance with the orders or rules of the court or other tribunal where the matter is pending, including, but not limited to testimony before a grand jury, the taking of a deposition, or the service of a grand jury or trial subpoena, summons and complaint, notice of deposition, administrative summons or subpoena or civil investigative demand.

(c) *Initiation of communication by represented party.* The represented party initiates the communication directly with the attorney for the government or through an intermediary and:

(1) Prior to the commencement of substantive discussions on the subject matter of the representation and after being advised by the attorney for the government of the client's right to speak through his or her attorney and/or to have the client's attorney present for the communication, manifests that his or her waiver of counsel for the communication is voluntary, knowing and informed and, if willing to do so, signs a written statement to this effect; and

(2) A federal district judge, magistrate judge or other court of competent jurisdiction has concluded that the represented party has:

(i) Waived the presence of counsel and that such waiver is voluntary, knowing, and informed; or

(ii) Obtained substitute counsel or has received substitute counsel by court appointment, and substitute counsel has consented to the communication.

(d) *Waivers at the time of arrest.* The communication is made at the time of the arrest of the represented party and he or she is advised of his or her rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and voluntarily and knowingly waives them.

(e) *Investigation of additional, different or ongoing crimes or civil violations.* The communication is made in the course of an investigation, whether undercover or overt, of additional, different or ongoing criminal activity or other unlawful conduct. Such additional, different or ongoing criminal activity or other unlawful conduct may include, but is not limited to, the following:

(1) Additional, different or ongoing criminal activity or other unlawful conduct that is separate from or committed after the criminal activity for which the represented party has been arrested or charged or for which the represented party is a defendant in a civil law enforcement proceeding; or

(2) Criminal activity that is intended to impede or evade the administration of justice including, but not limited to, the administration of justice in the proceeding in which the represented party is a defendant, such as obstruction of justice, subornation of perjury, jury tampering, murder, assault, or intimidation of witnesses, bail jumping, or unlawful flight to avoid prosecution.

(f) *Threat to safety or life.* The attorney for the government in good faith believes that there may be a threat to the safety or life of any person; the purpose of the communication is to obtain or provide information to protect against the risk of injury or death; and the attorney for the government in good faith believes that the communication is necessary to protect against such risk.

§ 77.7 Represented persons; investigations.

Except as otherwise provided in this part, an attorney for the government may communicate, or cause another to communicate, with a represented person in the process of conducting an investigation, including, but not limited to, an undercover investigation.

§ 77.8 Represented persons and represented parties; plea negotiations and other legal agreements.

An attorney for the government may not initiate or engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement, or other disposition of actual or potential criminal charges or civil enforcement claims, or sentences or penalties with a represented person or represented party who the attorney for the government knows is represented by an attorney without the consent of the attorney representing such person or party; provided, however, that this restriction will not apply if the communication satisfies § 77.6(c).

§ 77.9 Represented persons and represented parties; respect for attorney-client relationships.

When an attorney for the government communicates, or causes a law enforcement agent or cooperating witness to communicate, with a represented person or represented party pursuant to any provision of these regulations without the consent of counsel, the following restrictions must be observed:

(a) *Deference to attorney-client relationship.* (1) An attorney for the government, or anyone acting at his or her direction may not, when communicating with a represented person or represented party:

(i) Inquire about information regarding lawful defense strategy or legal arguments of counsel;

(ii) Disparage counsel for a represented person or represented party or otherwise seek to induce the person to forego representation or to disregard the advice of the person's attorney; or

(iii) Otherwise improperly seek to disrupt the relationship between the represented person or represented party and counsel.

(2) Notwithstanding paragraph (a)(1) of this section, if the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General or a United States Attorney finds that there is a substantial likelihood that there exists a significant conflict of interest between a represented person or party and his or her attorney; and that it is not feasible to obtain a judicial order challenging the representation, then an attorney for the government with prior written authorization from an official identified above may apprise the person of the nature of the perceived conflict of interest, unless the exigencies of the situation permit only prior oral authorization, in which case such oral authorization shall be memorialized in writing as soon thereafter as possible.

(b) *Attorney-client meetings.* An attorney for the government may not direct or cause an undercover law enforcement agent or cooperating witness to attend or participate in lawful attorney-client meetings or communications, except when the agent or witness is requested to do so by the represented person or party, defense counsel, or another person affiliated or associated with the defense, and when reasonably necessary to protect the safety of the agent or witness or the confidentiality of an undercover operation. If the agent or witness attends or participates in such meetings, any information regarding lawful defense strategy or trial preparation imparted to the agent or witness shall not be communicated to attorneys for the government or to law enforcement agents who are directly participating in the ongoing investigation or in the prosecution of pending criminal charges, or used in any other way to the substantial detriment of the client.

§ 77.10 Organizations and employees.

This section applies when the communication involves a former or current employee of an organization that qualifies as a represented party or represented person, and the subject matter of the communication relates to the business or other affairs of the organization.

(a) *Communications with current employees; organizational representation.* A communication with a current employee of an organization that qualifies as a represented party or represented person shall be considered to be a communication with the organization for purposes of this part only if the employee is a controlling individual. A "controlling individual" is a current high level employee who is known by the government to be participating as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter.

(b) *Communications with former employees; organizational representation.* A communication with a former employee of an organization that is represented by counsel shall not be considered to be a communication with the organization for purposes of this part.

(c) *Communications with former or current employees; individual representation.* A communication with a former or current employee of an organization who is individually represented by counsel may occur only to the extent otherwise permitted by this part. However, a claim by an attorney that he or she represents all or a large number of individual current and/or former employees of an organization does not suffice to establish that those employees are represented persons or represented parties under this part. In such circumstances, prior to engaging in communications that would be prohibited under this part as a result of the individual representation, the attorney for the government shall communicate with the individual current or former employee to determine if in fact that employee is represented by counsel concerning the subject matter of the investigation or proceeding.

(d) *Communications with separately represented controlling individuals.* When this part would preclude discussions with a controlling individual as defined in § 77.10(a) and the controlling individual has retained separate counsel on the relevant subject matter, an attorney for the government may communicate with such individual in the following circumstances:

(1) If the controlling individual's separate counsel consents;

(2) If the communication falls within one of the exceptions set forth in §§ 77.6 or 77.9; or

(3) In the case in which the individual does not qualify as a represented party, if the individual initiates the communication and states that he or she is communicating exclusively in his or her personal capacity and not on behalf of the represented organizational party, and manifests that his or her waiver of counsel for the communication is voluntary, knowing and informed, and, if willing to do so, signs a written statement to this effect.

(e) *Initiation of communication with unrepresented controlling individuals.* Notwithstanding any other provision of this part, an attorney for the government may communicate with a controlling individual who is not individually represented as to the subject matter of the communication when the controlling individual initiates the communication and states that he or she is communicating exclusively in his or her personal capacity and not on behalf of the represented organizational party, and manifests that his or her waiver of counsel for the communication is voluntary, knowing, and informed, and, if willing to do so, signs a written statement to this effect.

(f) *Multiple representation.* Nothing in this section is intended or shall be construed to affect the requirements of Rule 44(c) of the Federal Rules of Criminal Procedure, or to permit the multiple representation of an organization and any of its employees, or the multiple representation of more than one such employee, if such representation is prohibited by any applicable law or rule of attorney ethics.

§ 77.11 Enforcement of this part.

(a) *Exclusive enforcement by Attorney General.* The Attorney General shall have exclusive authority over this part and any violations of it, except as provided in § 77.12. Allegations of violations of this part shall be reviewed exclusively by the Office of Professional Responsibility of the Department of Justice and shall be addressed when appropriate as matters of attorney discipline by the Department. The Office of Professional Responsibility shall review any complaint alleging a violation of this part made by a state or federal judge, bar disciplinary board, official, or ethics committee, or by any other person or entity. The findings of the Attorney General or her designee as to an attorney's compliance or non-compliance with this part shall be final and conclusive except insofar as the attorney for the government is afforded a right of review by other provisions of law.

(b) *No private remedies.* This part is not intended to and does not create substantive rights on behalf of criminal or civil defendants, targets or subjects of investigations, witnesses, counsel for represented parties or represented persons, or any other person other than an attorney for the government, and shall not be a basis for dismissing criminal or civil charges or proceedings against represented parties or for excluding relevant evidence in any proceeding in any court of the United States.

§ 77.12 Relationship to state and local regulation.

Communications with represented parties and represented persons pursuant to this part are intended to constitute communications that are "authorized by law" within the meaning of Rule 4.2 of the American Bar Association Model Rules of Professional Conduct, DR 7–104(A)(1) of the ABA Code of Professional Responsibility, and analogous state and local federal court rules. In addition, this part is intended to preempt and supersede the application of state laws and rules and local federal court rules to the extent that they relate to contacts by attorneys for the government, and those acting at their direction or under their supervision, with represented parties or represented persons in criminal or civil law enforcement investigations or proceedings; it is designed to preempt the entire field of rules concerning such contacts. When the Attorney General finds a willful violation of any of the rules in this part, however, sanctions for the conduct that constituted a willful violation of this part may be applied, if warranted, by the appropriate state disciplinary authority.

Dated: July 30, 1994.

Janet Reno,

Attorney General.

[FR Doc. 94–19077 Filed 8–3–94; 8:45 am]

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Environmental Risk Management

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KEY TO AVOIDING LIABILITY IS A STRONG INTERNAL COMPLIANCE PROGRAM INCLUDING A WRITTEN ENVIRONMENTAL POLICY AND ASSOCIATED PROCEDURES TO ENFORCE THE POLICY.

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WHY HAVE AN ENVIRONMENTAL POLICY ?

- **MANAGE LIABILITIES IMPOSED BY ENVIRONMENTAL REGULATIONS**
- **MAXIMIZE ASSET AND SHAREHOLDER VALUES**
- **PROVIDE POSITIVE CORPORATE IMAGE TO COMMUNITY AND EMPLOYEES**
- **MAINTAIN INTERNATIONAL COMPETITIVENESS**

CRC ENVIRONMENTAL RISK MANAGEMENT, INC.



ENVIRONMENTAL LIABILITIES

- **FINES AND PENALTIES FOR NON-COMPLIANCE**
- **CRIMINAL LIABILITY FOR OFFICERS AND DIRECTORS RESPONSIBLE FOR ENVIRONMENTAL ACTIVITIES**
- **THIRD PARTY COURT ACTIONS**
- **VARIOUS EMPLOYER/EMPLOYEE LIABILITIES**
- **STEEPLY DISCOUNTED ASSET AND SHAREHOLDER VALUES**

CRC ENVIRONMENTAL RISK MANAGEMENT, INC.

HOW TO ESTABLISH AN ENVIRONMENTAL RISK MANAGEMENT POLICY

- **RETAIN LEGAL COUNSEL**
- **ESTABLISH BENCHMARKS WITHIN YOUR INDUSTRY GROUP**
- **CONSULT WITH ENVIRONMENTAL SERVICE PROVIDERS**
- **DEFINE POLICY OBJECTIVES AND ACCEPTABLE/UNACCEPTABLE RISK LEVELS**
- **CORPORATE/OWNERSHIP COMMITMENT PRIOR TO IMPLEMENTATION**

CRC ENVIRONMENTAL RISK MANAGEMENT, INC.

IN ESTABLISHING AN ENVIRONMENTAL POLICY:

- DEFINE LEVELS OF ENVIRONMENTAL ISSUES AND EXPOSURES
- PROVIDE RESOURCES TO ESTABLISH AN ENVIRONMENTAL POLICY AND ENFORCE THE PROCEDURES
- ESTABLISH AN INDIVIDUAL OR DEPARTMENT RESPONSIBLE FOR IMPLEMENTING THE POLICY
- DEFINE CORPORATE GOALS AND OBJECTIVES
- ESTABLISH REPORTING AUTHORITIES
- ESTABLISH LEVELS OF ENVIRONMENTAL INVESTIGATION FOR POTENTIAL ENVIRONMENTAL RISKS
- IDENTIFY OPERATIONS OR TRANSACTIONS WHICH REQUIRE ENVIRONMENTAL REVIEW OR INVESTIGATION
- DEFINE PROCEDURES FOR REPORTING NON-COMPLIANCE



ASSESS RISK LEVELS

- **DEVELOP ENVIRONMENTAL INVESTIGATION PROCESS TO IDENTIFY ENVIRONMENTAL RISKS**
- **IMPLEMENT INVESTIGATIONS OVER A MANAGED TIME FRAME**
- **ASSESS ENVIRONMENTAL RISKS DETERMINED FROM INVESTIGATIONS**
    - a) **COMPARE TO KNOWN REGULATORY AND SCIENTIFIC STANDARDS**
    - b) **FOR MORE COMPLEX RISKS, PERFORM APPROPRIATE LEVELS OF RISK ASSESSMENT**

CRC ENVIRONMENTAL RISK MANAGEMENT, INC.



DISTRIBUTE POLICY THROUGHOUT THE COMPANY

- **INCENTIVES FOR COMPLIANCE**
- **DISINCENTIVES FOR NON-COMPLIANCE**
- **PROVIDE ADEQUATE TRAINING ON THE POLICY AND IMPLEMENTATION OF PROCEDURES**

CRC ENVIRONMENTAL RISK MANAGEMENT, INC.

IMPLEMENT RISK MANAGEMENT METHODS

- **REDUCE HIGH LEVEL RISKS**
- **MANAGE ACCEPTABLE RISKS**
- **DOCUMENT PROCESS FOR LOW RISK ISSUES**

CRC ENVIRONMENTAL RISK MANAGEMENT, INC.

CREATE RELATIONSHIPS WITH ENVIRONMENTAL SERVICE FIRMS WHO SERVE AS COMPETENT ADVISORS AND WHO WILL ASSIST THE COMPANY BY:

- **KEEPING ABREAST OF NEW REGULATIONS**
- **ASSIST IN TRAINING COMPANY PERSONNEL IN ENVIRONMENTAL MATTERS**
- **ASSIST THE COMPANY IN COMPLYING WITH ITS ENVIRONMENTAL POLICY AND PROCEDURES THROUGH DOCUMENTING AND TRACKING ENVIRONMENTAL STUDIES**

CRC ENVIRONMENTAL RISK MANAGEMENT, INC.

SCHEDULE PERIODIC REVIEWS OF THE ENVIRONMENTAL POLICY AND COMPLIANCE PROGRAM

CRC ENVIRONMENTAL RISK MANAGEMENT, INC.

ENVIRONMENTAL RISK MANAGEMENT

- **IDENTIFY POTENTIAL ENVIRONMENTAL RISKS**
- **ASSESS RISK LEVELS**
- **IMPLEMENT MANAGEMENT METHODS**

CRC ENVIRONMENTAL RISK MANAGEMENT, INC.



DEFINE ENVIRONMENTAL RISK MANAGEMENT STRATEGIES AS THEY APPLY TO THE BUSINESS CONDUCTED:

- **MANUFACTURING**
- **INDUSTRIAL**
- **SHOPPING CENTERS/RETAIL**
- **COMMERCIAL OFFICE BUILDINGS**
- **RESIDENTIAL**

CRC ENVIRONMENTAL RISK MANAGEMENT, INC.

IDENTIFY POTENTIAL ENVIRONMENTAL RISKS

- **FROM EXISTING AND HISTORICAL OPERATIONS**
- **FROM EXISTING AND HISTORICAL DISPOSAL PRACTICES**
- **FROM PROPOSED MODIFICATIONS AND OPERATIONAL CHANGES**
- **FROM ACQUISITION, DIVESTURE OR FINANCING ACTIONS**

CRC ENVIRONMENTAL RISK MANAGEMENT, INC.

COMPLIANCE WITH ASTM

- **TIMING OF ENVIRONMENTAL INVESTIGATIONS**
- **LEVEL OF INVESTIGATION:**
  - **TRANSACTION SCREEN**
  - **PHASE I ENVIRONMENTAL ASSESSMENT**
  - **PHASE II INVESTIGATION**
  - **PHASE III**
- **SCOPE OF WORK**

Environmental Benchmarking

"Shake Rattle and Roll"

Paul Pizzi

ATTACHMENTS

1. F. Paul Pizzi Profile
2. *Cooperative Benchmarking*℠
3. *Cooperative Benchmarking*℠ *Grey Paper*
4. *Cooperative Benchmarking*℠ Flow Chart

PROFILE

F. PAUL PIZZI

Paul is the Senior Vice President of Pilko & Associates, Inc. He co-founded the firm in 1980 and is responsible for Pilko's worldwide environmental, health, and safety (EH&S) auditing business.

Paul is currently leading Pilko's Benchmarking activities - - assisting leading companies continuously improve their EH&S performance.

He has been actively involved in EH&S audits and risk assessments at both the corporate and facility level since 1975. Paul has helped many companies structure and implement EH&S audit and compliance review programs. He has also directed worldwide environmental due diligence assessments of businesses for acquisition and divestiture analysis.

Paul started his professional career with Sinclair Refining Company and later continued with SOHIO and BP.

Paul received his bachelor of chemical engineering degree from Villanova University. He is a frequent speaker to senior executives on Strategic Environmental Planning in the 1990s, Cooperative Benchmarking, and trends in EH&S auditing.

COOPERATIVE BENCHMARKING℠

... A Breakthrough in EH&S Benchmarking

My participation in Pilko's Remediation Benchmarking Study was one of the most valuable and educational experiences I have had in understanding the remediation business.

John Mincy
Ciba-Geigy

Utilization of face-to-face meetings with industry peers raised bench-marking to a new level.

David Justin
Sun Company

The sharing of case histories proved to be very effective and an excellent vehicle for imparting key "lessons learned" to our Remediation Project Managers.

Bob Wiederhorn
DuPont

Many corporations try to compare their Environmental, Health & Safety (EH&S) programs with other companies' programs. Yet these efforts often have serious flaws: Industry-group discussions lack depth. Informal company visits lack structure. Consultants may be too costly.

A Breakthrough

The *Cooperative Benchmarking* concept is a breakthrough in EH&S Benchmarking with several distinct elements that produce results far exceeding those realized from traditional benchmarking methods.

The idea for the *Cooperative Benchmarking* concept originated in 1992 when Pilko facilitated a landmark benchmarking study of the EH&S Auditing programs of eight leading companies: Allied-Signal, Amoco, Chevron, Conoco, DuPont, GE, Shell Oil, and 3M.

How It Works

The *Cooperative Benchmarking* process efficiently combines case studies and interactive group dynamics between companies where issues and practices are discussed, debated, and comprehensively evaluated. Unlike traditional methods which rely primarily on surveys, questionnaires, and telephone interviews, the *Cooperative Benchmarking* process **drives to the heart of key issues** through intense interaction among peers, providing a thorough understanding of the "how, why, and why not," not just the "what."

The *Cooperative Benchmarking* process:

- Includes a limited number of companies (ideally seven)
- Is based on a series of two-day meetings, with three companies participating in each meeting
- Is facilitated by individuals knowledgeable in the subject matter and skilled in the facilitation process

Its Value

Cooperative Benchmarking studies have proven to be very popular with major oil and chemical companies at the corporate and headquarters level. The richness and value of this process can best be understood by talking with individuals who have participated in a *Cooperative Benchmarking* study. Following are examples of recent studies facilitated by Pilko.

EH&S Organization & Staffing

In 1993 and 1994, Pilko facilitated two studies for 13 major energy companies that focused on EH&S management issues.

Each study centered around these key factors:

- Structure of the EH&S Organization
- EH&S Staffing at corporate, headquarters, and in the field
- Performance Measurement
- Strategic EH&S Planning
- EH&S Policies
- Universal EH&S Standards

Remediation

Several major oil companies "Partnered" in a study which compared remediation management practices for contaminated service stations and terminals: Amoco, Chevron, Sun, Texaco, and UNOCAL.

In still another study, eight leading companies focused on strategic aspects of remediation at large Corrective Action and Superfund sites: Allied-Signal, ARCO Chemical, AT&T, Ciba-Geigy, DuPont, Monsanto, Olin, and Rhone-Poulenc. (Continued...)

...Using the *Cooperative Benchmarking* model proved to be the critical success factor for this project. The results were of significant value and used to develop strategic plans for the HES function in the future.

Greg Lehman
Sun Company

This study has proven to be a valuable tool to assist Amoco in comparing its "Best Practices" with those of the industry.

Roy Hutson
Amoco

Pilko focused the groups into well organized, meaningful, efficient sessions and effectively summarized the findings.

Mike Terraso
Enron

As an added benefit, Partners in each of these remediation studies agreed to share the results of their study with the other — greatly expanding the benefits of participation.

What's New for 1995?

Accounting for Environmental Costs

Pilko will join efforts with the Institute for Corporate Environmental Management (ICEM) at the University of Houston to form a study on Accounting for Environmental Costs in the Chemical and Refining industries. The ICEM has been heavily involved in ground-breaking development of Accounting for Environmental Costs. Face-to-face sessions will enable Partners to better understand the financial results of cradle-to-grave environmental impacts and corresponding activities within their industry.

Pilko and ICEM recently were approved by the Gulf of Mexico Business Council on Sustainable Development (BCSD) to facilitate a cross-border U.S./Mexico study focusing on Accounting for Environmental Costs. This study will include several U.S. and Mexican companies.

Management Systems / ISO 14000

With the increased complexity of environmental issues facing companies today, there is keen interest in assessing and improving EH&S management systems. And, with the ISO 14000 Environmental Standards expected in 1996, interest is intensifying.

Pilko recently organized a Forum which includes a number of world-class companies in diverse industries that are interested in opportunities to look beyond industry paradigms.

The 1995 Forum will focus on distinct activities such as determining current EH&S Management Systems within each company, identifying innovative approaches and learnings — and planning for the 1996 implementation of ISO 14000.

Additional studies are being planned on these topics:

- Organization & Staffing for Chemical Companies
- EH&S Auditing
- Various Studies at the Plant Level
- CAAA - Title V
- EH&S Issues for European Companies
- EH&S Issues for Canadian Companies
- EH&S Issues for West Coast Utilities

The following companies have participated in recent Pilko *Cooperative Benchmarking* studies:

Allied-Signal	Exxon USA
Amoco	Marathon
ARCO Chemical	Monsanto
Ashland Oil	Olin
Atlantic Richfield	Phillips
AT&T	Quantum
BASF	Rhone-Poulenc
BP Oil	Shell
Chevron	Sun
Ciba-Geigy	Tenneco
CITGO	Texaco
Conoco	TRANSCO
DuPont	UNOCAL
Enron	

Pilko provides management-oriented solutions to complex EH&S challenges.

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PILKO GREY PAPER

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FEBRUARY 1993

PILKO PERSPECTIVE ON COOPERATIVE BENCHMARKING



George Pilko
President

Many corporations try to compare their Environmental, Health and Safety (EH&S) programs with other companies' programs. Yet these efforts often have serious flaws: Industry-group discussions lack depth. Informal company visits lack structure. Consultants may be too costly.

In this issue of the *Grey Paper*, you will find a fresh approach to benchmarking. It is such a departure from typical EH&S-related benchmarking that we've given it a new name: the Cooperative Benchmark, or CB for short.

In a Cooperative Benchmark, a number of corporations with similar EH&S concerns join together to candidly discuss their EH&S programs; they share costs and benefits equally. Our role is to prepare background data, manage logistics, facilitate meetings, and report results.

A CB study provides:

- A flexible format with a sharp focus;
- Direct dialogue between participating companies for unbiased information exchange;
- Consultant facilitation and analysis of data gathered; and
- Low cost - typically less than 20% of a typical consultant benchmarking study.

Our first experiences with Cooperative Benchmarking have been very positive, and we are eager to share this approach. In today's business environment, CB may be the only way to sustain the momentum of continuous EH&S improvement at a reasonable cost.

As always, we appreciate your comments, as well as suggestions, for future *Grey Paper* articles.



TOPIC FOR NEXT *GREY PAPER*:
KEY TRENDS IN AUDITING

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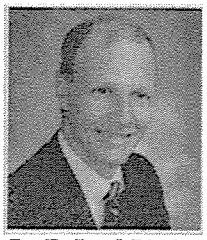
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PILKO
GREY PAPER

FEBRUARY 1993

THE COOPERATIVE BENCHMARK

A New Tool To Measure And Improve EH&S Performance



By F. Paul Pizzi

An outgrowth from traditional benchmarking, the Cooperative Benchmark (CB) is a management tool that we believe will ultimately take root in many successful businesses. This unique approach can make Strategic Environmental Planning more efficient and cost effective than it has ever been before.

To understand Cooperative Benchmarking, it helps to have a good understanding of the way benchmarking has been conducted in the past. We will start here, then describe how the Cooperative Benchmark expands the traditional benchmarking idea. We will conclude with a case study and a summary of the advantages of the CB approach.

OLD FORMS OF BENCHMARKING

You are probably familiar with typical means of benchmarking Environmental, Health and Safety (EH&S) performance and programs:

- **The industry discussion group.** Many companies rely on industry meetings (API, CMA, etc.) as a source of benchmarking information. But these discussions generally last only an hour or so and take place with 50-100 people present, which means that topics cannot be covered in much detail.
- **The informal visit.** Company A wants to know how Company B handles Process Safety Management. So individuals from each company get together and chat for several hours. There is usually no formal agenda or mutually agreed upon pre-meeting "homework." Nor is there a provision for thorough analysis of the information gathered.
- **A consultant takes over.** If Company A is really serious about finding out what others are doing, it may hire a consultant to do the benchmark. The consultant interviews other companies and reports back. The big problem is that major questions may remain unasked because there is no direct contact between companies. Results can be skewed - wittingly or unwittingly - by the preconceived notions and bias of the consultant. This type of benchmark can also be very costly. Typical benchmark approaches often don't gather data in a meaningful way, don't provide indepth information, and/or may be prohibitively expensive.

COOPERATIVE BENCHMARKING PROVIDES BREADTH, DEPTH, LOW COST

The idea for the CB program grew out of benchmarking efforts Pilko has conducted. We have seen the importance of several key factors:

- Extensive preparation prior to meetings.
- Direct meetings between client companies.
- Indepth discussions in small groups.
- Facilitation by a skilled independent consultant.
- Rigorous evaluation of information gathered.

With Cooperative Benchmarking, our aim is to incorporate all these factors in an approach that provides maximum benefits, demands a minimum of our clients' time, and overcomes the limitations of traditional benchmarking methods.

The Pilko CB program is a fixed-price study that costs only 15 to 20% of a typical consultant-mediated benchmark. The program not only costs far less than current benchmark approaches, it produces better results.

LAYING THE CB GROUNDWORK

A Cooperative Benchmark begins when a group of companies (ideally seven) agree to explore a particular topic together. Figure 1 shows a number of the topics supported by Pilko.

COOPERATIVE BENCHMARKING TOPICS

- EH&S audits
- EH&S organization and staffing
- Criminal liability
- Product stewardship
- Process Safety Management (PSM) implementation
- Responsible Care/STEP
- Integrating PSM into Responsible Care/STEP
- Pollution prevention
- EH&S awareness training
- Communications with public, media, and environmental groups
- Hazard communication
- Performance measurement
- Citation/Penalty reduction or elimination
- Crisis control for disasters
- Regulatory affairs tracking, forecasting, and trade organization involvement
- Planning for Clean Air Act Amendments

Figure 1. Cooperative Benchmarking Topics

Once companies have committed to a CB, we circulate a list of potential factors to be investigated within the topic under discussion. For example, an EH&S Auditing CB might look into program objectives, scheduling, staffing, quality assurance, performance measurement, protocols, training, reporting, follow-up, and international considerations.

CB partners use the list as a jumping-off point to arrive at the specific factors the group wants to investigate. The final list provides the input necessary for a detailed questionnaire.

ESTABLISHING A BASELINE

The questionnaire prepared by Pilko may run 15 to 20 pages. It contains specific questions, and it also asks each company to identify the most troublesome issues within the area to be benchmarked.

The questionnaire is useful in many ways: It gathers information needed to construct an agenda for the meetings, so they can run efficiently. It forces everyone participating in the CB to clearly organize their thoughts, which saves an immense amount of time. The questionnaire also solicits important background documentation (corporate policy statements, protocols, audit checklists and the like) as back-up.

In short, the questionnaire establishes the baseline for the entire CB process. It points up major differences between companies, and it tells Pilko where to focus discussions and how to facilitate the meetings that follow.

Figure 2 shows two questions (of 56) taken from a typical environmental auditing questionnaire.

- If significant modifications have been made to your program since its inception, what areas have been changed?
  a. Objectives and scope
  b. Organization and management
  c. Protocols and procedures
  d. Audit team composition
  e. Sites audited
  f. Methods used to collect or verify data
  g. Documentation procedures
  h. Follow-up procedures
  i. Measurement of program effectiveness (Quality Assurance)

- Which of the following protocols or procedures has your company adopted in written form?
  a. Audit program description
  b. Development and maintenance of audit procedures
  c. Selection of sites for audits and overall schedules
  d. Pre-audit coordination and planning
  e. Auditor training
  f. Selection of auditors
  g. Structure of teams and responsibilities of audit team members
  h. Documentation and reporting of findings
  i. Development of corrective action plans
  j. Records retention and security
  k. Quality assurance of audit program
  l. Monitoring of corrective actions
  m. Maintenance of reference materials
  n. Selection of topics for specific audits
  o. Special purpose audits
  p. Summary reporting to senior management

Figure 2. Two questions from a typical audit benchmarking questionnaire.

ENSURING DIRECT CONTACT

A bit of clever mathematics shows that it's possible to enable direct contact between all CB partners through a small number of meetings involving only a few companies at each meeting. Limiting each meeting to three companies helps discussions stay focused, and having more than two companies at each meeting reduces the total number of meetings (and thus the total time commitment). Meetings take place over a two- to three-month period and require one to two days each.

Each meeting starts with a review of objectives. Then each company presents its operations and reviews flowcharts that Pilko has prepared from completed questionnaires. Pilko acts as facilitator in talking through the flowcharts, modifying, and expanding them, until every participant in the meeting has a good understanding of every other participant's operational systems. Companies also arrive at a much clearer understanding of their own systems, because they are being queried by some of the top professionals in the country.

Once company presentations are complete, the group discusses specific topics of interest. Throughout the process, each company gains from the opportunity to question others directly and from the industry expertise of the facilitator. When all meetings have been completed, Pilko prepares a detailed report. The report summarizes the discussion points and highlights the programs used by each company to address the issues.

The Cooperative Benchmark concludes with Pilko's executive briefing to each participating company, which can then use the CB results to modify, expand, or reorient its activities in the benchmarked area. Many companies use the CB to maintain continuous improvement in their Total Quality Management process.

RESULTS OF A SUCCESSFUL COOPERATIVE BENCHMARK

Pilko recently completed a prototype Cooperative Benchmark involving seven major companies: Amoco and Conoco sponsored the CB, and Allied-Signal, Chevron,

GE, Shell, and 3M participated, along with Conoco's parent company, Du Pont. This particular study was funded solely by the sponsors; the participants received all relevant information about the sponsors but not from other participants.

This CB focused on EH&S auditing issues, both domestic and international. One of the most useful features was the different industries represented by the companies involved: chemical, energy, manufacturing, consumer goods, and electronics.

The success of this study encouraged us to modify the CB approach to make it more widely available.

WHAT CB REQUIRES - AND WHAT IT OFFERS

To be successful, a Cooperative Benchmark requires:

- Corporate partners with established programs;
- Open sharing of strengths and weaknesses;
- Intellectual curiosity and the courage to accept that your company's program may not be the best in everything;
- A knowledgeable and experienced facilitator; and
- Thorough analysis of the findings.

CB offers these advantages:

- **Flexibility.** Questionnaires and meeting agendas can be customized to meet the needs of all partners in the CB. "Hot buttons" within any particular company are easy to include.
- **The opportunity to adapt selected best techniques of leading companies.** Because a CB involves multiple companies from various industries, it offers unparalleled breadth and depth of scope. Managing EH&S issues is so complex that no one company can stay up with changing regulations and master the dragon on its own. A CB provides feedback that cannot be obtained any other way.
- **Unbiased information.** A Cooperative Benchmark facilitates candid dialogue between partner companies so that everyone has the opportunity to ask questions and receive answers directly.
- **Minimal cash outlay.** Because costs are shared, each partner pays only about 15 to 20% of the cost of a typical consultant-facilitated benchmarking study. Cooperative Benchmarking provides an easy way to maintain the momentum of continuous improvement, in spite of budget constraints and down-sizing.
- **Expert facilitation.** The consultant acts as an impartial third party whose key interest is in ensuring effective flow of information. (The consultant may also bring to meetings his or her knowledge of other industries and other companies' approaches.)
- **Minimal use of internal resources.** As facilitator, Pilko develops questionnaires and similar materials, evaluates responses, establishes meeting agendas, and reports results. Pilko also coordinates all the logistics associated with the meetings.
- **Enables identification.** Since there is direct dialogue between all partners, factors that enable a company to install best techniques can be explored to determine if and how these techniques can be applied to other companies.
- **Solid information.** The standardized and thorough analysis behind Cooperative Benchmarking helps ensure that data is truly meaningful.

In our experience with Cooperative Benchmarks, we have found that participating companies gain not only new ways to approach their own problems, but also a greater appreciation of other companies' expertise. We believe that Cooperative Benchmarking will become the norm for industry comparative studies in the future.

PILKO & ASSOCIATES, INC. BACKGROUND

Pilko & Associates is a nationwide consulting firm providing quality service to a broad range of clients in the following areas:

Strategic Environmental, Health and Safety Planning (SEP)

Acquisition and Divestiture Due Diligence

Litigation Support Services

Environmental Permitting

Environmental, Health and Safety Risk Assessment

Industrial Site Selection

Additional copies of this *Grey Paper* can be obtained by calling Pat White at (713) 861-1417. As always, we look forward to your comments as well as suggestions for future *Grey Paper* topics.

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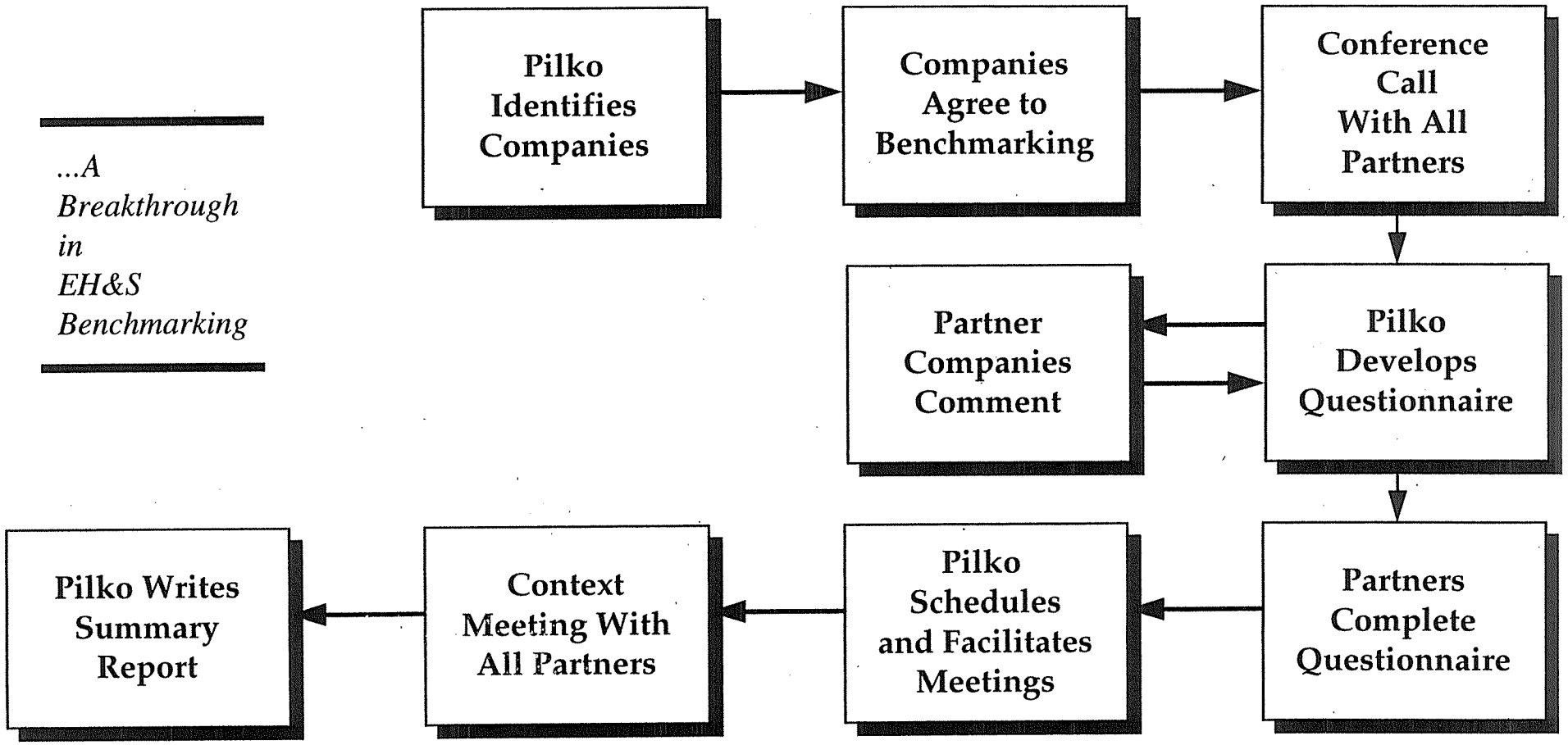
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Pilko & Associates, Inc.
Cooperative Benchmarking$_{SM}$

...A Breakthrough in EH&S Benchmarking



Environmental Benchmarking "Shake Rattle & Roll"

Seventh Annual Texas Environmental Superconference

August 4, 1995



PILKO & ASSOCIATES, INC.

Topics

- Traditional EH&S Benchmarking
- *Cooperative Benchmarking*
- Completed/Ongoing Studies
- Future Studies
- Internal Benchmarking

Traditional EH&S Benchmarking

- Approach A - Trade Associations
  - Large Groups
  - Limited Time
- Approach B - "Visiting" With Another Company
  - No Formal Agenda
  - Limited Analysis Of Information
- Approach C - Consultants
  - No Direct Contact With Other Companies
  - Consultant's Bias And Filtering
  - Costly

The Need ....
.... For A Breakthrough

- Most Organizations Are "Rightsizing"
- Budgets Are Squeaky-Tight
- EH&S Requirements Becoming More Complex
- The Board, Senior Management, And The Public Demand Continuous EH&S Improvement



" There used to be seven of us; but we lost Grumpy, Sneezy, Bashful and Doc in the restructuring."

*Cooperative Benchmarking*SM

A New Tool To Measure And Improve EH&S Performance

PILKO & ASSOCIATES, INC.

Stages Of EH&S Management

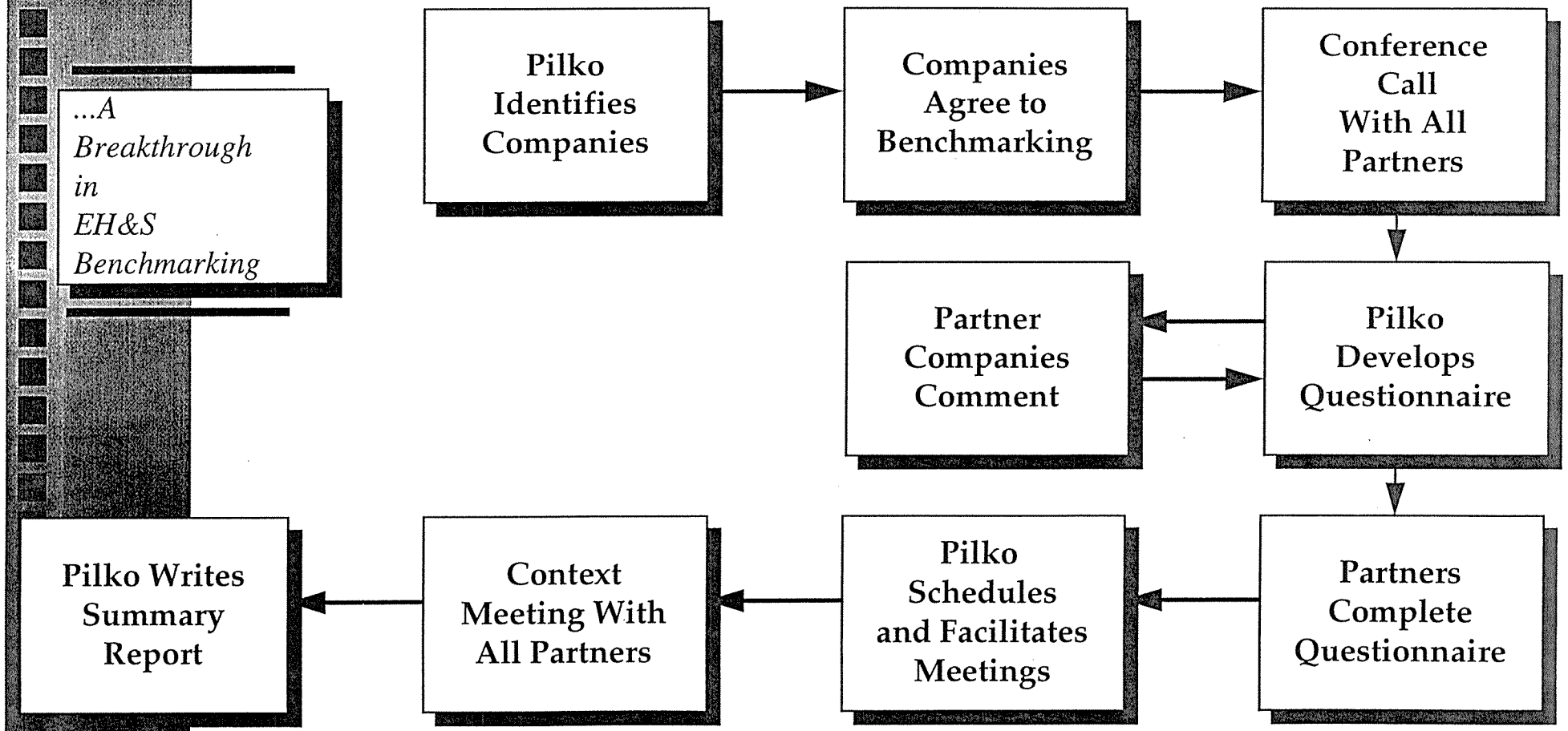
STAGE 1	STAGE 2	STAGE 3
Compliance with Existing Regulations	Stage 1 Plus Planning for Proposed Regulations	Stage 2 Plus Selective Actions Beyond Regulations



REACTIVE **PROACTIVE**

Pilko & Associates, Inc.
*Cooperative Benchmarking*SM

...A Breakthrough in EH&S Benchmarking



Cooperative Benchmarking is a Service Mark of Pilko & Associates, Inc.

PILKO & ASSOCIATES, INC.

EH&S Auditing Benchmarking

CLIENTS	**PARTNERS**
Amoco	Allied-Signal
Conoco	Chevron
	GE
	Shell
DuPont	3M

EH&S Auditing Benchmarking

- ARCO Chemical
- Atlantic Richfield
- AT&T
- Caltex
- Ciba-Geigy
- Elf Atochem
- Kerr-McGee
- Rhone-Poulenc
- Shell

Organization & Staffing Benchmarking

- 1993
  - Amoco
  - BP
  - Enron
  - Exxon
  - Phillips
  - Shell
  - Sun
- 1994
  - ARCO
  - Ashland
  - CITGO
  - Conoco
  - Marathon
  - Texaco

Key Learnings
Organization & Staffing

- Organization & Structure
- Performance Management, Measurement & Reporting
- Auditing

Organization & Structure

- Effectively Integrating EH&S Planning With Ongoing Business Planning Activities
- Moving Audit Function Outside EH&S Group
- Having Senior Line Managers Head Significant EH&S Efforts, Such As:
  - Developing Standards
  - Designing Performance Measurement Systems

Organization & Structure

- Carefully Evaluating What Corporate EH&S Can / Should / Must Do – Given Time, Budget, and Resource Constraints
- Supplementing "Stretched" Internal Resources by Outsourcing Activities Such As Auditing and Due Diligence

Performance Management, Measurement & Reporting

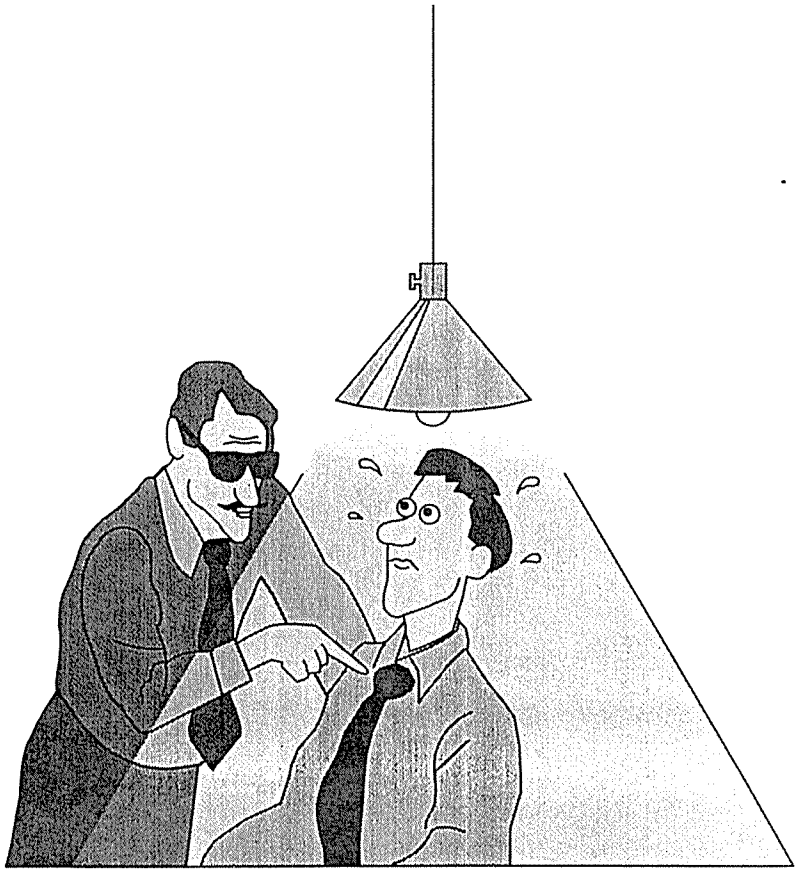
- Having Line Managers Report EH&S Performance to Senior Management
- Defining "Inputs"
  - Establishing Connection with "Outputs"
  - Measuring & Reporting
- Being More Visible in Efforts to Change the Paradigm of How Industry Works with Agencies

Auditing

- Improving Receptivity of Program by Line & Business Managers

Auditing

"...there are only 87 findings...."



Auditing

- Improving Receptivity of Program by Line & Business Managers
  - Alignment of Goals & Objectives
  - Awareness Training
  - Communications
- Considering "Layered Audit" Concept
  - Oversight
  - Compliance Assurance
  - Formalized Self-Audits

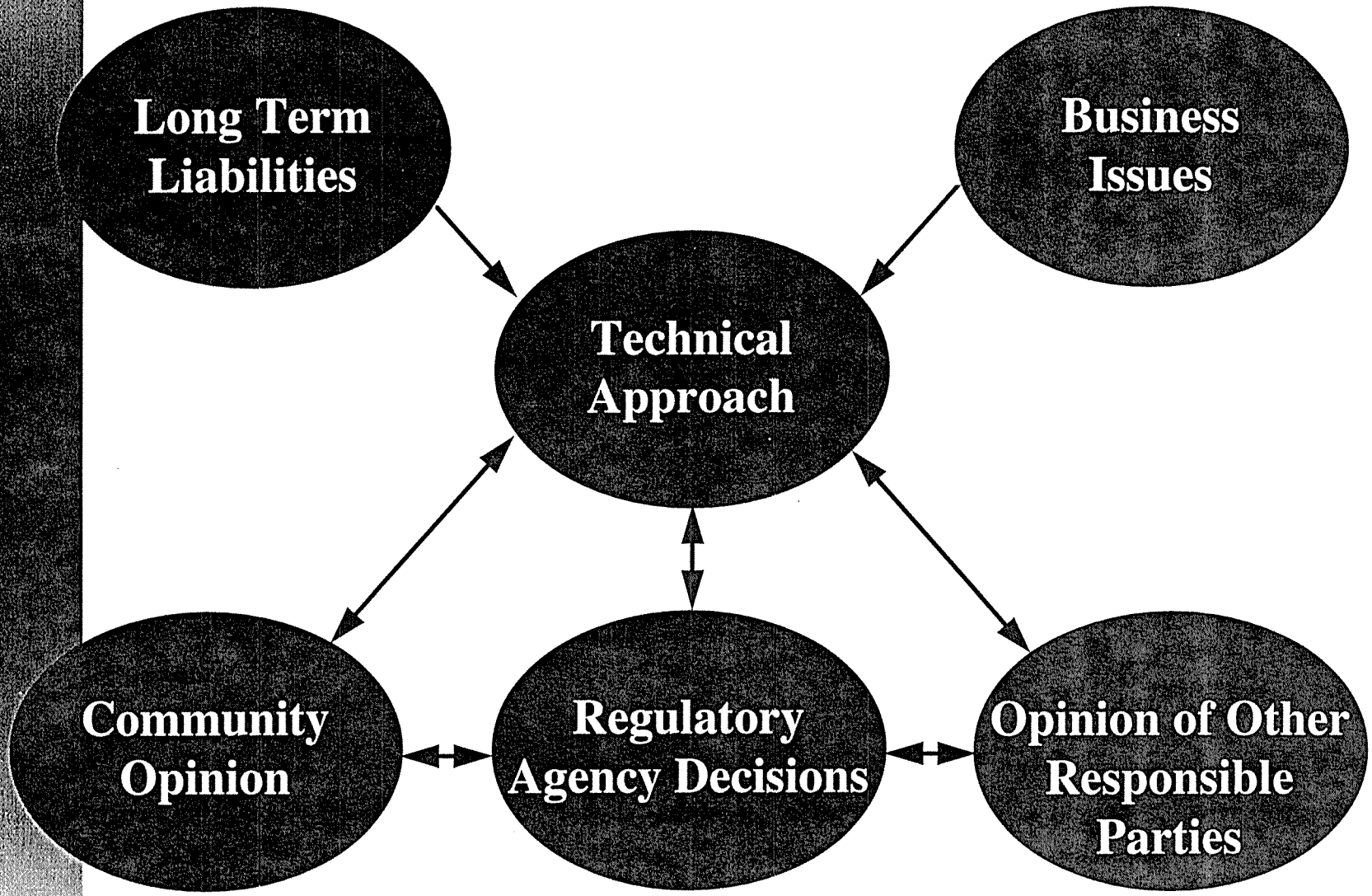
Remediation For Oil Companies

- Amoco
- Chevron
- Sun
- Texaco
- UNOCAL

Remediation For Chemical Companies

- Allied-Signal
- ARCO Chemical
- AT&T
- Ciba-Geigy
- DuPont
- Monsanto
- Olin
- Rhone-Poulenc

Complex Relationship Of Issues



Key Learnings
Controlling Remediation Costs

- Organization/Staffing
- Regulatory Agency Interface
- Legal Support

Organization / Staffing

- Manage Remediation *Like a Business*
- *Team Approach* Is Essential
- *Project Manager Experience* Is Critical
- Project Managers Must Be *Empowered*

Regulatory Agency Interface

- *Use Relationships Rather Than Strict Process* To Drive Project
- Understanding The *Personal Objectives Of The Agency RPM* Is Essential For Minimizing Costs
- *Agencies Respond To Community Concerns* Which Impact Their Preference For Investigation, Remediation, and Timetables

Regulatory Agency Interface

- *Be Aggressive* With Agencies

  "If You Don't Ask, You Don't Get It" Persistence Pays. Don't Take No For An Answer - Agencies Can Be Flexible When They Want To.

Legal Issues For Remediation Projects

- *The Remediation Team Leader Should Set Strategy* For All Issues With Legal Support
- *Use Legal As A Defense* Rather Than Driving The Process
- Generally, A *Legal Approach Does Not Encourage Win-Win Solutions*

ontinuous Improvement hrough Cooperative Benchmarking

- Assess Current Effectiveness Of EH&S Organization
- Maintain EH&S Momentum While Reorganizing, Downsizing, Belt-Tightening, Etc.
- Adapt Other Leading Companies' Ideas
- Share Costs With Others
- Minimize Unproductive Use Of Valuable Internal Resources

Internal Benchmarking

- Compare Effectiveness Of Programs
- Analyze Progress Of Functional Groups
- Determine Performance Of Operating Companies
- Improve Effectiveness Of Corporate / Plant Relationships

Future Benchmarking Studies

- Management Systems/ISO 14000
- EH&S Auditing
- Plant Level (Various Topics)
- Organization & Staffing (Chemical Companies)
- Environmental Cost Accounting
- Acquisition & Divestiture Risk Management
- Environmental Litigation Management
- Remediation Management
- European Companies (EH&S Management)

Cross-Border U.S./Mexico: Accounting For Environmental Costs

- Celanese Mexicana
- Ciba-Geigy
- Coastal
- Grupo Primex
- Pemex-Refinacion
- Pennzoil

ISO 14000/ Management Systems

- ARCO Chemical
- AT&T
- BASF
- Brown & Root
- Chevron Chemical
- Ciba-Geigy
- Quantum Chemical
- Rhone-Poulenc
- Tenneco
- Texaco
- TRANSCO

EPA Region VI Update

"All Shook Up"

Sam Coleman

BIOGRAPHICAL INFORMATION

SAMUEL COLEMAN

Samuel Coleman (Sam) is currently the Director for the Compliance Assurance and Enforcement Division in EPA Region 6. Mr. Coleman held several positions at EPA prior to his current position, including Deputy Director of the Office of Site Remediation Enforcement (OSRE), Chief of the Policy and Regional Operations Branch in the RCRA Enforcement Division, Office of Waste Program Enforcement (OWPE), Office of Solid Waste and Emergency Response (OSWER). In Region 6, Mr. Coleman held the position of Chief of the RCRA Enforcement Texas Section and the Underground Storage Tanks Branch.

Before coming to EPA, Mr. Coleman held several positions with the U.S. Army Corps of Engineers in the Dallas/Fort Worth area and in Seoul, Korea. Mr. Coleman holds a B.S. Degree in Civil Engineering from Prairie View A & M University and is a Registered Professional Engineer.

# # # # # # #

TNRCC Decision Making

"Love Me Tender"

David Bolduc

DAVID BOLDUC
Biographical Sketch

David Bolduc was named General Counsel to the Texas Natural Resource Conservation Commission (TNRCC) in February 1995, after serving as Assistant General Counsel before his appointment as the chief legal advisor to the Commission. Prior to joining the TNRCC, Bolduc served as an Assistant Attorney General and Chief of the Workers' Compensation Division in the Office of the Attorney General of Texas. He also served as Deputy General Counsel for the Texas Department of Agriculture and spent more than ten years as an attorney in private practice in Austin, concentrating on legislative, tax, and business issues. He has degrees from Bowdoin College and The University of Texas School of Law.

Decision Making at the Texas Natural Resource Conservation Commission

David Bolduc
General Counsel
Texas Natural Resource Conservation Commission

Prepared for the Seventh Annual Texas Environmental Superconference,
August 3-4, 1995

CAVEAT: The views and opinions expressed herein are solely those of the author in his individual, not official, capacity. The author does not intend, nor does he have the authority to, offer opinions on behalf of the Texas Natural Resource Conservation Commission, its Chairman, its Commissioners, or its Executive Director.

Decision Making at the Texas Natural Resource Conservation Commission

Introduction

This paper summarizes some information about how decisions are made and how the decision making process functions at the Texas Natural Resource Conservation Commission (TNRCC), in the hope that the information will be useful to those who practice before the Commission. It is not intended to be an exhaustive catalog of all the decision making processes at the TNRCC, but rather a discussion of those matters most likely to affect a practitioner in the conduct of matters (primarily contested cases) before the Commission - that is, before the three Commissioners sitting as a body in their official capacity.[1]

Several types of decisional processes will be addressed: those delegated by the Commission to the Executive Director, those delegated to the General Counsel, and those exercised only by the Commission. Only pre-referral and post-hearing matters that occur in contested cases will be dealt with here, since the transfer by the 74th Legislature in Senate Bill 12[2] of hearings duties from the TNRCC's Office of Hearing Examiners to the State Office of Administrative Hearings will be addressed elsewhere during this conference. Although no attempt will be

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1 Notwithstanding the careful legislative process of consolidating the Texas Water Commission, the Texas Air Control Board, and part of the Texas Department of Health into one agency, the statutes governing the operations of the Texas Natural Resource Conservation Commission still refer both to the three Commissioners acting as a body and to the agency which they oversee as "the Commission". While the distinction can be of more than academic interest to those dealing with the TNRCC, no attempt will be made here to elaborate on it, and the phrase "the Commission" will be used to refer to the three Commissioners acting as a body.

2 All references to Senate or House Bills herein are to bills considered during the Regular Session of the 74th Legislature in 1995.

made to detail the manner in which the Executive Director makes a decision, the author will attempt to give some insight into the other decisional processes under discussion, and to indicate some issues that may affect parties appearing before the Commission.

MATTERS DELEGATED TO THE EXECUTIVE DIRECTOR

No attempt will be made here to examine the general duties delegated to the Executive Director, though these matters may be found in the Water Code,[3] or to examine powers given to the Executive Director by law, such as the power to institute suit for violating the Texas Clean Air Act or a board order or rule.[4] Rather, the discussion will focus on matters delegated to the Executive Director by the Commission, and specifically on permitting matters which are likely to be of interest to the regulated community. These basically involve emergency orders and uncontested permitting matters.

Emergency Orders

As an example, Section 382.063 of the Texas Clean Air Act provides for the issuance of emergency orders by the Commission, or by the Executive Director on delegation of authority from the Commission, in the event of catastrophe.[5] Similar provisions exist for water and wastewater orders.[6] This authority has been delegated to the Executive Director,[7] and as a practical matter, practitioners may it simpler to obtain such an order from the Executive Director than from the Commission, since the Commission may want an application for an emergency order to be reviewed by the Executive Director's staff because of their technical expertise, and because an emergency meeting of the Commission can be difficult to arrange, given the constraints of the Open Meetings Act and the difficulties associated with ensuring the presence of a quorum of the Commission.

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3 V.T.C.A., Water Code, §§5.221 - 5.337.
4 V.T.C.A., Health and Safety Code, §382.082.
5 V.T.C.A., Health and Safety Code, §382.063.
6 V.T.C.A., Water Code, §382.063, and V.T.C.A., Health and Safety Code, §361.301.
7 30 TAC Chapter 116, Subchapter E, and 30 TAC §§305.25, 305.30.

Other Matters and Senate Bill 741

Prior to 1995, the Commission by resolution had delegated a number of matters, and specifically those dealing with uncontested or unopposed permitting matters, to its Executive Director.[8] The 74th Legislature ratified and codified this delegation with respect to permitting matters in Senate Bill 741, which added Section 5.122 to the Water Code to permit the Commission to delegate uncontested matters to its Executive Director. The bill also ratified most actions taken by the Executive Director (other than those held invalid by a court of competent jurisdiction) on such delegated matters prior to the bill's effective date.[9]

Matters that may be delegated to the Executive Director under Section 5.122 include applications or other requests "to issue, renew, reopen, transfer, amend, extend, withdraw, revoke, terminate, or modify a permit, license, certificate, registration, or other authorization or approval"[10] - in other words, most matters generally thought of by the public as "permitting" matters. For the Executive Director to resolve these matters under his delegated authority, the required notice of the matter must have been given, the holder of or applicant for the authorization or approval must agree in writing, and the application or request must be uncontested or must have become uncontested because all parties to it have agreed in writing.[11]

Persons affected by actions taken by the Executive Director under Section 5.122 may appeal these actions to the Commission[12], except for matters decided regarding federal operating permits under Sections 382.051 - 382.055 or 382.059 of the Health and Safety Code, which must be appealed to the administrator of the United States

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8 Texas Natural Resource Commission Resolutions of August 18, 1993 and January 26, 1994.

9 Senate Bill 741, Section 2.

10 V.T.C.A., Water Code, §5.122(a).

11 V.T.C.A., Water Code, §5.122(a)(1)-(3).

12 V.T.C.A., Water Code, §5.122(b).

Environmental Protection Agency in accordance with the Commission's rules adopted under Section 382.0563 of the Health and Safety Code.[13]

New Procedural Rules

The Commission has proposed, as part of a redraft of its procedural rules this summer,[14] to delegate most uncontested permitting matters to the Executive Director. This delegation is contained in 30 TAC Chapter 263, Subchapter A of the proposed procedural rules published by the Commission in the Texas Register on July 11, 1995.[15] For the Executive Director to decide one of these matters, it must not raise new issues which require the interpretation of commission policy; the staff and Public Interest Counsel must not raise objections; and no timely protests or requests for hearings may have been filed on the matter, or, if any have been filed, the requests or protests must have been withdrawn.[16] The proposed rules specifically provide that matters may be referred by the Commission[17] or the State Office of Administrative Hearings[18] to the Executive Director for action if all protests, objections, and requests for hearing are withdrawn. These provisions should eliminate the delays occasioned by the current process, in which contested matters that have been settled must still be put on the Commission's agenda, rather than being dealt with by the Executive Director.

Benefits

The primary benefit to applicants of action by the Executive Director, rather than the Commission, on permitting matters is the speed with which they can be processed. Since these matters are no longer contested, they are not resolved by the Commission in open meeting, and neither the notice requirements of the Open Meetings Act[19] nor the

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13 V.T.C.A., Water Code, §5.122(c) and V.T.C.A., Health & Safety Code, §382.0561.

14 Published at 20 TexReg 5013 - 5049 on July 11, 1995, and at 20 TexReg 5167 - 5171 on July 18, 1995. Citations to these proposed rules herein will be to "Proposed 30 TAC ...".

15 Proposed 30 TAC §263.1 - 263.12.

16 Proposed 30 TAC §263.2(3)-(5).

17 Proposed 30 TAC §§263.5, 265.160, and 265.163(b)

18 Proposed 30 TAC §§263.5, 265.41.

19 V.T.C.A., Government Code, Chapter 551.

"contested case" provisions of the Administrative Procedure Act[20] apply. In addition, the delays occasioned by the Commission's publication, backup, and agenda preparation process[21] (from 3-4 weeks under ordinary circumstances, even on settled matters) can be significantly shortened, and an application for a permit or authorization granted in a much shorter time frame.

MATTERS DELEGATED TO THE GENERAL COUNSEL

The Commission has broad authority under the general provisions of the Water Code to delegate powers to its General Counsel.[22] While in the past this delegation has been informal, one of the effects of the procedural rules revision proposed by the Commission this summer is to formalize and extend this delegation, generally in an attempt both to make the delegation clear and to simplify some matters for those appearing before the Commission. While the proposed delegation includes primarily procedural matters, some more substantive matters, such as the initial determination of the validity of a request for hearing, are delegated in part.

Procedural Matters

Given the procedural limitations on the conduct of Commission meetings imposed by the Open Meetings Act,[23] it may have been difficult in the past for a practitioner to determine how the Commission could act on a motion for continuance or for an extension of time, or even to determine when a matter would be set on the Commission's agenda. The rule revisions proposed by the Commission this summer would clear up this confusion by specifically delegating to the General Counsel the power to waive filing requirements or to impose additional requirements for filings in anticipation of Commission meetings,[24] to change filing deadlines for pleadings following the issuance of a proposal for decision

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20 V.T.C.A., Government Code, Chapter 2001.
21 See the section on Timing Constraints below.
22 V.T.C.A., Water Code, §5.110(d).
23 V.T.C.A., Government Code, Chapter 551.
24 Proposed 30 TAC §261.17(h).

by the State Office of Administrative Hearings,[25] to reschedule the presentation of a proposal for decision,[26] to set the amount of time for oral presentations[27], and to modify the time limits for the filing for motions for rehearing and the replies thereto.[28] These provisions generally expand and make explicit the current Commission practice of exercising control over the matters set on its agenda through its General Counsel.

The idea behind these proposed rules is not to grant more power to the General Counsel, but rather to make it simpler for parties and their attorneys to deal with the Commission on procedural matters, by providing an explicit mechanism for these to be resolved without the necessity of calling a Commission meeting or setting them on the agenda for an already called meeting - a necessity which can lead to counsel having to produce their clients and witnesses for a hearing at which they will also be arguing a motion for continuance, because there is no earlier available mechanism to have the motion granted or denied, and they have been unable to secure the agreement of all parties to the continuance.

Practitioners may want to note that the historical practice of the Commission has been to defer many procedural matters concerning Commission meetings, such as requests for additional time for argument, or requests to have matters heard at a particular time during a Commission meeting, to its General Counsel. Parties who anticipate the need to make such a request should contact the General Counsel well in advance (and should, of course, refrain from discussing non-procedural matters of fact or law).

Substantive Matters

In addition to the procedural matters delegated to the General Counsel by this summer's proposed rule revisions, three more

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25 Proposed 30 TAC §265.154(d).
26 Proposed 30 TAC §265.156.
27 Proposed 30 TAC §265.157.
28 Proposed 30 TAC §265.164(d).

substantive matters are delegated to the General Counsel by the proposed rules: the setting of certified questions from the State Office of Administrative Hearings, the setting of motions for rehearing, and the handling of hearings requests.

Certified Questions

Under the rules proposed this summer, the General Counsel, or one or more Commissioners through the General Counsel, may request that a certified question from the State Office of Administrative Hearings be set for consideration during a Commission meeting.[29] This is the practical equivalent of the balloting procedure used by some entities, in which any single member can cause a matter to be set before the whole body. Since the proposed rule provides that the General Counsel has 15 days to respond to the request, it should enable parties to obtain a fairly speedy determination of whether or not a certified question will be considered by the Commission.

Motions for Rehearing

The proposed rules allow the General Counsel to determine whether a motion for rehearing will be set upon the Commission's agenda.[30] This represents a change from the current practice, in which parties are often unable to determine whether a motion for rehearing will be heard by the Commission until the time for acting on it expires by operation of law or until they receive notice that it is on a Commission meeting agenda, and must simply wait to see what happens.

Practitioners may want to note that as a result of the authority given the General Counsel by the proposed rules to direct the parties concerning the amount of time for oral presentations on motions for rehearing,[31] several options will now be available to the Commission when handling a motion for rehearing: (1) refusing to set the motion for Commission action and having it overruled by operation of law; (2) ruling on the motion for rehearing after considering only the pleadings, *i.e.*, the

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29 Proposed 30 TAC §265.71.
30 Proposed 30 TAC §265.164(c)(1).
31 Proposed 30 TAC §265.157.

motion and any replies to the motion, with no oral argument; and (3) ruling on the motion after oral argument.

One might reasonably surmise that the availability of these options could lead to a more predictable process at the Commission of dealing with motions for rehearing, with these generally being set and dealt with on the pleadings alone. This may, in turn, lead to more rapid finality of Commission orders as fewer motions for rehearing are overruled by operation of law and more are dealt with at Commission meetings.

Hearing Requests

With the transfer of the majority of its evidentiary hearings to the State Office of Administrative Hearings,[32] the Commission faces new challenges in dealing with hearing requests in a manner that is expeditious, avoids unnecessary delays, and remains fair to applicant and protestant alike. Of paramount interest to the Commission and the parties in this process is the determination of whether or not a request for hearing causes a matter to be sent to the State Office of Hearings Examiners, or whether it remains at the Commission for disposition by the Commission or the Executive Director.

As a solution to this problem, the Commission has proposed that the initial determination of the validity of a hearing request (that is, whether or not the request meets the requirements set forth in the rules) be delegated to its General Counsel.[33] Under the proposed rule, affected persons may request that a contested case hearing be held concerning an application.[34] The Commission's chief clerk will forward a copy of the request for hearing to the General Counsel, Executive Director, Public Interest Counsel, and applicant.[35] The latter three may then submit written responses to the request for hearing, and the General Counsel may require the person requesting a hearing to submit affidavits or other competent evidence, and may hold a meeting, in person or by telephone,

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32 The Commission itself may still consider temporary and emergency orders, and possibly other matters. See, for example, V.T.C.A., Health and Safety Code, §382.063.

33 Proposed 30 TAC §263.23.

34 Proposed 30 TAC §263.22.

35 Proposed 30 TAC §263.23(a) - (b).

to discuss the request.[36] This procedure closely follows (except for the added ability to require affidavits or other competent evidence, occasioned by the passage this session of Senate Bill 1546) the procedure currently followed by the Office of Hearing Examiners.

If the General Counsel determines that a hearing request is not valid, both the request and the application will be scheduled for Commission consideration,[37] a process that mirrors that currently followed. If the General Counsel or the Commission determine that the request is valid, the case will be referred to the State Office of Administrative Hearings for further proceedings.[38] It should be noted that the proposed rules also require that the hearing request be made by an affected person (see Senate Bill 1546) and must be reasonable,[39] in light of Senate Bills 1125 and 1126 and Commission rules.

Under the proposed rules, the initial determination by the General Counsel of the validity of a hearing request is not finally dispositive and may be appealed by both parties. Should the General Counsel determine that a hearing request is not valid, the requestor may have the Commission determine whether it should be granted.[40] Should the General Counsel determine that a hearing request is valid, the applicant may possibly both contest the requestor's status as a party[41] (presumably asking that the matter be remanded to the Executive Director if the requestor is determined not to be an affected party)[42] and request that the issue of whether or not the hearing request is valid be submitted to the Commission as a certified question.[43]

The intended effect of these proposed rules is not to create a complicated series of processes through which a hearing request must pass, but rather to attempt to construct a system that increases the

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36 Proposed 30 TAC §263.23(c)(1).
37 Proposed 30 TAC §263.23(d).
38 Proposed 30 TAC §263.23(e).
39 Proposed 30 TAC §263.24.
40 Proposed 30 TAC §263.23(d).
41 Proposed 30 TAC §§265.43, 265.61, and 265.67.
42 Proposed 30 TAC §§253.5, 265.41.
43 Proposed 30 TAC §265.71.

likelihood of dealing with permitting matters in a swift and fair manner, without imposing unnecessary delays occasioned by hearing requests that do not meet the requirements of the law, and while ensuring that valid hearing requests lead to the expeditious setting of matters for hearing.

Practitioners may want to note that the rules on hearing requests, like the other procedural rules proposed this summer, have an expiration date in May of 1996. This represents a recognition by the Commission that even the best laid plans may go awry, and a commitment to revisit these rules after some experience has been gained with them and with Senate Bill 12. In this setting, it seems obvious that the Commission and its staff will be greatly interested in comments in the coming months from practitioners and the public about the actual (as opposed to the intended) effect of the proposed rule revisions.

The proposed procedural rules are, of course, only proposals, and it is possible that the Commission might take another tack on the issue of how to deal with hearing requests before adopting these rules. One possibility that can be envisioned is to simply substitute an alternative dispute resolution or mediation office for the General Counsel in the rules dealing with hearing requests. Such an office might both deal with requests for hearing, and determine if there is any likelihood of the dispute between the applicant and the person requesting a hearing being resolved without referral to the State Office of Administrative Hearings. On this matter, as on other issues raised by the proposed rules, it can reasonably be anticipated that the Commission will carefully evaluate public comment and may make some changes to the rules as proposed in response to that comment.

MATTERS DECIDED BY THE COMMISSION

The matters dealt with here fall into two general areas - general considerations of the limits placed upon Commission action by the law or its own policies, and Commission procedures leading up to and involving Commission meetings.

General Considerations - the Limits

No party appearing before the Commission can afford to remain uninformed about two major limits on the Commission's authority to consider the matters that come before it - prohibitions against *ex parte* communications and the problems occasioned by the application of the Open Meetings Act to a three-member commission. Additionally, the limits imposed on the Commission by the posting requirements of the Open Meetings Act and by its own procedures regarding mailing of meeting agendas and the preparation of backup materials can impose some constraints on when the Commission may consider a matter.

Ex Parte Communications

In any contested case[44], particularly permitting and enforcement matters, the Administrative Procedure Act's prohibition against *ex parte* communications[45] clearly applies to the three Commissioners of the TNRCC, as do other prohibitions against ex parte communications, such as those in the Health and Safety Code.[46] The Commission's practice in the recent past has been to construe this prohibition broadly, and generally to avoid communications which even resemble *ex parte* communications on matters of fact or law, even when they can be argued to be within the limits permitted by *Vandygriff*.[47] Thus, for instance, the Commissioners have generally refused to engage in *ex parte* communications with parties or those who may become parties to permitting matters that *may* become contested. For example, the Commissioners have generally declined to communicate with those who are or may become parties to a permit application between the point when it is clear that an application that is likely to be contested will be filed and the actual filing of the application and receipt of hearing requests.

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44 Defined in V.T.C.A., Government Code, §2001.003(1).
45 V.T.C.A., Government Code, §2001.061.
46 V.T.C.A., Health and Safety Code, §361.0831.
47 *Vandygriff v. First Savings and Loan Ass'n of Borger*, 617 S.W.2d 669 (Tex. 1981).

This practice, while arguably sometimes awkward, has had the advantage of avoiding even the appearance of impropriety in an arena that often attracts public attention and generally engenders strong feelings on the part of the participants. The result for parties or prospective parties to permitting matters is that communication with the Commissioners outside of Commission meetings ceases at a relatively early stage of the proceedings.

Open Meetings Problems

The requirement of the Open Meetings Act that every meeting of a public body must be open to the public, except where provided by the Act,[48] coupled with the Act's definition of a meeting as a deliberation between a quorum,[49] and a quorum as a majority of a governmental body,[50] mean that for a three-member body, such as the Commission, there is effectively no way for two Commissioners to discuss much of their business outside of open meetings of the Commission. As a result, and perhaps also under the influence of *Acker*,[51] the Commission's recent history has been one of avoiding even the appearance of an unauthorized closed meeting, to the extent that the Commissioners rarely spend time together outside of their meetings, and then generally have a "chaperone" available (usually in the person of the General Counsel or one of his or her staff) to ensure that no Commission business is discussed. This practice has extended even to briefing sessions with staff, which, though not violative of the Act,[52] have been avoided by the Commission in recent times.

The practical impact of this on those appearing before the Commission is that their contacts with Commissioners, even on uncontested matters, are somewhat constrained, and contact with more than one Commissioner at a time is generally not possible. Thus, persons interested in matters not subject to the *ex parte* provisions of the Administrative Procedure Act, such as rule making, may find themselves

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48 V.T.C.A., Government Code, §551.002.
49 V.T.C.A., Government Code, §551.001(5).
50 V.T.C.A., Government Code, §551.001(6).
51 *Acker v. Texas Water Commission*, 790 S.W.2d 299 (Tex. 1990).
52 Attorney General Opinions DM-191 (1992) and JM-1058 (1989).

engaging in a series of individual meetings with the Commissioners to communicate their concerns, a process that can be somewhat time-consuming.

Timing Constraints

The Open Meetings Act's requirement that notice of a meeting of a body with statewide jurisdiction must be posted for at least seven days before a meeting[53] except in cases of emergency[54] influences the speed with which the Commission can deal with issues. Of more impact, perhaps, are the Commission's own requirements. For instance, the Commission requires that a copy of its agendas be mailed to interested persons[55] well in advance of each meeting. This requirement and the Commission requirement that backup materials be prepared in a timely manner for the Commission have resulted in the general practice of setting Commission meeting agendas 19 days in advance of meetings. Since the present Commission generally meets every Wednesday except during the summer, this means that the agenda for a meeting is ordinarily set, and all backup material filed with the Chief Clerk, by the third Friday before a Commission meeting.

While the 19 day requirement is not imposed by rule or law, it is generally followed by the Commission, and is ordinarily not avoidable, except with the permission of the General Counsel or one of the Commissioners. In practice, the Commissioners appear not to have involved themselves in scheduling matters, leaving these to the General Counsel, a practice which apparently will be expanded by the proposed procedural rules.

Commission Procedures

The Commission procedures of most interest to the practitioner are the rulemaking process (recently modified), the backup process performed prior to Commission meetings, the legal advice the Commission receives prior to and at its meetings, the handling of ADR

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53 V.T.C.A., Government Code, §551.044.
54 V.T.C.A., Government Code, §551.0045.
55 The Chief Clerk maintains a mailing list for this purpose.

and evidentiary matters, the conduct of meetings, the meeting agendas, the order of proceeding at Commission meetings, and the decision on a matter. A brief discussion of each of these may be of some use to those appearing before the Commission.

Rulemaking

In the last year, the Commission has modified its rulemaking and policy generation process, in an attempt to ensure more coordination and more consistency. Currently, the Office of Policy and Regulatory Development (OPRD), which reports to the Executive Director, fills the central role of both managing these processes and assuring a degree of quality control. While this is not the place for an exhaustive description of the process followed to develop rules and policy and to develop implementation plans for new programs or legislation, a short description of the rulemaking process may be of some use to those concerned with the Commission's rules.

At present, most rulemaking processes at the TNRCC begin with the presentation of a concept paper by an agency Office (Air, Water, Waste, OPRD, Executive Director, and General Counsel) to the OPRD's Rules Review Committee for approval. If this concept paper is approved, the rulemaking project is entered into the agency's rules tracking log, a timeline for the rulemaking process is established, a rulemaking team is appointed from the staff of the Offices involved, and a staff member from the lead Office is appointed as project manager to coordinate the rulemaking team. A timeline for the rulemaking process is established, and drafting proceeds. Once the draft is finalized, it is reviewed by a Policy Review Committee, made up of the Executive Director, the Deputy Executive Director, the General Counsel, and representatives from the various agency Offices. If approved, it is set on the Commission's agenda for proposal.

Given the fairly extensive legislative action this year on matters involving the Commission, this new system will be extensively tested this summer as the agency strives to meet deadlines for rules to implement legislative changes.

Backup Materials

One of the purposes of the 19 day requirement is to ensure that the Commission has sufficient backup material (within the limits of what it may legally consider) to evaluate the issues before it, and sufficient time to review that material. The staff members responsible for an item on the Commission's agenda are responsible for seeing that a backup package for that item is prepared and furnished to the Chief Clerk prior to the deadline, so that it can be furnished to each Commissioner, the General Counsel, the Public Interest Counsel, and the Executive Director and his staff. A copy is also kept by the Chief Clerk, and may be reviewed in the Clerk's office.

In the case of a contested matter for which a proposal for decision has been prepared, the backup material will consist of the examiner's proposal for decision, as well as any exceptions by the parties and any responses to those exceptions. In some cases, the General Counsel or one or more of the Commissioners may also request copies of all or part of the transcript. For an agreed or settled matter, the backup will generally consist of the agreed order, as well as an executive summary describing the matter under consideration. For a motion for rehearing, the backup material will consist of the Commission's order, the motion, and any responses to the motion. For a rulemaking, the backup will include the proposed rule and an executive summary. In addition, the backup material for matters in which compliance history is legally relevant, such as permitting matters, will generally include a compliance summary. Backup requirements for other matters vary, but are generally predictable, in that they will include sufficient material to enable the Commissioners to evaluate the matter at hand.

The backup material is placed in notebooks for each of the persons receiving it, and is made available to the Commissioners by at least the Friday before each Commission meeting. On complex matters, particularly proposals for decision and substantive rules packages, the backup material may be given to the Commissioners much earlier, to assure sufficient time for its review. The backup notebooks can be seen

on the Commission's dais in front of each Commissioner and the General Counsel during its meetings.

Legal Advice

The Commission ordinarily receives legal advice in six forms concerning matters on the Commission's agenda. First and most obviously, the General Counsel or an Assistant General Counsel is present on the dais with the Commissioners during the Commission's meetings to give legal advice, to assist in the conduct of the meetings, and sometimes to ask questions.

Second, the General Counsel's office (currently, the General Counsel and three Assistant General Counsels) may advise the Commissioners on when and whether a matter may be considered. This may include a review of the sufficiency of agenda captions for Commission meetings and determinations of whether the Commissioners may legally meet or talk over the telephone with persons attempting to contact them, and reviews of correspondence relating to matters on the Commission's agenda to determine whether it may be read by the Commissioners.[56]

Third, the General Counsel and the Assistant General Counsels review the backup material provided to the Commissioners in an effort to ensure that it is complete and that each item meets all legal requirements for approval, to identify legal issues for the Commissioners, and to ensure consistency on those issues with law and Commission precedent. This process includes the preparation of briefing materials for the Commissioners on the legal issues presented by each matter, which can vary from no briefing materials at all on simpler or routine matters to ensuring that copies of relevant statutes, rules, or decisions are available, or to relatively lengthy briefs on more complex matters. Ordinarily, primary responsibility for this duty is rotated between the Assistant General Counsels on a weekly basis, with the attorney

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56 A surprising amount of correspondence is received on important issues. The Commissioners generally may not read it in contested matters, although it may be read or offered at a Commission meeting as public comment or entered in the Chief Clerk's records as such.

primarily responsible assigning more difficult matters, such as proposals for decision, to those not so engaged that week for review. Each Commissioner has an individual briefing session with the General Counsel prior to Commission meetings to go over this legal briefing material and to ask questions.

Fifth, the General Counsel's office reviews orders prepared for issuance by the Commission after its meetings to ensure that they reflect the Commission's decision on each matter and meet all legal requirements.

Sixth, the General Counsel is present during closed meetings of the Commission, to ensure that only those matters posted for a closed meeting are discussed and to assist in preparing the certified agenda of the closed meeting.

Evidentiary Matters and ADR

The Commission has been generally reluctant to deal with evidentiary matters itself, and has in the past delegated them to its hearing examiners under its authority in the Water Code[57], and it seems likely that this delegation will continue under Senate Bill 12. When a matter requiring an evidentiary hearing arises during its public meetings, such as an emergency or temporary order,[58] the Commission has, with the agreement of the parties,[59] recessed a hearing to allow a hearing examiner to hear the matter and either prepare a brief proposal for decision or simply make an oral presentation of the matter later that day or at the next Commission meeting.

Those appearing before the Commission should be aware of the Commission's great interest in alternative dispute resolution (ADR), which is shared by its Executive Director and General Counsel. There appears to be a shared conviction that environmental disputes are

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57 V.T.C.A., Water Code, §§5.313.

58 Under V.T.C.A., Health and Safety Code, §§361.301 and 382.063, or V.T.C.A., Water Code, §26.0191.

59 Required by V.T.C.A., Government Code, §2001.062(e).

particularly suitable for ADR, and a shared desire to use it where appropriate. Not only does the Commission have rules that govern the use of ADR,[60] it is not unheard of for the Commission to recess a matter during a hearing to give the parties an opportunity to try to resolve their differences, especially if they have made no prior effort to do so, or if it appears to the Commission that there may be some common ground between the parties.

Conduct of Commission Meetings

The Chairman of the Commission presides over Commission meetings[61], and generally determines the order in which matters are considered. In his or her absence, another Commissioner designated by the Chairman presides over Commission meetings.[62] Matters are generally taken up in the order in which they appear on the printed agenda for the meeting, although the Chairman may deviate from this order for the sake of convenience. For instance, two items involving the same matter may be heard together, or a contested matter that has been settled may be heard with other settled matters.

Meetings and Agendas

Commission meetings are currently held on Wednesday mornings and are conducted following the agenda prepared by the Chief Clerk (although, as noted above, the Chairman may deviate from the order set out in the printed agenda). An effort is made by the Chief Clerk to separate items into uncontested matters and those that are or were at some point contested. While all matters are set as a group for 9:30 AM, a conscious effort is made to dispose of uncontested matters as quickly as possible, followed by settled matters, to allow those involved in them (both parties and Commission staff) to depart without having to sit through arguments on contested matters. The theory behind this practice is that it is a more efficient use of the time of all those involved than simply handling matters without regard to how long a matter may take or how many people are involved. There is, however, a disadvantage

60 Proposed 30 TAC Chapter 264 (and the current Chapter 264).
61 V.T.C.A., Water Code, §5.058(c), proposed 30 TAC §261.6.
62 V.T.C.A., Water Code, §5.058(b), proposed 30 TAC §261.6.

to this method of proceeding for those involved in contested matters, who may have to arrive in time for the start of a meeting and remain there until their matter is reached, since it is difficult to predict when this will occur.

In the interest of saving time for the staff and the Commissioners, uncontested and settled matters are usually heard in groups, determined by which staff members are involved in making presentations on them. Thus, for instance, all settled hazardous waste enforcement matters will generally be heard together, as will all settled district matters, since the same staff will be involved in making presentations to the commission on each of them.

The conduct and timing of meetings, like a number of issues concerning Commission meetings, are really a matter of preference for the Commission[63] and are subject to change as circumstances change or as the membership of the Commission changes. It is entirely possible that the Commission could decide to meet on a different day of the week, to consider different types of matters on different days, or to separate its agenda by setting different matters or types of matters for various times during the day. Given the Commission's current efforts to make its procedures more accessible and convenient for the public, one might anticipate that there could be some experimentation in the future with the format of Commission meetings.

Order of Proceeding

Items heard before the Commission follow a regular order of proceeding. After a matter is called for hearing by the Chairman, he or she may set time limits to be followed during presentations to the Commission.[64] The hearing examiner assigned to the matter, if any, then presents an overview of the matter and the proposal for decision, as

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63 Times for meetings may be set by Commission order. V.T.C.A., Water Code, §5.058(d).

64 30 TAC §269.8 provides that time limits before the Commission will be 5 minutes unless otherwise established by the Chairman. Note that proposed 30 TAC §265.157 will allow time limits on motions for rehearing to be set in advance by the General Counsel.

well as the proposed order and any changes suggested as a result of exceptions filed by the parties. It is this author's understanding that this procedure will continue to be followed after the transfer of hearing functions to the State Office of Administrative Hearings.

The hearing examiner's presentation is followed by a presentation from the Executive Director's staff (generally his legal staff in the case of a proposal for decision), and by a presentation from the Public Interest Counsel. As a practical matter, presentations on most uncontested and settled matters where there is no proposal for decision will be made by the Executive Director's staff, with a short comment, if any, by the Public Interest Counsel. The Commissioners or the General Counsel may ask questions during or after these presentations.

Since the Commission generally accepts public comment on all matters before it, the Public Interest Counsel is normally followed by public comment, which the Chairman usually limits to 3 minutes per person. This time limit is enforced by the clerk sitting immediately in front of the Chairman, who times presentations and will call "time" when the time allotted is exceeded.

Once the public comment portion of the hearing is concluded, the parties or their representatives have an opportunity to address the Commission. These presentations are generally limited to 15 or 30 minutes or less per side (not per party) except in complex cases, where the Chairman may allow additional time.[65] Ordinarily, the applicant will be allowed to open and close, and may split his or her time to do so. The clerk will generally indicate when 5 minutes and 1 minute remain for argument by holding up cards with the time remaining printed on them. Presentations on proposals for decision should be limited to the evidence introduced at the evidentiary hearing and to arguments on the legal issues presented.

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65 Parties anticipating a need for additional time should contact the General Counsel well in advance.

After the parties' presentations, the Commissioners may ask questions or may proceed directly on to discussion of the matter and a vote.

The Decision

As the reader can see from the discussion above, the Commissioners are generally well prepared for each hearing, have examined the backup material available to them, have read the proposal for decision and exceptions to it, and have had the opportunity to be briefed on legal issues by their counsel. Thus, while the Commission has the option of recessing a matter from day to day,[66] its practice has been not to take matters under advisement, but rather to make and announce its decisions at the conclusion of the hearing on each matter.

After the parties' presentations and any questions from the Commissioners, the Commission will proceed to discussion of the matter at hand, if any, and generally one Commissioner will offer a motion to dispose of the matter. This motion will die without a second, which may be given for the purposes of discussion alone, and a motion must receive two votes to pass and become the decision of the Commission.

Orders on each matter are reviewed by the General Counsel's office, as noted above. Should a proposed order be adopted only in part by the Commission, it will be redrafted by the Executive Director's legal staff in the case of an uncontested matter, or by one of the General Counsel's staff in the case of a matter involving a proposal for decision, prior to its being signed by the Chairman for the Commission.

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66 V.T.C.A., Water Code, §5.116, 30 TAC §267.24.

Geographic Information Systems for Environmental Projects (A Demonstration)

"A World of Our Own"

Louis Zachos

Biographical Sketch

Louis Zachos is a Senior Scientist with Radian Corporation, a multinational environmental engineering and consulting firm. Louis has a BS and MS in Geology from the University of Florida (1976 and 1978) and an MSE in Mechanical Engineering (Operations Research) from the University of Texas at Austin (1989).

He has been employed in various positions in the environmental and petroleum industries, including federal and state agencies and in the private sector. He worked as a hydrologist for the National Park Service in Everglades National Park and developed a database system for recording and reporting hydrologic measurements in the park. He worked as a hydrogeologist for a geotechnical engineering firm in Miami, then as a production and exploration geologist for Exxon Co., USA in Oklahoma City and Houston. He worked closely with the Computer Applications Group at Exxon in database design, computer-aided mapping, and statistics applications. He also worked in the Groundwater Conservation Division of the Texas Water Commission prior to its incorporation into the TNRCC. There he developed desk-top database applications for analyzing and maintaining historic groundwater monitoring data.

Louis has been active with Geographic Information Systems for the past four years at Radian Corporation in Austin, and has experience in the development of large-scale GIS projects in the petroleum and environmental areas. Current projects include development of GIS projects for the Department of Defense, the Electric Power Research Institute, and Mexico City, Mexico.

Geographic Information Systems for Environmental Projects

Louis Zachos
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I. What is GIS?

GIS is an acronym that stands for Geographic Information System. A GIS is really a computer system for organizing and using spatial data - that is, information describing places on the earth's surface. At the very basic level, a GIS consists of a set of data that is tied to known and very specific locations and a computer program that allows you to view and manipulate it from a geographic standpoint.

GIS programs allow you to use "spatial queries" to obtain information. For example, a map of an area under investigation can display numerous sample locations. Selecting locations from the map will bring up information about the locations, the sampling, and results of testing. In another example, you could query the data for all locations for which sample results exceed some value and have all those locations highlighted on the map. Such functions may involve answering questions such as:

"What is the shortest route between two cities?"

"What landfills are found in a particular voting district?"

"Where is a particular address?"

"How many houses are within 1/4 mile of a pipeline?"

There are many computer programs on the market that let you store and manipulate data, some of which may be geographic. These range from various spreadsheet programs that may contain such spatial information as addresses, to sophisticated CAD (Computer Aided Drafting) programs that can be used to draw detailed maps. These are not GIS programs because they do not allow you to perform spatial functions on the data.

The three main components of a GIS are (1) computer software tools, (2) a database, and (3) a trained user. Software tools include the GIS software itself, plus any number of other tools that can be used to format data and output. The database component consists of the actual data. This includes the schemas or definitions of the data tables and their domains, as well as tools for editing and manipulation. The final component is a trained user - and the word "trained" is significant. No matter how easy a GIS demonstration may seem, there is not at present or in the foreseeable future a "do my job" button the user can press that will create and analyze a GIS project. Although simplified GIS-based data viewers are available for general purpose use,

creation and maintenance of a GIS project requires a user who understands both the software and the data.

The geographic information that makes up a GIS project is not stored as maps, but in special data formats that allow you to create maps at any scale and projection and with any combination of features you might choose. You can create new features by performing operations on current features, by modeling the data, or by combining features.

A GIS is, however, much more than a computer system for making maps. A GIS is an analytical tool that allows you to explore the spatial, and in some cases temporal, relationships between map features. Spatial information about a feature is inherent to the GIS: length, area, distance, relationship. A GIS also can link other types of data, such as census data or analytical results, with geographic information about a particular feature on a map: a road, a building, a sample location, a school district.

GIS systems are not necessarily easy to build or maintain. In a standard database there is no real enforcement of data quality or freedom from errors, unless the database builder has explicitly built these kinds of checks into the system. Bad locational data may not be obvious, and a user may never even notice it. In a GIS project bad locational information will often render analysis worthless. Sometimes just getting ANY reliable locational data can be a major part of the project.

II. Geographic Data Concepts

One way to understand the concepts of GIS is to look at GIS as different types of dualities. There are two sides to every viewpoint of GIS.

With regard to format, geographic data can be divided into 2 types of information: raster and vector. Raster data (the term raster is derived from the German word for screen, as in television screen) is data organized on a pixel or grid cell basis. Photographic data is inherently raster, and consists of a matrix of dots or pixels. Vector data, on the other hand, consists of discrete graphic elements (points, lines, and polygons). Some GIS software deals strictly with raster data, some with vector, and many can deal with both. There is a whole field of study in the rasterization of vector data, and the vectorization of raster data.

Raster data is used where there is a large amount of detailed information in the spatial realm but only limited amounts in the data realm. Landsat satellite photography is an example of raster data where there is limited information in the individual pixels, but the data is available for 100 x 100 meter pixels over scenes 100 kilometers across (on the order of a million pixels). Vector data is used where the spatial detail is limited but the data realm is large. A set of soil sample locations can be represented as a small set of discrete points, but there may be hundreds of thousands of records of analytical data associated with the locations.

Raster to vector conversion is used, for example, when a network of rivers and streams needs to

be derived from aerial photographs, or a network of city streets needs to be derived from a digitally scanned street map. Vector to raster conversion can be used when, for example, a polygon representing a proposed environmental impact area is used to mask out a portion of a Landsat image for land use analysis.

Geographic data can be divided into another 2 types of information: spatial and descriptive. Spatial information, also referred to as feature attribute information, describes the location and shape of geographic features, and their spatial relationships to other features -- a property termed topology. Descriptive information includes all other data about a feature. Descriptive information can represent characteristics of the feature when it is drawn: color, line width, font, and size. It can also represent other information related to the feature, some examples of which are given above.

Every feature in the GIS will have spatial information, which at the barest minimum is an X-Y coordinate. In order to represent a feature geographically that feature must have a known geographic location. Although people are very used to finding a house by its address, or following street directions to a store downtown -- basically locating places in relationship to other places -- that information does not directly provide the necessary "geographic location." We don't usually know the latitude and longitude of our home, but that is what we need in order to represent it in a GIS. Not only must each feature have an X-Y coordinate, all the features in a project must have the same coordinate system. This is not always a trivial constraint. The earth is (almost) a sphere, but maps are flat and can be represented by any one of a very numerous collection of mapping projections or coordinate systems. Latitude and longitude work well on the sphere, but cause distortion when used on a flat map. Information about the mapping projection of the X-Y coordinates is important information.

In addition, features may have other spatial information, such as directionality of a line (important when modeling fluid flow), closure of a polygon (important when determining whether a feature is inside or outside a polygon), and connectedness of a network of lines (important when modeling routing problems).

With regard to a particular project, geographic data can loosely be divided into 2 types of information: base map information, and object information. Base map data forms the context or infrastructure of a GIS project. It may consist of nothing more than general geographic data: roads, city boundaries, and rivers. In other cases there may be basic information tied to the base map features: street names, address ranges, etc. The base map is to a GIS project what canvas is to a painting.

Object information includes the features for which significant amounts of generally non-spatial data is available. These are the "objects" that are of primary interest in a GIS project. These can be sample locations for which extensive sampling and chemical analysis data exist, buildings for which detailed occupancy data exist, census tracts for which detailed demographic data exist, and so on.

This brings us back to our original division of data. Base map data may be raster, and object data may be vector. An example is an overlay of sample points over an aerial photograph. Base map data may consist only of spatial information, or spatial information with a minimum of descriptive data. Primary information will be associated with other features that will be displayed over a basemap. A base map serves to orient us in the manner to which we are accustomed, that is, we can locate features in their relationship with other familiar features, not by X-Y coordinates alone.

III. Why GIS?

A very specific question to ask at this point is "How can GIS be used in environmental projects?"

The answer depends very much on two things (yet another duality): the scale of the project, and the complexity of the project. The value of a GIS in understanding an environmental project grows in proportion to the size of the project and its complexity. Typical GIS projects involve remediation programs on military bases (generally exceeding 5000 acres in size), risk assessments over multi-county areas (usually exceeding 1000 square miles), environmental studies in large metropolitan areas (usually exceeding 100 square miles), and consolidated studies of multiple wide-ranging facilities (with individual facilities covering 10's to 100's of acres, and located on a regional scale).

GIS can be used in environmental projects in several ways. All the data incorporated in a GIS project is in the same spatial coordinate system, and all the data can be viewed in its proper spatial relationship. Any descriptive data can also be displayed spatially and can be queried spatially. This can be far more instructive than review of data tables and computer printouts. There are five generic questions a GIS can answer:

Location: "What is at this location?"

Condition: "Where does a particular condition exist?"

Trends: "What has changed over time?"

Patterns: "What spatial patterns can I see in the data?"

Modeling: "What will happen under certain conditions?"

In an environmental project these questions might be: "What chemical compounds do I find in monitoring well number 1? What monitoring wells have positive tests for VOCs above detection limits? How have VOC levels in these wells changed during the past year? Can I see any patterns to the VOC distribution? What can I expect if I begin pumping from an extraction well?"

We can begin to see that the value of GIS is in large part a matter of data visualization. A GIS

allows the engineer or project manager to link sometimes disparate and usually voluminous amounts of data to spatial features in order to visualize the overall picture of an investigation or remediation project. Some simple analytical tools available to a GIS can also be useful. An important example is geocoding. Geocoding is the process of assigning an X-Y coordinate to a point based on the point's relationship to another feature with known coordinates. Using geocoding it is possible to locate a point from its street address instead of requiring an X-Y coordinate. This can be quite useful because street address information in GIS-compatible electronic form is available for many metropolitan areas in the U.S.

Another valuable use for GIS is in planning. Typical projects may include siting of waste facilities, power lines, or gas lines. Projects involving risk assessments for facilities impacting air quality can involve areas exceeding several thousand square miles, and can incorporate air dispersion, runoff, uptake, and demographic models all at once. Development of emergency response programs for railroads and highways can involve optimization in pre-location of emergency equipment and determination of best response routes, as well as identification sensitive environments. The use of GIS has long been a cost-effective method in urban land use and utility planning.

In addition to asking "Why GIS?" you also need to weigh the benefits to be gained against the cost of the project. There is a benefit/cost function that will vary somewhat for each project. There is no practical minimum or maximum limit to the size of a project, but GIS development costs start at several thousand dollars, and are generally only a small fraction of overall project costs. Costs can be estimated reliably. Typical costs include:

The cost of publicly available or commercially available data. Much general base map type information is available from federal, state, and regional governments - often at nominal cost. Commercial data is more costly, but is generally of higher quality.

The cost to collect and compile data not readily available. For most environmental projects, this cost is part of normal data collection. It is important to stress the need for accurate X-Y locational information.

The cost to build the GIS project. This may be an in-house cost if equipment and personnel are available. This work may be contracted to a firm specializing in building GIS projects, either on a turn-key basis or with specified delivery and training goals. Several weeks of time may be required.

The cost to maintain the GIS project. In general, one-shot projects are not cost-effective uses of GIS.

The cost to train GIS users. This is generally a low-level cost to train engineers and managers how to use GIS viewing software, but it can include training in developing and maintaining a GIS project.

Cost considerations are also dependent on the complexity of the project. Relatively simple data visualization projects can be built with low-end systems currently available for the desktop PC market, using publicly available base map data. Some software just now coming into the market is quite sophisticated, but requires an "enlightened" user for optimum performance (i.e., a computer nerd). Nonetheless, low-cost data visualization will become increasingly more attainable in the near future.

Larger, more complex projects still require high-end GIS software systems and supporting hardware (workstations, scanners, large-scale color plotters, multi-megabyte disk storage). The results of these high-end systems are large-scale analyses and high-quality graphics, with long-term maintainability.

IV. Examples

Several examples of environmental GIS projects will be demonstrated real-time ("live") using PC-based viewing software. These will include examples of remediation information management, waste recycling facility siting, epidemiologic evaluation, and emergency response planning. This will give an overall "flavor" of the application of GIS to environmental projects.

Remediation Information Management

This example is from a U.S. Air Force base. The typical Air Force base has been in existence for 50 or more years and seen many different missions. Materials handled, stored, and disposed of include petroleum products, insecticides, explosives, radioactive materials, and many industrial chemicals and solvents. A base is very much a small industrial city. Environmental studies under the auspices of RCRA, CERCLA, and just about every other regulatory acronym have resulted in huge volumes of data. GIS offers the following benefits to remediation efforts on these bases:

> Consolidation of base infrastructure in a common frame of reference that is independent of scale. This includes aerial photography as well as information on buildings, roads, utilities, etc.
>
> The ability to spatially reference multiple data files to the base infrastructure. For example, any information associated with buildings -- handling and storage of hazardous material, presence of asbestos or lead-based paint, cultural heritage, property value -- can be accessed by spatially selecting one or more buildings.
>
> The ability to access the results of environmental sampling. The U.S. Air Force maintains a computer database called IRPIMS -- the Installation Restoration Program Information Management System -- that can be directly accessed using GIS tools.

Waste Recycling Facility Siting:

This example from a study to find optimum sites for waste recycling facilities in Mexico City. In this case, a large part of the GIS effort was expended in creation of the set of base maps for the study. Some of the important considerations in the study were the spatial density of industrial sites producing recyclable wastes, proximity to roads and highways permitted for transport of these wastes, and location of vacant land suitable for construction of the facilities. GIS offers the following benefits in this study:

Creation of a spatially registered base map by vectorization of scanned maps.

Ability to calculate location and spatial density of industrial facilities and potential sites for recycling facilities.

Ability to layer information to determine optimum sites for recycling facilities.

Epidemiologic Evaluation:

This example is from a study of electromagnetic fields (EMF) around power lines in the Metropolitan Denver area. Statistical studies relate the proximity of homes to power lines, childhood cancer cases, street patterns, and demographics. The basis of the study was the so-called "Wire Code Paradox." Epidemiological studies of childhood leukemia cases in the Denver metropolitan area have previously shown a correlation with wire code. Wire code in these studies is a visual scheme to characterize electric power distribution wiring in neighborhoods. The larger and more numerous the wires, and the closer a residence is to the wires, transformers, and electric substations, the higher the wire code index for that residence. Direct measurements of EMF, however, do not show this correlation - thus the "wire code paradox." The earlier studies used only a small set of residences (800) in the Denver area. This study used information from the Public Service Company of Colorado and the various county tax accessors offices, as well as purchased commercial street and address data, to calculate wire codes for all locatable addresses in the metropolitan area -- over 350,000 homes and apartments. GIS offers the following benefits for this study:

The ability to handle the shear volume of information on homes and power lines in the area (hundreds of thousands of residences, power lines, transformers, and streets).

The ability to test several hypotheses concerning the "wire code paradox" -- possible correlations with demographics and street patterns, for example.

The ability to automatically calculate wire codes for every residence in the area.

Emergency Response Planning:

This is a hypothetical example showing how information can be managed for emergency response planning along a railroad. Railroads typically index segments of track between major rail centers by mile markers. If an accident should occur, it is reported by rail segment and mile marker location. It is important to know the proximity of emergency equipment to the accident location. If there is a spill of hazardous material, it might be necessary to know which streams or rivers might be affected, if there are schools or hospitals nearby, what local authorities need to be notified, and so on. GIS offers the following benefits for this study:

The ability to view data at a range of scales covering several orders of magnitude, from a regional rail system to the area immediately around a mile marker location.

The ability to pre-process information in order to make it rapidly available to simple spatial queries. This information, which may include sensitive habitat areas, locations of schools, and emergency telephone numbers, can all be linked to the mile markers on a railroad segment.

The ability to link raster data (photographs) to vector (mile markers) data.



Dean Hester is a Shareholder and Director of the El Paso firm of Scott, Hulse, Marshall, Feuille, Finger & Thurmond, P.C. in the firm's business section practicing principally in the areas of business association, mergers and acquisitions and securities. He graduated from The University of Texas School of Law in 1966, served as a Senior Law Clerk to U.S. District Judge Jack Roberts in Austin during 1966-67 and began practice with Heath, Davis & McCalla in Austin in November 1967. While in practice in Austin, he was a Lecturer at U.T. in business associations and insurance law (1969-70) and completed his first public offering of securities. He subsequently moved to El Paso where he practiced in banking (domestic and international), bankruptcy, commercial law, corporations and partnerships, securities and business litigation. In April 1985, he joined the Fort Worth firm Kelly, Hart & Hallman, where his practice was more concentrated in corporate and securities matters. His experience in Fort Worth included serving on the Planning Committee for the Annual Conference on Securities Regulation and Business Problems at U.T. Law School for several years where he was also a moderator and speaker. During his previous residence in El Paso, Dean served on the boards of El Paso Community Foundation, the El Paso Arts Alliance and the El Paso Rehabilitation Center.

Corporate Issues for Environmental Professionals

"Suspicious Minds"

Dean Hester

CORPORATE ISSUES FOR

ENVIRONMENTAL PROFESSIONALS

"Suspicious Minds"

Presented By

DEAN HESTER

Scott, Hulse, Marshall, Feuille,
Finger & Thurmond
El Paso, Texas

at the

State Bar of Texas Environmental and Natural Resources Law Section
Texas Hazardous Waste Management Society
Water Environment Association of Texas
Air and Waste Management Association, Southwest Section

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CORPORATE ISSUES FOR ENVIRONMENTAL PROFESSIONALS

I. INTRODUCTION

Environmental counsel are frequently met with statutory or judge-made rules of law imposing liabilities on shareholders, directors or officers of business corporations for actions or failures to act on the part of the corporation itself, but may not always appreciate whether and to what extent the imposition of such liability departs from or comports with the law generally applicable to those persons and entities.

Similarly, the increasing use of limited liability companies as business vehicles poses new questions of secondary or derivative liability of individuals participating therein, both generally and in the environmental theater. This paper attempts to provide some guidance over turf possibly otherwise unfamiliar to the environmental specialist.[1]

The chosen form of business entity, particularly the corporate form, has significant implications to the environmental counsellor, with respect to:

(1) the legal persons to whom the lawyer's duty is owed;

(2) the rights and responsibilities of the various possible clients;

(3) potential conflicts of interest among and between the potentially responsible parties;

(4) the prerequisites and scope of the attorney-client privilege;

(5) the scope of the self-evaluative privilege; and

(6) environmental liabilities.

Unless otherwise indicated, the discussions of corporate law herein will be of Texas law. For an excellent article comparing Texas corporate law with that of Delaware, see Huff, *Choice*

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[1] The author thanks Jeff Civins and Margaret Menicucci of Kelly, Hart & Hallman in Austin for permission to use their guidance over the unfamiliar environmental turf in Civins and Menicucci, *Environmental Implications of Business Transactions*, University of Texas School of Law 6th Annual Hazardous Solid Waste Management Institute (1994). The author also gratefully acknowledges the research assistance of Ms. Amy Stewart Sanders and Mr. J. Wesley Dorman, his colleagues at Scott & Hulse in El Paso.

of State of Incorporation - - Texas Versus Delaware: Is it Now Time to Rethink Traditional Notions? State Bar of Texas Business Law Section Bulletin, Vol. 31. No. 4, p. 9 (Dec. 1994).

II. OVERVIEW OF CORPORATE LAW

A. Benefits of Incorporation. Although the benefits of incorporating have been greatly reduced by certain changes in federal income tax law contained in the Internal Revenue Code of 1986 ("the Code"), there are still sound business and tax reasons for doing business in the corporate form. The ability to limit one's liability for obligations of the corporation to the amount invested in the corporation is a great benefit to most investors and entrepreneurs. As we shall see, that limited liability is subject to a number of exceptions, not the least of which is responsibility for certain environmental liabilities.

In start-up businesses, the corporate veil is most frequently pierced by negotiation: landlords, suppliers and lenders frequently insist upon the personal guaranties of corporate obligations by at least the major shareholders.

The corporation nonetheless still has considerable utility as an ownership vehicle: a substantial convenience is involved in the ability to convey complex combinations of assets that may be owned by the corporation through the rather simple expedient of transfer of shares of the underlying stock, which normally takes only a signed stock power or assignment separate from certificate, sometimes with a signature guaranteed by a national bank or a New York Stock Exchange member firm. Corporations can still provide slightly better employee benefits than proprietorships or partnerships.

Special provisions in Subchapter S of the Code permit pass-through tax treatment for the shareholders of a "Sub S corporation" even though they are shielded from ordinary business liabilities for state law purposes by doing business in the corporate form. The pass-through treatment allows shareholders to pay taxes on the income earned by their Sub S corporation only once, rather than twice as would be required without the special provisions referred to. However, limits on the number of and nature of shareholders in a Sub S corporation generally have the effect of denying this treatment to larger companies. The existence of these limitations and the impatience of entrepreneurial America with them have given a special impetus to the rise of another limited liability vehicle, the limited liability company, discussed in more detail later.

B. How Formed. Corporations are formed by one or more organizers signing and filing with the Secretary of State (or other designated official) articles of incorporation which are required to give certain basic information about the corporation such as its name, its period of duration, its initial directors, the name and address of its registered office, the name and address of its registered agent for service of process, the number of shares and any classes or series of capital stock initially authorized and frequently a statement that the corporation will not commence business until it has received in the form of cash, property or labor done on its behalf a minimum amount of capital. See, *e.g.*, Art. 3.02. Tex. Bus. Corp. Act. It frequently happens that there is some imperfection in the filing of the articles of incorporation, or perhaps the

failure to file them at all even though they are drawn up, signed and were clearly intended to be filed, and in many such cases the courts have concluded that a ***de facto*** corporation existed with many of the same attributes as ***de jure*** corporations.

Once formed, corporations are not assured of perpetual existence: the failure to observe formalities such as the issuance of share certificates evidencing equity ownership, the holding of annual meetings of shareholders to elect directors or the holding of periodic meetings of directors to elect officers, pass banking resolutions and the like or the failure to file annual franchise tax returns may result in a loss of the benefits of the corporate liability shield and in some cases result in the forfeiture of the corporate charter. See, *e.g.*, Art. 7.01.B, Tex. Bus. Corp. Act.

C. How Operated. The key to understanding the operations of the ordinary business corporation lies in understanding its tripartite structure. Corporations are owned by shareholders, who elect directors of the company: a group of one or more persons who give broad directions to the business and activities of the corporation and establish general policies for its internal and external operations, and who in turn elect the officers of the corporation who are responsible for managing the day to day affairs of the corporation.

As noted above, one of the drawbacks of corporate life (except for close corporations as noted below) is the necessity for holding and keeping records of the periodic meetings of shareholders and directors. If the corporation is very actively engaged in, for example, a program of acquiring and disposing of other businesses, frequent shareholder meetings will be required to approve the mergers, stock acquisitions or perhaps cash asset purchases. If it has a large number of shareholders, this can involve a substantial expense; if it is a public company, an additional expense above and beyond just the internal governance of the corporation is involved in filing the necessary reports with regulatory agencies such as the Securities and Exchange Commission.

The basic method of operation of a corporation is that the shareholders meet at least once a year to elect directors, the directors meet more frequently to make policy decisions concerning the business of the corporation and to elect its officers, and the officers work full time day to day on the details of the operations of the corporation. Corporations may also be thought of as having a fourth level of structure and activity in their employees. Not all officers, of course, are employees of the corporation and many times, especially in the area of environmental activities, it will be the actions of employees in the first instance that bind the corporation to certain responsibilities, obligations or liabilities.

The articles of incorporation, once filed and accepted by the sovereign jurisdiction of incorporation, imply the following contract between the incorporators and the sovereign: if the incorporators and owners of the corporation observe all the necessary formalities of corporate operation, the liability of the owners of the corporation for contracts or torts of the corporation will be limited to the amount of equity invested in the corporation and the retained earnings

thereof. Some relief from the layers of formality has been granted to shareholders of corporations in some jurisdictions such as Texas, where special provisions permit the creation of "close corporations" (See Art. 12.01 *et seq.* of the Tex. Bus. Corp. Act).

Close corporations are allowed to conduct their internal operations informally in accordance with the terms of a shareholders' agreement which might provide, for example, that the day to day business affairs, as well as broad policy decisions, shall be in the hands of the shareholders. An oversimplified but not inaccurate view is that close corporations may operate like a general partnership while retaining the limited liability status of an ordinary corporation. But even this benefit requires some gilding of the lily: the articles of incorporation have to state "This corporation is a close corporation" and on top of that a "Statement of Operation as a Close Corporation" has to be filed and endorsed "Filed" by the Secretary of State once a shareholders' agreement becomes effective.

Finally, inquiring minds wanted to know why is all the ritual and ceremony the price of having a limited liability entity? Why can't we form an entity as simple as a general partnership that provides us limited liability? Such companies have been in use in Europe for many years. In 1979, Wyoming answered "why not?" And as soon as the Internal Revenue Service ruled that limited liability companies properly created would be taxed as partnerships, many other states joined the scramble to enact legislation involving the creation of so-called LLC's, discussed in part III below.

D. Liabilities - General Rules

1. The Corporation. We begin with the proposition that a corporation is criminally or civilly liable for the unlawful or improper acts of its agents acting within the scope of their actual or apparent authority. U.S. v. Bi-Co Pavers, Inc. 741 F.2d 730 (5th Cir. 1984). Apparent authority is that authority which outsiders would normally assume an agent to have judging from his/her position with the company and the circumstances surrounding his/her past conduct. An important effect of this rule is that a corporation may be found liable for criminal offenses requiring criminal intent, for example to conspire or to aid and abet, even though corporations cannot in and of themselves possess a mental state. The authorized agent's mental state suffices to meet this requirement and his/her unlawful acts are the basis for the corporation's criminal liability. U.S. v. Investment Enterprises, Inc., 10 F.3rd 263 (5th Cir. 1993).

2. Shareholders. Normally shareholders are not liable for debts, torts or crimes of their corporation; neither are they deemed to be owners of the underlying assets of the corporation. The traditional statement in Texas on shareholder liability appears in Pace Corp. v. Jackson, 155 Tex 179, 195, 284 S.W.2d 340, 351 (1955):

> "Courts will not disregard the corporate fiction and hold individual officers, directors or shareholders liable on the obligations of a corporation except where it appears that the individuals are using

> the corporate entity as a sham to perpetuate a fraud, to avoid personal liability, avoid the effect of a statute, or in a few other exceptional situations."

As Professor Robert Hamilton observed in his seminal article on this topic "The Corporate Entity," 49 Tex. L. Rev. 979 at 982 (1971), the sheer breadth of this statement renders it almost totally useless. Clearly corporations are formed every day with no other purpose than to "avoid personal liability." Professor Hamilton also points out that sometimes courts utter phrases about disregarding the corporation when they are merely holding shareholders liable under conventional theories of agency or tort law. If a shareholder is acting as a principal in his own name, he is clearly liable on the obligation. Hermes Grain Co. v. Hailey, 435 S.W.2d 181 (Tex.Civ.App.--Corpus Christi 1968, *no writ*). Or, if the corporation can be considered his agent under accepted agency law, the shareholder-principal is liable on a contract as a principal, not as a shareholder of a pierced corporation. Or, putting the agency shoe on the other foot, if a shareholder commits a tort while acting as agent for his corporation, the shareholder is liable under substantive agency principles. Western Rock Co. v. Davis, 432 S.W.2d 555 (Tex.Civ.App.--Fort Worth 1968, *no writ*).

3. Directors. While great volumes of corporate lore exist pondering the correct measure of directors' liability to shareholders, frequently referred to as the "business judgment rule," the rule regarding director liability to strangers to the corporation such as corporate creditors generally or persons against whom the corporation has committed a tort is very simple: in the absence of a special statute or evidence establishing that a director of a corporation participated personally rather than in a representative capacity, a director is not liable to such persons. However, the case law is susceptible of the interpretation that if a corporate director lies to persons doing business or about to do business with the corporation, he or she is deemed to be lying in a personal as well as representative capacity. Barclay v. Johnson, 686 S.W.2d 334 (Tex.App.--Houston, 1985 *no writ*).

4. Officers. In the absence of a special statute, such as Sections 111.016 and 171.255 of the Texas Tax Code, an officer of a corporation is not liable for torts of the corporation unless he or she participated directly in or authorized the improper or unlawful act giving rise to the claim. For analysis of the cited Texas Tax Code sections, see In re Cooley, 166 B.R. 85 (Bkrtcy. S.D. Tex. 1993) and Wilburn v. State, 824 S.W.2d 755 (Tex.App.--Austin 1992, *no writ*).

The general rule stated above is supported by such cases as Mozingo v. Correct Mfg. Corp., 752 F.2d 168 (5th Cir. 1985) and a case arising under the Texas Water Code: State v. Malone Service Co., 853 S.W.2d 82 (Tex.App.--Houston [14th Dist.] 1993, *writ denied*). Compare Moss v. Ole South Real Estate, Inc., 933 F.2d 1300 (5th Cir. 1991); individual officers of a real estate brokerage are potentially liable for racial discrimination practiced by the corporation if they personally performed the discriminatory acts; with Pace v. Garcia, 631 F. Supp. 1417 (W.D.Tex. 1985): individual officer of a corporation sued for a breach of a real

estate purchase agreement found not to have acted outside the scope of his corporate authority and not personally liable for any damages resulting from the alleged breach.

The background of case law in Michigan apparently prompted the court in Kelley ex rel. Mich. Nat. Res. Comm'n v. Tiscornia, 827 F. Supp. 1315 (W.D.Mich. 1993), a CERCLA case, to reject rules that would impose CERCLA liability on a corporate officer merely because he or she had the capacity or authority to control corporate operations or prevent CERCLA violations, in favor of the rule of New York v. Shore Realty, 759 F.2d 1032 (2nd Cir. 1985), the so-called "direct control or participation" test. The Fifth Circuit opinion in Riverside Market Dev. v. Intern. Bldg. Products, 931 F.2d 327 (5th Cir. 1991), *cert. denied*, 502 U.S. 1004, 112 S. Ct. 636, seems to be in accord.

5. Employees. The general rule applicable to officers and directors also applies to employees or other agents of the corporation. However, a line of Texas cases posing a danger for anyone who acts on behalf of a corporation deserves some special comment here. Cases such as Lachmann v. Houston Chronicle Publishing Company, 375 S.W.2d. 783 (Tex.Civ.App.--Austin, 1964, *writ ref'd n.r.e.*), Southwestern Bell Media, Inc. v. Trepper, 784 S.W.2d 68 (Tex.App.--Dallas 1989, *no writ*) and A to Z Rental Center v. Burris, 714 S.W.2d 433 (Tex.App.--Austin 1986, *writ ref'd n.r.e.*) have held that anyone who enters into a contractual arrangement on behalf of a corporation must disclose the full legal name not just the trade name or d/b/a of the corporation, in order to escape personal liability for the contractual obligations. This liability is predicated on the agency rule that an agent for an undisclosed principal is personally liable for any obligations incurred on behalf of the purported principal. See Miller, *Agents Take Heed: A Principal By Any Other Name Is Not A Disclosed Principal - The Perils Of Identifying A Principal By Its Trade Name*, XIII Corporate Counsel Review 281 (1994). This rule is equally applicable to directors, officers employees or any other agents acting on behalf of a corporation doing business in a trade name.

6. Successors. The rules of successor corporation liability, in Texas and in elsewhere, are complex. The general rule, applicable in contract or tort, is that in the absence of a statute, if one corporation consolidates or merges with another, the resulting or surviving corporation is liable for all debts and liabilities of the predecessor, unless specific provisions have been made for avoiding such responsibility. A second general rule is that the mere purchase or acquisition of another company's assets does not render the purchaser or acquirer liable for all debts and liabilities of the seller. There are, however, at least six exceptions to this general rule: four traditional exceptions and two modern exceptions. The four traditional exceptions are to the effect that the acquiring corporation may be liable for the obligations of the seller if (1) the purchaser expressly or impliedly agreed to assume such obligations, (2) the transaction amounts to a consolidation or a merger of the seller and purchaser, (3) the purchasing corporation is merely a continuation of the selling corporation, or (4) the transaction is entered into fraudulently in an attempt to escape liability for the debts and obligations. The two modern exceptions also subject the acquiring corporation to liability where (5) the purchaser continues the manufacture of the same product line of the selling corporation, or (6) the purchaser continues the enterprise of the seller.

Although CERCLA holds past and present owners and operators of a vessel or facility strictly liable for cleanup costs, it contains no express provision for successor corporation liability. On the other hand, there is no express exclusion for such liability either. The broad definition of "facility" in CERCLA indicates that corporations that merge with existing owners or operators may be held liable for violations occurring or continuing after the merger or consolidation takes place. Such a successor corporation may thus become strictly liable for cleanup costs as an owner or operator of the facility.

A difficult question from the standpoint of fairness is whether the successor should be held liable for past CERCLA violations of the predecessor, even if the successor does not acquire the offending facility and does not engage in the activities that led to the CERCLA violations. Several courts have determined that such successor corporations may indeed be held liable for CERCLA violations of their predecessors. In Smith Land and Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3rd Cir. 1988), *cert. denied* 488 U.S. 1029, 109 S. Ct. 837 (1989), the Court stated that "Congressional intent supports the conclusion that, when choosing between the taxpayers or a successor corporation, the successor should bear the cost. . . . We believe it in line with the thrust of the legislation to permit -- if not require -- successor liability under traditional concepts."

Oswald and Schipani in their excellent Northwestern University Law Review article (86 NW. U.L. REV. 259 (1992)) cited elsewhere herein, found that the scope of successor corporation liability for CERCLA violations is no broader as applied by the cases than successor corporation liability in other tort contexts. In the Smith Land case, the plaintiff purchaser of land containing asbestos waste, contended that the defendants, corporate successors to the Phillip Carey Company (Carey), which had created the waste, should be held liable for their predecessor's violations. Carey had in fact sold the land to the plaintiff's predecessor. The defendants never owned or operated the offending facility and the record indicated that the reorganizations involved had been statutory mergers or consolidations. While the court ultimately remanded the case allowing the plaintiff to explore the defendants' corporate reorganizations in greater detail, the court definitely set the stage for application of successor corporate liability rules under CERCLA.

In the asset acquisition context as noted above, entities purchasing assets are generally not accountable for the liabilities of their sellers. In the CERCLA context the difficult cases involve deciding whether contractual language that does not explicitly mention environmental liabilities should be interpreted as implicitly including an assumption of CERCLA obligations. In Mobay Corp. v. Allied-Signal, Inc., the court considered whether the purchasing corporation impliedly assumed sellers' CERCLA obligations under a contractual provision that stated that the purchaser would indemnify the seller from certain obligations, even though the contract itself predated the enactment of CERCLA. In the context of the contract the court interpreted the clause as an assumption of personal injury and property damage claims and not as an assumption of environmental claims. 761 F. Supp. 345 (D.N.J. 1991).

In reaching its conclusion that CERCLA liabilities had not been impliedly assumed, the Mobay court reviewed a number of other cases involving similar issues. It appears that whether liabilities have been implicitly assumed in CERCLA cases is going to be a fact specific, case by case determination.

Other courts appear to be applying traditional common law doctrines in the "***de facto*** merger" exception context. Compare i.e., In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1010 (D. Mass. 1989), and Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260 (9th Cir. 1990).

The same is true in applying the "mere continuation of selling corporation" exception. Some examples are Kelly v. Thomas Solvent Co., 725 F. Supp. 1446 (W.D. Mich. 1988), and U.S. v. Carolina Transformer Co., Inc., 739 F. Supp. 1030 (E.D.N.C. 1989) *aff'd*, 978 F.2d 832 (4th Cir. 1992).

The courts have also imposed successor corporation liability in the case of the two modern exceptions; the product line exception and the continuation of enterprise theory. The former theory was created by the California Supreme Court in Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977), and followed by the New Jersey Supreme Court in Ramirez v. Amsted Industries, Inc., 86 N.J. 332, 431 A.2d 811 (1981). The latter exception was introduced by the Michigan Supreme Court in an asset purchase context in Turner v. Bituminous Casualty Co., 397 Mich. 406, 244 NW2d 873 (Mich. 1976).

In the CERCLA context, the court in U.S. v. Distler, 741 F. Supp. 637 (W.D.Ky. 1990), considered whether the purchasing corporation might be held liable for its predecessor's CERCLA violations under the continuation of enterprise exception. In denying the successor's motion to dismiss the government's claim of successor liability, the court found that the successor may have succeeded to its predecessor's CERCLA liability based on whether or not the successor retains the same employees, retains the same supervisory personnel, retains the same production facilities in the same location, continues producing the same products, retains the same trade name, maintains continuity of assets and general business operations and holds itself out to the public as the continuation of the previous corporation. On motion for reconsideration in light of the decision of the Sixth Circuit in Anspec Company, Inc. v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. 1991), the Court concluded that the question of successor liability should be decided under state law. Under Ohio law, the elements of the "mere continuation" exception to the general rule were not present, the court determined, and there was no successor liability under CERCLA. U.S. v. Distler, 865 F. Supp. 398 (W.D. Ky. 1991). The court in U.S. v. Western Processing Co., Inc., 751 F.Supp. 902 (W.D. Wash. 1990), considered the applicability of the modern exceptions in ruling on a pretrial motion and did not foreclose the potential applicability of either the product line or continuation of enterprise exceptions to CERCLA cases.

III. A FEW WORDS ABOUT LIMITED LIABILITY COMPANIES

If your work in the environmental area has caused you to become curious about the creation and maintenance of business entities that are designed as liability shields, you must become familiar with the current rage in the creation of such entities: the limited liability company or "LLC". For the reasons outlined above, almost every state in the union has enacted a statute permitting the creation of limited liability companies.

Limited liability companies are separate business entities owned by members which may be managed by the members themselves or may, if the members so elect, be managed by managers. In simplest terms, these are companies that operate like general partnerships, but have the limited liability associated with corporate status. We have referred above to the basic problem involved in the creation of corporations, that is, the trouble of creating the entity and then issuing share certificates, having annual meetings of shareholders and directors and keeping careful minutes of the deliberations of both and so forth.

A related set of problems was involved in creating a limited partnership, where one could be an investor whose liability was limited to the amount put into a particular entity, but if he/she took any part in the management of the day to day business affairs of the entity, he/she became liable as a general partner, which defeated the purpose of the investment intention in the first place. Furthermore, most attorneys creating limited partnerships installed a corporation as the general partner, involving the high maintenance outlined above.

In the case of limited liability companies it makes no difference in the determination of limitation on your personal liability whether you as a member thereof do or do not take part in management of the company. It doesn't matter whether you and the other members ever have a meeting or not, and it doesn't matter whether you annually elect managers or other persons who perform the functions analogous to a general partner in a limited partnership or an officer or director of a business corporation. You can name such persons at the outset of the venture and never have to rename or reelect them if you so desire.

It must be stressed that the interest that most people have in the creation of limited liability companies is being treated for tax purposes as a partnership that is taxed under Subchapter K of the Code. If the limited liability company is created in such a way that it lacks at least two of the attributes of corporateness (that is continuity of life, centralized management, free transferability of interest and limited liability) the Internal Revenue Service will permit flow through taxation, that is, the gains or losses of the entity will be treated as if they had been incurred or realized pro rata by the members of the limited liability company. Note also that the determination that a particular limited liability company will be taxed for federal income tax purposes under Subchapter K is not binding on state taxing authorities. Some states have indicated that they will follow the IRS's determination in a particular case, but others in their enabling statutes have been careful to state that the question of whether a limited liability company created under their state's law will be taxed as a partnership or as a corporation is subject to determination on a case-by-case basis by the state revenue authorities.

In some states it takes at least two members to make a limited liability company. In others the minimum number is not specified. The Internal Revenue Service, for the time being at least, is holding fast to their position that it takes more than one partner to make a partnership. Therefore, if you want your LLC taxed as a partnership, you should have at least two members.

Under the laws of some states a limited liability company can be managed by someone who has no ownership interest and no other connection with the limited liability company, apart from the fact that he/she/it has been elected manager by the members. This may have important consequences in the area which is the subject of this paper. If a limited liability company can in effect delegate the management to another entity for purposes of liabilities created under state law, such as trespass or nuisance associated with an environmental violation, there may not be automatic recourse to the assets of the managing entity in the absence of a showing of negligence or other misfeasance on the part of the managing entity.

In other words, if a parent corporation manages the affairs directly of one of its subsidiaries, bypassing the directors and officers of the sub, the courts have no trouble in piercing the corporate veil and subjecting the assets of the parent company to any liabilities created by its activities in managing the affairs of the sub. As yet, there are no cases piercing the LLC veil. It's possible that by analogy the courts will impose liabilities in similar sets of circumstances, but a major problem at least from the standpoint of dogma is posed by the fact that some of these state statutes expressly permit an LLC to be managed by a non-member non-owner. For more in-depth treatment of issues surrounding the creation of LLCs, see the series of articles in ABA Section of Business Law, Business Law Today, (Mar/Apr 1995): "LLC's: Wave of the Future."

IV. DISREGARDING THE CORPORATE ENTITY

A corporation is frequently found at fault because of the actions of its subsidiary or other affiliated corporation. This reaching through another entity to impose liability and the variety of names it goes by are well explained by the Fifth Circuit panel in the following excerpts from Lubrizol Corp. v. Cardinal Construction Co.:

> The law relating to disregard of the corporate entity, or piercing the corporate veil, is not uniform throughout the United States. There are many different terms ascribed to a cause of action seeking to hold one corporation liable for the actions of another corporation. Common theories use terms and phrases such as "alter ego", "agency", "mere instrumentality", "sham corporation", and "entity". Not only are these terms unhelpful, but they cloud the thinking of lawyers and judges. As Benjamin Cardozo wrote:
>
> > The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in

> law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.

Berkey v. Third Avenue Railway Co., 244 N.Y. 84, 155 N.E. 58, 61 (1926).

One might therefore expect some disagreement as to what the various terms mean. Some courts hold, for example, that the agency theory is the same as the mere instrumentality theory. See e.g., House of Koscot Development Corp. v. American Line Costmetics, Inc., 468 F.2d 64 (5th Cir. 1972); see also Pan Eastern Exploration Co. v. Hufo Oils, 855 F.2d 1106, 1130-33 (5th Cir. 1988). Other courts hold that the two theories are distinct and comprise different elements. See Pacific Can Co. v. Hewes, 95 F.2d 42 (9th Cir. 1938); Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc., 456 F. Supp. 831 (D.Del. 1978).

Both appellant and appellee agree that the instruction regarding liability under the theory of "instrumentality" was accurate. Courts have consistently applied the three elements of the cause of action:

1. complete domination of the other corporate entity;

2. the control must be wrongful; and

3. the control must proximately cause the injury complained of.

See Johnson v. Warnaco, Inc., 426 F. Supp. 44, 48 (S.D. Miss 1976).

* * * In Minchen v. Van Trease, 425 S.W.2d 435, 437 (Tex.Civ.App.--Houston [14th Dist.] 1968, *writ ref'd, n.r.e.*), for example, the court stated, "While Texas courts may be somewhat more lenient than those of other jurisdictions in disregarding the corporate entity, the reasons for doing so have been well enumerated. These are when the corporation is used to perpetrate a fraud, to evade an existing legal obligation, to achieve or perpetrate a fraud, to evade an existing legal obligation, to achieve or perpetrate a monopoly, to protect a crime, to justify a wrong, to circumvent a statute, and when one corporation exists as a mere tool or business conduit of another corporation." *Id.* While the appellants content that the Texas courts have never considered the agency theory, it is clear that Texas courts simply refuse to find liability without wrong-doing by the controlling corporation. The appellants can point to no case in Texas jurisprudence, nor have we found any, that imposes this sort of liability without wrongdoing.

The Texas Supreme Court, in the leading case of Bell Oil & Gas Co. v. Allied Chemical Corp., 431 S.W.2d 336, 339 n. 3 (Tex. 1968), wrote that, "The statement that the insulation will be broken down when the subsidiary is an 'agency,' 'adjunct,' 'instrumentality,' 'alter ego,' 'tool,' 'corporate double,' or 'dummy,' of the parent is not helpful. These concepts themselves need defining. At best, they merely state results. And the results are significant only in light of the facts." *Id.* The court also noted that the corporate arrangement "must be one which is likely to be employed in achieving an inequitable result by bringing into operation a basically unfair device...." *Id.* at 340. And again, in Castleberry v. Branscum, 721 S.W.2d 270, 271-72 (Tex. 1986), the Texas Supreme Court listed the circumstances under which the corporate fiction might be disregarded. *Id.* The circumstances listed all involve some type of wrongdoing. Nowhere does the court suggest that liability may lie without improper behavior. In fact, the court cites with approval a commentator who says the purpose of the law is equity:

> What the formula comes down to, shorn of verbiage about control, instrumentality, agency and corporate entity, is that liability is imposed to reach an equitable result.

Latty, Subsidiaries and Affiliated Corporations 191 (1936). 868 F.2d. 767 at 769-71 (5th Cir. 1989).

Whether a factual basis exists for the disregard of the corporate entity is a fact question for the jury. Castleberry, 721 S.W.2d 270 at 271.

The Castleberry decision was controversial in the minds of many businessmen and their lawyers, making it too easy to disregard the corporate fiction. The aftermath of the case is well described in Western Horizontal Drilling v. Jonnet Energy Corp., 11 F.3d 65 at 67 (5th Cir. 1994):

> To better understand Castleberry; we have interpreted the case as establishing three broad categories in which a court may pierce a corporate veil: (1) the corporation is the alter ego of its owners and/or shareholders; (2) the corporation is used for illegal purposes; and (3) the corporation is used as a sham to perpetrate a fraud. Villar v. Crowley Maritime Corp., 990 F.2d 1489, 1496 (5th Cir. 1993); Fidelity & Deposit Co. v. Commercial Casualty Consultants, Inc., 976 F.2d 272, 274-75 (5th Cir. 1992). Thus, alter ego is but one of several methods for piercing the corporate veil. The Castleberry court defined alter ego as when "a corporation is organized and operated as a mere tool or business conduit of another corporation." Castleberry, 721 S.W.2d at 272; see also Harrell v. DCS Equip. Leasing Corp., 951 F.2d 1453, 1458-59 (5th Cir. 1992); Pan Eastern Exploration Co. v. Hufo Oils, 855 F.2d 1106, 1130-33 (5th Cir. 1988). The Castleberry court further established that alter ego "is shown from

the total dealings of the corporation and the individual, including the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, the amount of financial interest, ownership and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes." *Id.*

The Castleberry decision significantly curtailed shareholders' rights relative to common law corporate disregard theory. In response; the Texas legislature amended its Business Corporation Act in 1989 to read, in part:

> A. A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted shall be under no obligation to the corporation or to its obligees with respect to:
>
> (3) any contractual obligation of the corporation on the basis of the failure of the corporation to observe any corporate formality, including without limitation: (a) the failure to comply with any requirement of this Act or of the articles of incorporation or bylaws of the corporation; or (b) the failure to observe any requirement prescribed by this Act or by the articles of incorporation or bylaws for acts to be taken by the corporation, its board of directors, or its shareholders.

TEX. REV. CIV. STAT. ANN. art. 221 A(3) (Vernon Supp. 1993). The amendments overruled Castleberry to the extent that a failure to observe corporate formalities is no longer a factor in proving the alter ego theory in contract claims. Farr v. Sun World Sav. Ass'n., 810 S.W.2d 294, 296 (Tex.App. 1991); Villar, 990 F.2d at 1496 n. 8 & 1500; Fidelity & Deposit Co., 976 F.2d at 275: Thus, to pierce the corporate veil using the alter ego theory in a contract claim, the claimant must look to the remaining factors outlined in Castleberry. (Footnotes and headnotes omitted).

The amendments to art. 2.21, T.B.C.A. also eliminated constructive fraud as a grounds for piercing in contract claims. Actual fraud must be proven, although in tort claims, either actual or constructive fraud will suffice for piercing. Farr v. Sun World Sav. Ass'n., 810 S.W.2d 294, 296 (Tex.App.--El Paso, 1991, *no writ*). Atlantic Richfield Co. v. Long Trusts, 860 S.W.2d 439 (Tex.App.--Texarkana 1993, *writ denied*). See generally Boyce I. Graham, *Navigating the Mists of Metaphor: Examination of the Doctrine of Piercing the Corporate Veil*, 56 J. AIR L. & COM. 1135 (1991) and Note, Alter Ego: Shareholders' Lingering Liability Under Matthews Construction Co. v. Rosen, 44 Baylor L. Rev. 393 (1992). Incidentally, the Matthews Construction case, 796 S.W.2d 692 (Tex. 1990) gave a surprising answer to the question: "If you obtain a judgment against a corporation, how long do you have before being

barred by limitations in an attempt to collect from its shareholders by an action to disregard the corporate entity?" The Texas Supreme Court's answer was 10 years, under such statutory provisions as § 31.006 or § 34.001, Tex. Civ. Prac. & Rem. Code Ann. (Vernon 1986).

The 1989 amendments to Article 2.21 of the TBCA did not herald an end to the difficulty in this area of Texas law. In Superior Derrick Services, Inc. v. Anderson, 831 S.W.2d 868 (Tex.App.--Houston [14th Dist.] 1992, *writ denied*), a Texas court of appeals found both Superior Derrick Services, Inc. ("Superior") and Champion Manufacturing Industries, Inc. ("Champion") jointly and severally liable for the purchase price of three oil rig masts on the "single business enterprise" theory. This theory should have been dead after the 1989 TBCA Amendments but was, alas for Superior and Champion, very much alive in 1992.

According to the earlier case of Paramount Petroleum Corp. v. Taylor Rental Center, 712 S.W.2d 534, 536 (Tex.App.--Houston [14th Dist.] 1986, *writ ref'd n.r.e.*), the "single business enterprise" theory is to the effect that "when corporations are not operated as separate entities but rather integrate their resources to achieve a common business purpose, each constituent corporation may be held liable for debts incurred in pursuit of that business purpose." The Superior Derrick Services court applied this theory by analyzing whether Superior and Champion had commingled offices, employees, accounting, etc. and generally failed to observe corporate formalities in dealing with one another. The case was probably tried on the wrong theory (partner by estoppel would probably have been correct, since most "single business enterprise" cases involve parent and subsidiary corporations, whereas there was no evidence that Superior or Champion owned any of each other's stock). Nevertheless, the willingness of the court of appeals to disregard the mandate of Article 2.21 concerning imposing liability on shareholders in contract cases for failure to observe corporate formalities was disturbing. See Robert F. Gray, Jr., et al., *Corporations, Annual Survey of Texas Law*, 46 SMU L. Rev. 1171, 1174-5 (1993). As the authors of the same survey observed a year later:

> Accordingly, the legislature attempted [in 1993] to clarify the limited circumstances under which a shareholder will be liable for the contractual obligation of a corporation. As revised, Section A of Article 2.21 provides that a holder of shares, an owner of any beneficial interest in shares, or a subscriber
>
> > shall be under no obligation to the corporation or to its obligees with respect to...any contractual obligation of the corporation on the basis that *the holder, owner, or subscriber is or was the alter ego of the corporation*, or on the basis of actual fraud or constructive fraud, a sham to perpetrate a fraud, *or other similar theory*, unless the obligee demonstrates that the holder, owner, or subscribed caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on

> the obligee primarily for the direct personal benefit of the holder, owner, or subscriber....

Section B now states that the "liability of a holder, owner, or subscriber of shares...for an obligation that is limited by Section A...is *exclusive and preempts any other liability* imposed on a holder, owner, or subscriber...for that obligation *under common law or otherwise*," unless that person has agreed to be liable for the obligation or is otherwise liable under the TBCA or other applicable statute.

One commentator has written that the 1989 amendments to TBCA Article 2.21, made in response to *Castleberry*, resulted in the lower courts "show[ing] an inclination to avoid the clear language and intent of the statute and allow contract claims against shareholders in the absence of actual fraud." The 1993 amendment to Article 2.21 was an effort to "reverse this trend by making it unambiguously clear that contractual claims against a corporation may only be pursued against shareholders in the circumstances stated."

Although such clarity was intended, the result may have fallen short. Rather than to simply state the circumstances set forth in Section A provide the exclusive bases for pursuing contractual claims against shareholders, Section B states "that [t]he *liability* of a [shareholder] . . . for an obligation that is limited by Section A . . is *exclusive and preempts any other liability...*" A literal interpretation gives the conclusion that a shareholder's *liability* precludes any other liability, begging the question of how a shareholder who is *not* liable for an obligation under Section A can be *protected* against other theories of liability by Section B. Even though the statutory language of Section A has been tightened, it still may be possible for courts which seek to find a shareholder personally liable to construe the language of Section B in a manner which achieves the desired result.

Likewise, encouraging judicial interpretation of the phrase "or other similar theory" may test the creativity of practitioners seeking to circumvent the obvious intention of the legislature. The amendment does not address *non-contractual* corporate obligations, however, and thus leaves the corporate disregard doctrines viable for use by tort claimants and those seeking recovery based on other equitable theories [Footnotes omitted].

John D. Jackson, et al., *Corporations and Limited Liability Companies, Annual Survey of Texas Law*, 47 SMU L. Rev. 901 at 918-19 (1994).

The following cases involve the application of some of the tests used to determine whether parent corporations may be liable for actions of their subsidiaries. Interlocking officerships and directorships and broad authority at the parent level for activities of the subsidiary suffice for finding the parent an "owner" or "operator" under CERCLA. John S. Boyd Co., Inc. v. Boston Gas Co., 992 F.2d 401 (1st Cir. 1993) (The case also involves a refusal to find a successor corporation liable). There is no liability of a parent corporation as an owner under CERCLA absent circumstances justifying piercing the corporate veil and no liability of a parent corporation as an operator unless evidence of actual control over the subsidiary's activities is adduced. Lansford-Coaldale Joint Water Authority v. Tonolli Corp., 4 F.3d 1209 (3rd Cir. 1993). An interesting way to reach a parent corporation without piercing a subsidiary's veil is demonstrated by a case where a parent corporation was liable under Section 324A of the Restatement (Second) of Torts (1966) for an explosion at a subsidiary's plant because the parent's safety manager's duties included inspection of the subsidiary's plant. Johnson v. Abbe Engineering Company, 749 F.2d 1131 (5th Cir. 1984).

A seminal case on the alter ego or agency theory in the Fifth Circuit, U.S. v. Jon-T Chemicals, Inc., 768 F.2d 686 (1985) *cert. denied*, 475 U.S. 1014, 106 S. Ct. 1194 (1986), is a good illustration of how sloppy record keeping and informality in dealings between affiliated corporations can result in the imposition of upstream liability. Here the subsidiary was initially undercapitalized, relied upon repeated infusions of capital from the parent (which were not authorized by corporate resolutions or memorialized in promissory notes or the issuance of additional equity securities), sometimes permitted the parent to pay the subsidiary's obligations directly or cover its overdrafts at the bank, used facilities of the parent without rent, had an identity of officers and directors with the parent, borrowed from the parent without documentation or collateral and allowed the parent to pay the salary of its employee. The Court of Appeals had no trouble affirming the Northern District in holding that the sub was the alter ego of the parent. The Court of Appeals also reaffirmed its rule that while in contract cases, fraud is an essential element of an alter ego finding, in tort cases it is not.

Furthermore, a contract claimant must show initial reliance on the corporate owner's creditworthiness to avoid the effect of a corporate insolvency which he or she otherwise will be deemed to have assumed the risk of. Fidelity & Deposit Co. v. Commercial Casualty Consultants, 976 F.2d 272 (5th Cir. 1992).

The law differs from state to state concerning the ability of limited partners of a limited partnership to pierce the veil of a corporate general partner to hold the shareholder of the general partner liable to the limited partners. Contrast Remenchik v. Whittington, 757 S.W.2d 836 (Tex.App.--Houston 1988, *no writ*) and Maywalt v. Parker & Parsley Petroleum Co., 808 F.Supp. 1037 (S.D.N.Y. 1992) (veil may be pierced) with In re Estate of Hall, 517 Pa. 115, 535 A.2d 47 (Pa. 1987) (veil may not be pierced).

Although in CERCLA and the "Erosion" of Traditional Corporate Law Doctrine, 86 NW. U.L. REV. 259 (1992), authors Lynda J. Oswald and Cindy A. Schipani made a strong argument that most of the cases imposing derivative CERCLA liabilities on corporate officers or shareholders do not depart significantly from ordinary hornbook corporate law, it is nonetheless difficult to square CERCLA cases such as Donahey v. Bogle, 987 F.2d 1250 (6th Cir. 1993) *rev'd on other grounds*, _____ U.S. _____, 114 S. Ct. 2668 (1994) (sole shareholder of a corporation that had produced wastes dumped on land was a PRP as an "owner") with cases from other fields such as William B. Roberts, Inc. v. McDrilling Co., 579 S.W.2d 335 (Tex.Civ.App.--Corpus Christi 1974, *no writ*) (the fact that all of the stock in a corporation is owned by a single individual does not of itself constitute the corporation the alter ego of the individual). See R.D. Snook, "The Liability of Shareholders of Closely Held Corporations under CERCLA," 68 Connecticut Bar Journal 422 (1994) (expresses the view that, because Superfund imposes liability based on status, rather than fault, a shareholder of a closely-held corporation is much more likely to be held liable because of participation in activities constituting him or her an "operator.")

The writer's belief is that a very sound analysis of the proper ground for decision is set out in Joslyn Mfg. Co. v. T.L. James & Co., Inc., 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108, 111 S. Ct. 1017 (1991), where the court declined to impose liability on a parent corporation because the factors normally justifying the disregard of the corporate entity were not present.

It must be conceded, however, that expressing a preference for the application of traditional corporate doctrines does not necessarily involve embracing clarity, especially in Texas. Texas courts don't seem to agree on whether piercing is an exceptional remedy, as in Aztec Management and Inv. Co., Inc. v. McKenzie 709 S.W.2d 237 (Tex.App.--Corpus Christi 1986, *no writ*), or rather routine, as in Mancorp, Inc. v. Culpepper, 802 S.W.2d 226 (Tex. 1990).

Finally, remember that sometimes corporate barriers are pierced horizontally, not vertically. In a proper case of commingling assets, using common letterhead, employees, offices and officers, brother-sister corporations may be held jointly and severally liable for one another's obligations. Furthermore, the effect of horizontal piercing may be to spread a fiduciary duty owed by one of the sister corporations to all the others. See, e.g., Crum & Forster, Inc. v. Monsanto Co., 887 S.W.2d 103 (Tex.App.--Texarkana 1994).

V. PRACTICAL CONSIDERATIONS FOR ENVIRONMENTAL LAWYERS

The lawyer representing the corporation frequently is confronted with the problem of divided loyalties in the context where not only the corporation but certain persons acting in the employ of or on behalf of the corporation may be found to be responsible for some conduct pursuant to the business of the corporation. This immediately presents the lawyer with some difficult ethical questions. Is he or she required upon first discovering the possibility of multiple liability to require that the individual who might be comparable or responsible retain his or her

own counsel apart from the representation normally provided by the corporation? Do the bylaws or other expressed corporate policy of the corporation provide that the corporation may seek indemnity from an individual found responsible for criminal, or perhaps finable civil, conduct while in the course for working for the corporation; or do they expressly negate any such intent or waive any such right on part of the corporation?

If it is clear that both the corporation and individuals can be held responsible, for example for statutory damages, but that there is no right of indemnity or contribution that the individuals or the corporation have with respect to one another, then representation by a single lawyer or firm would seem to be appropriate. In all other cases (as discussed in more detail below) the multiple representation can proceed if at all only after necessary disclosures, for example, concerning the waiver of privilege as to communications among and between those who are co-represented, and if an informed consent in writing is given by all such affected persons. The practical difficulties that these situations present for lawyers cannot be overemphasized.

A corporation is an imaginary critter. A shareholder, director or officer of a corporation that periodically refers you or your law firm business is a living, breathing human being with a temper and a threshold of exasperation, etc. If you tell such a person after all the money the corporation has paid your firm over the past x years, they still have to go out and retain counsel of their own in connection with a particular environmental investigation or perhaps a civil lawsuit by another private litigant, they are quite likely to be unhappy. This is especially true if the bylaws of the corporation do not expressly or unequivocally provide that the corporation can advance the expense of such representation until such time as it is established whether or not there was any culpability on the part of the individual, which under applicable statutory or bylaw provisions or provisions in the articles of incorporation, would result in a requirement that they reimburse the corporation for the cost of such representation.

Another very ticklish and related area is the question of the necessity of public disclosure of potential liabilities, not only of the corporation but possibly of its shareholders, directors or officers. Naturally, private companies have more liberty to keep quiet about such potential liabilities, except perhaps as regards to communications with their lenders or shareholders. Conversely, public companies have the obligation not only to their existing shareholders but the potential investing public in general to make timely disclosure of material corporate events, including the emergence of potential environmental liabilities. The fact that certain officers of the corporation may also be liable under the applicable statutes is something that the individuals involved are usually not eager to think about, let alone mention to the public, but if the corporation is potentially responsible for paying the attorney fees and expenses for separate representation of those individuals in connection with an environmental investigation or perhaps a lawsuit by a private party, the potential amounts in timing of such expenditures may at least for a smaller company become a material item which must be disclosed.

A. Who Is The Client? Rule 1.12 of the Texas Disciplinary Rules of Professional Conduct makes quite clear (and subpart (a) expressly states that) a lawyer employed or retained by an organization represents the entity. Subpart (e) of the Rule states:

> In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.

The idea that only the organization qualifies as the client is troubling, but any other approach leads to chaos. "The loyalty of a corporate lawyer must be directed solely toward the interests of the entity." C. WOLFRAM, *MODERN LEGAL ETHICS* 421 (1986). "[T]he general proposition of corporate identity apart from its shareholders leads us to conclude, in accordance with decisions from other jurisdictions, that the attorney's client is the corporation and not the shareholders." Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C., 107 Mich. App. 509, 512 309 N.W.2d 645, 648 (Mich. App. 1981).

A director or officer of an organization, accustomed to making decisions for the organization and to directing the work of its lawyers usually believes that he is the lawyer's client. Lawyers frequently refer to the individuals, such as the vice president of finance or perhaps the chairman of the board as "My client." Frequently those officers and their lawyers feel a closeness or a friendship that resembles a relationship between a lawyer and an individual client and those officers might well believe that the lawyer's duty of loyalty runs to them as well as to the organization. The officer may further believe incorrectly that he would be the decision maker as regards claiming or waiving the attorney-client privilege. Nevertheless, as Rule 1.12 makes clear, the lawyer-client relationship is only between the lawyer and the entity.

To make sure that officers, directors and employees of an organization understand that the lawyer represents the entity and not the management team, Rule 1.12 further requires the lawyer in dealing with the organization's representatives to explain the identity of the client when it is apparent that the organization's interest are adverse to those of the representatives with whom the lawyer is dealing, or whenever it appears reasonably necessary to avoid misunderstanding on their part. As pointed out in Schuwerk and Sutton, *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A Hous. L. Rev. 1 (1990) at 190, the failure to heed the latter admonishment can put the lawyer in a very difficult position and result in considerable harm to the organization:

> "Suppose for example that a high corporate official, reasonably believing that a lawyer for a corporation also is his lawyer, reveals that he has breached his fiduciary duties to the corporation and has engaged in conduct that would implicate the corporation in criminal activity. May the lawyer disclose those matters to his

authorities in the organization? Professional Ethics Committee Opinion 387, rendered under the Texas Code, says "no," explaining:

> "If it be considered that both the corporation and the officer are clients, the answer is easy. They are multiple clients and the attorney's duty to each conflicts and he should withdraw from representing *both*. The revelation of a past crime is privileged and he has no duty or right to reveal the confidential communications to anyone."

If, however, the corporation was considered to be the only client-as would be the case had the lawyer clearly explained his role before any disclosure had been made-the lawyer would have been "free to disclose the official's conduct to the directors of the corporation and, if necessary, to its shareholders."

Under these Rules, a lawyer might have a greater degree of discretion to disclose the corporate official's wrongdoing than was true under the Texas Code as construed in Opinion 387. Nonetheless, a prudent lawyer for an organizational client should take steps to minimize the possibility of acquiring information of great importance to the well-being of his client, but which the lawyer is not able to disclose to that client.

It is possible, of course, for the organization's lawyer to represent, as an additional client, an officer or other constituent of the organization, subject to the usual regulations relating to the dual representation of actually or potentially conflicting interests. (Footnotes omitted).

Paragraph (b) of Rule 1.12 provides as follows: A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that: (1) an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization; (2) the violation is likely to result in substantial injury to the organization; and (3) the violation is related to a matter within the scope of the lawyer's representation of the organization.

Paragraph (c) goes on to say: Except where prior disclosure to persons outside the organization is required by law or other Rules, a lawyer shall first attempt to resolve a violation by taking measures within the organization. In determining the internal procedures, actions or measures that are reasonably necessary in order to comply with paragraphs (a) and (b) a lawyer

shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Such procedures, actions and measures may include, but are not limited to, the following: (1) asking reconsideration of the matter; (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization is determined by applicable law.

Paragraph (d) states: Upon a lawyer's resignation or termination of the relationship in compliance with Rule 1.15, a lawyer is excused from further proceeding as required by paragraphs (a), (b), and (c), and any further obligations of the lawyer are determined by Rule 1.05. Schuwerk and Sutton offer the following commentary:

> In the main, the Rule only requires the lawyer to act reasonably in dealing with improper conduct by other representatives of an organization. . . The Rule also offers advice relating to several matters. These include a recognition that a lawyer normally should work through the organizations regular chain of command; a partial listing of possible remedial steps for certain situations; and a listing of some matters a lawyer should consider in determining what is reasonably in the organization's best interest. 27A Hous. L. Rev. 1 at 182-3 (Footnotes omitted).

Schuwerk and Sutton continue as follows at page 186:

> When the lawyer is confronted with the paragraph (a) or (b) situation requiring him to take reasonable action within the organization, paragraph (c) provides both substantive and procedural guidance. The appropriateness of the measures the lawyer elects to take is guided by due regard to (1) "the seriousness of the violation and its consequences;" (2) "the scope and nature of the lawyer's representation;" (3) "the responsibility in the organization and the apparent motivation of the person involved;" (4) "the policies of the organization concerning such matters;" and (5) "any other relevant considerations." The recommended, but non-exclusive list of procedures includes (1) asking reconsideration of the course of action, (2) advising that a separate legal opinion be obtained and presented to higher authority, and (3) referring the matter to higher authority (including the highest, if circumstances warrant) in the organization. . . .Rule 1.12(d) allows the lawyer to withdraw from the representation in certain circumstances, rather than to

> attempt to remedy the constituents violation within the organization. The lawyer's freedom to adopt that approach, however, is governed by Texas Rule 1.15(a) and (b). Assuming they authorize withdrawal, the lawyer must also comply with Texas Rule 1.15(d) and, if applicable, Rule 1.15(c) as well (Footnotes omitted).

In summary, Rule 1.15 provides as follows: A lawyer shall decline to represent a client or withdraw from such representation if (1) the representation will result in violation of any applicable rules of professional conduct or other law, (2) the lawyer's physical, mental or psychological condition impairs his fitness to represent the client or (3) the lawyer is discharged with or without good cause.

It further provides that a lawyer may withdraw from representing a client anytime withdrawal can be accomplished without material adverse affect on the interest of the client. A lawyer is also permitted to withdraw from representing a client if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes may be criminal or fraudulent, the client has used the lawyer's services to perpetrate a claim or fraud, the client insists on pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement, the client fails to pay the lawyer's fees and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled, the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client, or other good cause for withdrawal exists.

Upon terminating representation a lawyer must take steps to the extent reasonably practical to protect a client's interests such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payments of fees that have not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.

Clearly the lawyer is at liberty to withdraw from representation of a client if an impermissible conflict of interest arises. As stated in comment 3 to Rule 1.06: "An impermissible conflict may exist or develop by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." See also Rule 109.

The basic point is that even though a lawyer withdrawing is excused from any further proceeding required by paragraphs (a), (b) or (c) of Rule 1.12, the precondition of that excuse is that the lawyer's resignation or termination of the relationship is in compliance with Rule 1.15, and the lawyer must continue to observe the strictures of Rule 1.05 concerning client confidentiality.

Before the enactment of the disciplinary rules of professional conduct by the State Bar of Texas, the general rule was that one attorney or firm could represent multiple clients so long as the clients interests were not actually adverse and hostile. See *e.g.*, In interest of H.W.E., 613 S.W.2d 71 (Tex.App.--Ft.Worth 1981, *no writ*); Mandell & Wright v. Thomas, 441 S.W.2d 841 (Tex. 1969). A mere potential conflict of interest was deemed insufficient to prohibit multiple representations so long as there was no real or substantial conflict. Campbell v. State Mortgage Corp., 48 S.W.2d 395 (Tex.Civ.App.--Galveston 1932, *writ dismissed*).

B. What If The Interests Of Multiple Clients Diverge? Suppose you are an attorney for a corporation designated as a PRP under CERCLA and you have further done personal legal work in the past for a major shareholder and officer of the corporation who has been active in that facet of the business giving rise to the superfund claims and who is potentially in your judgment susceptible of a claim that he was an "owner" or "operator" of the offending facility. You are satisfied there is no benefit to be gained by either the corporation or the shareholder officer in throwing stones at one another, that is, the liability vel non of each will be determined by his or its status under CERCLA and neither can disprove culpability on his or its part by attempting to prove culpability on the part of the other. You want to represent both parties in the Superfund proceeding and both want you to represent them - what do you do?

The situation begins with an analysis of Rules 1.06 and 1.07. Rule 1.07(d) provides that: "Within the meaning of this Rule a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests." The Rule says in paragraph (a) that "A lawyer shall not act as intermediary between clients unless (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation; (2) the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the clients best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful; and (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients."

Paragraph (c) of Rule 1.07 provides that: "A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation."

Paragraph (e) goes on to say that: "If a lawyer will be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct."

Rule 1.06 provides the general rules in the conflict of interest area: (a) "A lawyer generally shall not represent opposing parties to the same litigation." (b) "In other situations and

except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person (1) involves a substantially related matter in which that person's interest are materially and directly adverse to the interest of another client of the lawyer or the lawyer's firm; or (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person, or by the lawyer's or law firm's own interests."

Paragraph (c) says: "A lawyer may represent a client in the circumstances described in (b) if (1) the lawyer reasonably believes the representation of each client will not be materially affected and (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications and possible adverse consequences of the common representation, and the advantages involved, if any."

Paragraph (d) says: "A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of that matter, unless prior consent is obtained from all such parties to the dispute."

Paragraph (e) provides that: "If a lawyer has accepted representation in violation of this Rule or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules." Rule 1.06 in paragraph (f) contains the same rule as Rule 1.07, that is: "If a lawyer would be prohibited by this Rule from engaging in particular conduct no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct."

A comment to the Rule concerns the meaning of "directly adverse". The comment says that the representation of one client is directly adverse to the representation of another if the lawyer's independent judgment on behalf of a client or the lawyer's ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client.

In the hypothetical case posed, a disclosure letter to each client should be prepared, advising them of the superiority of several or separate representation over joint representation, stressing that should litigation ever arise between the two of them over the subject matter or the fact of the joint representation, nothing said by either client to you in your capacity as an attorney will be privileged as against discovery attempts by the other, and so forth. The letter should further point out that if a decision is made by other management of the corporation to waive the attorney-client privilege as regards your previous work for the corporation, the individual client will be powerless to prevent the waiver. If after full disclosure of the downside, they both consent (writing is not required by the Rules but strongly recommended by all commentators), you may proceed.

A final word about privileges is probably in order. Article 4447cc, V.A.T.S., the Texas Environmental, Health, and Safety Audit Privilege Act (H.B. 2473), was signed by Governor Bush on May 23, 1995, effective that day. A comprehensive review of this important new statute is beyond the scope of this paper, but a portion pertinent to our subject is Section 5(c), which provides as follows:

> A person, when called or subpoenaed as a witness, cannot be compelled to testify or produce a document related to an environmental or health and safety audit if:
>
> > (1) the testimony or document discloses any item listed in Section 4 of this Act that was made as part of the preparation of an environmental or health and safety audit report; and
> >
> > (2) for purposes of this subsection only, the person is:
> >
> > > (A) a person who conducted any portion of the audit but did not personally observe the physical events;
> > >
> > > (B) a person to whom the audit results are disclosed under Section 6(b) of this Act; or
> > >
> > > (C) a custodian of the audit results.

It goes on to say that a person who has actually seen physical events of violation can be called to testify about those events but can't be required to produce anything related to the preparation of the privileged audit. The privilege is comforting in its breadth, especially when the persons referred to in Section 5(c)(2)(B) are included: employees, lawyers, partners, independent contractors, insurers, potential transferees, lenders and governmental officials in privity, so to speak, with the owner or operator.

But the drawback to the lawyer who wishes to undertake joint representation is that the privilege can be waived by the owner or operator who prepared or caused the preparation of the audit report. Sec. 6(a), Art. 4447cc, V.A.T.S. gives the provisions of the new statute the same effect as Rule 1.12 of the Texas Disciplinary Rules of Professional Conduct: the organization is the client and the privilege belongs to the client.

Ethical Issues

"You're the Devil in Disguise"

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B.A., 1976, Southwestern University
J.D., 1979, St. Mary's University School of Law

LEGAL PRACTICE:

Mr. Romo is currently a sole practitioner in the general civil practice of law. His areas of practice include real estate, contracts, environmental, water districts, mediation, business, commercial, and general civil law and litigation. Mr. Romo was previously an Assistant Attorney General in the Environmental Protection Division of the Office of the Attorney General of Texas from 1990 to 1994. Prior to his work with the Office of the Attorney General, Mr. Romo practiced law in Anchorage, Alaska.

PRESENTATIONS

Mr. Romo has been a speaker, and presented papers at the following seminars: CLE International's legal seminar: Bankruptcy and the Enforceability of Environmental Liabilities, Dallas, Texas, September 1991; the Midwest Environmental Enforcement Association's 6th Periodic Conference, Omaha, Nebraska, May, 1992; The University of Texas Health Science Center's Environmental Symposium, San Antonio, Texas, December 15, 1992; The National Association of Attorney General's Environmental Enforcement Seminar, New Orleans, Louisiana, February 16-19, 1993; The Office of the Attorney General of Texas; Texas' Environmental Conference for State Agencies, Austin, Texas, July 29-30, 1993; The National Association of Attorney General's Environmental Enforcement Seminar, Orlando, Florida, March, 1994; ADR Services International, Inc.'s Mediation Training for Professionals, San Antonio, Texas, February 23 - 26, 1995; Austin, Texas, April 27 - 30, 1995; Houston, Texas, May 18 - 21, 1995; San Antonio, Texas, July 20 - 23, 1995.

ETHICAL ISSUES:

"You're the Devil in Disguise"

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ETHICAL ISSUES: "You're the Devil In Disguise"

Leslie David Romo

In addition to being well versed in the environmental statutes, codes and rules that apply to their particular area of the law, environmental attorneys should also be well acquainted with the variety of ethical laws and rules that they may face in their practice. This paper does not attempt to cover all of the different ethical laws and issues that an environmental practitioner may face, it is instead a general overview of some of the more common ethical issues and laws faced in the practice of environmental law.

I. THE TEXAS ETHICS COMMISSION

On November 5, 1991, Texas voters approved Article III, §24a to the Texas Constitution. This amendment created the Texas Ethics Commission ("TEC"). The 72nd Texas Legislature passed the enabling statute for the TEC in Senate Bill No. 1 ("S.B. 1"), Acts 72nd Legislature, 1991, which became effective January 1, 1992. This bill was formally designated as article 6252-9d.1 of the Tex. Rev. Civ. Stat. This statute was repealed and recodified in Title 5 of the Texas Government Code (Tex. Gov't Code Ann.) (Gov't Code") in Chapters 571 and 572. In addition to enacting the enabling statute for the TEC S.B. 1 also:

* Amended the Lobby Control Act, Tex. Gov't Code Ann. Chap 305.
* Amended the standards of conduct/financial disclosure law governing state officers and employees. Tex. Rev. Civ. Stat. Ann. art. 6252-9b (now Chapter 572 of the Gov't Code).
* Amended the official bribery/gift criminal statutes. Tex. Penal Code §§36.01, 36.02, 36.07, 36.08 and 36.10
* Amended the political funds law. Tex. Elec. Code Ann, Title 15
* Enacted restrictions on lodging and meal reimbursements with public funds. Tex. Rev. Civ. Stat. Ann. art 6823-b (now §§61.001 & .002 of the Gov't Code).
* Amended the financial disclosure law governing county or district officers and county employees. Tex. Local Gov't Code Ann. Chap. 159.

S.B. 1 gave the TEC jurisdiction to administer and enforce:

* Chapter 305 of the Government Code (governing the conduct of lobbyist)
* Chapter 302 of the Government Code (governing the Speaker's race)
* Tex. Rev. Civ. Stat. Ann. art. 6252-9b (now Chapter 572 of the Gov't Code)(concerning financial disclosure and standards of conduct for state officers and employees), and
* Title 15 of the Election Code.

Pursuant to S.B. 1, the TEC has the duty of issuing written advisory opinions giving its interpretation of the law. The TEC may initiate an inquiry about the interpretation of the statute or a question of law on its own initiative or upon a request by an interested person. Most TEC opinion orders have been issued in response to questions by interested persons.

The appointment of members to the TEC and their replacement are spelled out in Tex. Cont. art. III, §§24a(a)-(c). Each member currently holds a four year term.

The enforcement process related to TEC is spelled out in the Gov't Code. Some ethics laws may be enforced by the Attorney General, district or county attorneys in addition to the TEC. §305.035(a) of the Gov't Code. Violations of Chapter 305 of the Gov't Code may subject a person to being convicted of a Class A misdemeanor resulting in a penalty of $4,000 or up to a year in jail or both. §305.031(a) of the Code. Violations of §305.022 of the Gov't Code, however, may subject a person who is found to intentionally or knowingly committed the violation of being convicted of a 3rd degree felony and a penalty of up to $10,000 or from 2 to 10 years in jail or both. §305.031(b) of the Gov't Code. The TEC may also impose a civil penalty in the amount of not to exceed an amount equal to three times the compensation, reimbursement or expenditure against a person who fails to register as a lobbyist. §305.032 of the Gov't Code. A civil penalty of up to $100 per day may also be imposed for late filing of a registration. §305.033(b) of the Gov't Code. If the registration is 30 days late, the TEC may issue a warning to the person, if the person does not pay the penalty stated in the warning within 10 days of the receipt of the warning by registered mail, the TEC may penalize the violator in an amount not to exceed $10,000. §305.033(c) of the Gov't Code. The TEC may also impose a civil penalty of not more than $5,000 or triple the amount at issue under a law administered and enforced by the TEC, whichever amount is greater, for a delay in complying with a TEC order or for a violation of a law administered and enforced by the TEC. §571.173 of the Gov't Code.

The TEC can also issue and enforce cease and desist orders to stop violations and can issue affirmative orders to require compliance with the laws it administers and enforces. §571.172 of the Gov't Code. In addition, following a person's criminal conviction for an offense under Chapter 36 of the Penal Code or Chapter 305 of the Gov't Code, the TEC can deny, suspend or revoke the person's registration under Chapter 305 of the Code. §571.174 of the Gov't Code.

It should be noted that there is severe liability for the filing of a complaint that is determined to be made in bad-faith or found to be frivolous. A "frivolous complaint" is defined as being one that is groundless and brought in bad faith. §571.176(a) of the Gov't Code. The TEC can impose a civil penalty of not more than $10,000

for the filing of a frivolous or bad-faith complaint. §571.176 of the Gov't Code. A person who files a frivolous complaint may also be civilly liable to the respondent in an amount equal to the greater of $10,000 or the amount of actual damages incurred by the respondent, including court cost and attorney's fees. §§571.140, .176 of the Gov't Code. Given that the complaint must both be groundless and brought in bad faith it would appear that a person should not be held liable for filing a complaint that resulted in a finding in favor of the respondent if it was brought in good faith. The issue has not yet been decided by the TEC nor by the courts.

In addition to other changes to the law, S.B. 1 made changes to the laws governing personal financial disclosure and conflicts of interests for state officers and employees. Chapter 572 of the Gov't Code. Essentially, these changes require that all state officers and the party chairman of major political parties file with the TEC a sworn financial statement disclosing their financial activities and the financial activities of their spouses and dependent children over which they had actual control for the preceding reporting year. §§572.021-.029 of the Gov't Code.

II. LOBBYIST REGISTRATION

An important issue addressed by changes brought by S.B. 1 concerns the lobbyist regulation governed by Chapter 305 of the Gov't Code. Prior to S.B. 1, Texas had a two-pronged test to determine whether a person was required to register as a lobbyist. A person was required to register if they spent more than $200, excluding personal expenses, and was paid more than $200 in a calendar quarter to communicate directly with members of the legislative or executive branch to influence legislation or administrative action. Tex. Gov't. Code Ann. §305.003(a)(Vernon 1988) S.B. 1, however, changed the provisions of this statute and now a person who communicates directly with a member of the legislative or executive branch to influence legislation or administrative action must register if he/she triggers a single threshold by either meeting the levels set for expenditures (not less than $200) or compensation/reimbursement (not less than $200) during a quarter. §305.003(a) of the Gov't Code. This has caused an increase in the number of persons required to register as lobbyists.

There are exceptions to the registration rules. The TEC has promulgated TEC Rule 40.3(c) which provides a method by which a person who only spends a small amount of their time lobbying from meeting the registration requirements. If during a calendar year a person spends no more than 5% of his/her total compensated time on lobbying activities, then the lobby related activities are considered an "incidental" portion of his/her overall activities and duties and the person is not required to register.

There are also statutory exceptions to the registration

requirements:

A. For a political party lobbyist whose combined expenditures and compensation do not exceed $5,000 in a calendar year;

B. For a person who has direct communication with a member of an executive branch as an attorney of record in a pending case before a state agency;

C. For testimony or appearance in a public hearing before a member of the legislative or executive branch in conjunction with official proceedings or rule making procedures if the person does not receive special or extra compensation for the appearance, preparation or submission or testimony other than actual expenses incurred for the preparation, appearance, submission or testimony;

D. The person owns directly or indirectly, publishes or is employed by a newspaper or other news medium that opposes or promotes legislation or administrative action and the person does not otherwise engage in activities that would require registration;

E. The person's only lobbying activity consists of compensating or reimbursing a registered lobbyist to act on his/her behalf;

F. The person's only activity is encouraging members, employees or stockholders of the entity that compensates him/her to communicate with a member of the legislative or executive branch;

G. The only activity is attendance at a meeting or entertainment event attended by a member of the legislative or executive branch if the total cost of the meeting or entertainment event is paid by a business entity, union or association; and

H. The compensation that would require registration is reimbursement for wages not earned by attendance at a meeting or entertainment event, and/or other costs related thereto, if a member of the legislative or executive branch attends the meeting or event and if the total cost of the meeting or event is paid by a business entity, union or association;

Certain activities are not considered to constitute direct communication to influence legislation or administrative action under the Code. These include:

A. Testimony or appearance in a public hearing or other communication made by a party or their attorney of record in a proceeding of an adjudicative nature of the type authorized by the Administrative Procedure Act.

B. Direct communication to the legal representative of a state agency whether concerning litigation in which the agency is a party or concerning adjudicative proceedings of the agency;

C. For providing merely clerical assistance in producing direct communication, (ex.: typing or hand-delivering a document);

D. Direct communication to an appointing authority made by a person in his/her capacity as a member of an advisory committee or task force appointed by a member or an entity of the legislative or executive branch;

E. Direct communication for the purpose of compliance with

existing laws, administrative rules, policies and procedures if there is no attempt to change or seek exceptions to such rules, policies or procedures;

F. Direct communication in connection with an audit, inspection or government investigation to determine compliance with existing laws, regulations and policies;

G. Direct communication involving a request for a written opinion interpreting the law administered by the agency or office of which that person is a member;

H. Activities set forth in §§305.003(c) and 305.004 of the Gov't Code, whether or not such activities constitute the sole activities or the person to influence legislation or administrative action.

I. Direct communication to provide information in response to a specific request for the information from member of the legislative or executive branch that are unsolicited or otherwise not a subterfuge from compliance with the requirements of the applicable laws.

The TEC has ruled that negotiations with regulatory agencies in regards to permits are excepted from the lobby statute requirements as long as the negotiations are in regard to whether an applicant does in fact meet existing standards of general application. Tex. Ethics Comm. Op. No. 14 (1992). The TEC also held in that Opinion that the application for a permit with a regulatory agency is an exempt activity. Also an attorney who met the compensation and reimbursement threshold who requested a written opinion from an agency which cites statutory and other law in support of a particular view point was not held to be engaging in an activity that would require registration. Tex. Ethics Comm. Op. 5 (1992). However, an attorney who represents a client at a non-contested case that is not an adjudicatory proceeding under the Administrative Procedure Act is not covered by the exemption set out in the rule of the TEC from lobby registration under §305.003 of the Gov't Code. Tex. Ethics Comm. Op. No. 126 (1993).

An attorney who receives compensation for communications in connection with a response to a bid solicitation is not required to register as a lobbyist under the compensation threshold on the basis of such communication. Tex. Ethics Comm. Op. No. 159 (1993). A partnership must register as a lobbyist an individual who otherwise meets the registration requirements of the Code if they directly communicate or take some other action that requires registration, and for purposes of the lobby statute, money received by an individual partner from a partnership for lobbying activities is "compensation" for purposes of the statute. Tex. Ethics Comm. Op. No. 115 (1993).

The time for registration is no later than five days after the first direct communication is made that requires registration. A fee of $100 per year is required with the registration. A registration submitted without the required fee will be not be

accepted. Failure to timely file the registration will subject the person to a $100 penalty.

A person may not retain or employ another person and a person may not accept employment or render any service to influence legislation or administrative action for compensation that is totally or partially contingent on the passage or defeat of any legislation, the governor's approval or veto of any legislation or the outcome of any administrative action. §§305.022(a), (b) of the Gov't Code. For purposes of this section, a sales commission payable to an employee of a vendor of a product is not considered compensation contingent on the outcome of administrative action. §305.022(c) of the Gov't Code. The TEC has ruled that contingent fees for efforts to influence state agency purchasing decisions are not prohibited. Tex. Ethics Comm. Op. No. 185 (1994).

Certain expenditures are restricted by the Code. Except as provided in §305.025 of the Gov't Code, a registered person and any person on the registered person's behalf may not offer, confer, or agree to confer to a member of the legislative or executive branch:

A. A loan, including the guarantee or endorsement of a loan;
B. A gift of cash or a negotiable instrument as described by §3.104 of the Business & Commerce Code (setting requirements of a negotiable instrument);
C. An expenditure for travel or lodging;
D. An expenditure or series of expenditures for entertainment that in the aggregate exceed $500 in a calendar year;
E. An expenditure or series of expenditures for gifts that in the aggregate exceed $500 in a calendar year;
F. An expenditure for an award r memento that exceeds $500;
G. An expenditure for transportation and lodging, food and beverages, entertainment or for attendance by members of the legislative or executive branch at a political fund-raiser or charity events unless the registrant is present.

§305.024(a)(1)-(7) of the Gov't Code.

Also, except as provided by §305.025 of the Gov't Code, a member of the legislative or executive branch may not solicit, accept or agree to accept from a registered person or someone on the registered person's behalf and with the registered person's consent or ratification any of the above listed expenditures. §305.024(b) of the Gov't Code.

There are exceptions to the expenditure restrictions:

A. A loan in due course of business from a corporation or other business entity that is legally engaged in the business of lending money and that has conducted that business continually for more than one year before the loan is made;
B. A loan or guarantee of a loan or gift made or given by a

person related within the second degree of affinity or consanguinity to the member of the legislative or executive branch;

C. Necessary expenditures for transportation and lodging when the purpose of the travel is to explore matters directly related to the duties of a member of the legislative or executive branch, such as fact-finding trips, but not including attendance at merely ceremonial events or pleasure trips; and

D. A political contribution as defined by §251.001 of the Election Code.

The TEC has ruled that Chapter 305 of the Gov't Code does not apply to gifts to a state agency as opposed to individual officers or employees of a state agency. Tex. Ethics Comm. Op. No. 31 (1992). The TEC has nixed the ability of a lobbyist to pay or provide for transportation and lodging expenses for a legislator in connection with a hunting trip, and the legislator may not accept the payment of these items. Tex. Ethics Comm. Op. No. 12 (1992). However, in the same Opinion the TEC held that subject to certain monetary limitations and reporting requirements, the lobbyist may provide and the legislator may accept food in connection with the hunting trip as well as a place to hunt if the person providing the food and entertainment is present.

Although there are exceptions to the prohibition on lobby expenditures for lodging, the exceptions are not applicable to lodging to be used by a legislator's spouse. Tex. Ethics Comm. Op. No. 81 (1992). On the other hand, the TEC held that a spouse of a legislator may receive payments for contracted work, but that a person may not make payments to the spouse with the intent of having them go to the legislator. Tex. Ethics Comm. Op. 252 (1995). For purposes of the Gov't Code, the term "Expenditure" includes a loan or advance of anything of value, and certain payments for transportation and lodging are prohibited regardless of whether they were reimbursed at a later date. Tex. Ethics Comm. Op. No. 58 (1992). The TEC has held that a lobby expenditure for transportation that is of more than "incidental value" is prohibited by the Code. Tex. Ethics Comm. Op. No. 91 (1992).

It appears that the restrictions in these rules are an effort to prevent lobbyist from paying for a trip unless it is for an official purpose, and the cost does not exceed an amount that is necessary to accomplish that purpose. The payment of trips for pleasure or those that are non-essential are prohibited.

What must a lobbyist report under the law? First the lobbyist must report who they represent and the submit matter of the representation. §305.005(f) of the Gov't Code. Pursuant to §§305.006-.009 of the Gov't Code the lobbyist must also file a detailed monthly "activity" report specifically stating payments made in the course of lobbying and to whom the payments are made to or for. If a lobbyist does not intend to make reportable expenditures in excess of $1,000 during a calendar year, he/she may

elect to file an annual report by January 10 of the following year as opposed to filing the monthly activity report. In addition, lobbyists must report the amount of compensation or reimbursement paid by each person who reimburses, retains or employee the lobbyist for the purpose of communication directly with a member of the legislative or executive branch or on whose behalf the registrant communicates directly with a member of the legislative or executive branch. §305.005(f) of the Gov't Code.

In addition to these reporting requirements, S.B. 1 also created two additional reporting requirements. First, state officers must disclose any partnership, joint venture or other business association in which both the sate officer and a lobbyist have an interest. §572.023(12) of the Gov't Code. This rule does not apply to interests held in publicly held corporations. Second, a state officer must disclose fees received for services rendered to or on behalf of a lobbyist. §572.024 of the Gov't Code. This requirement also covers fees for services rendered to or on behalf of an entity that the state officer actually knows directly compensates or reimburses a lobbyist.

It is interesting to note that the TEC has ruled that nothing prohibits a legislator from being employed by a law firm that has other attorneys who represent clients before state agencies, and the legislator was permitted to represent clients before a school district board. Tex. Ethics Comm. Op. No. 117 (1993).

III. PENAL CODE CHANGES

S.B. 1 also made changes to the penal code that may be faced by environmental practitioners. An amendment to the Texas Penal Code prohibits hearing examiners employed by an agency performing regulatory functions from accepting benefits from persons appearing before the agency in a contested case, doing business with the agency or having an interest in a matter before the hearing examiner. Tex. Penal Code Ann. §36.08(g). Also enacted was a prohibition against the solicitation, acceptance or agreement to accept any thing of value by an association of employees of one regulatory agency from a business entity that is regulated by that agency and that is required to obtain a permit from that agency to operate business in this state, or from an individual directly or indirectly connected with that business entity. §572.055(a) of the Gov't Code. Also, offering or granting anything of value by this entity is prohibited. §572.055(a) of the Gov't Code. It should be noted that these provisions do not apply to an agency regulating operations for inspection of motor vehicles nor to an agency in charge of enforcing the parks and wildlife laws of the State of Texas, §572.055(c) of the Gov't Code. Violation of these prohibitions is a Class A misdemeanor punishable by up to one year in jail and a fine not to exceed $4,000 or both. §572.055(d) of the Gov't Code; Tex. Penal Code Ann. §12.21.

In addition to the above, S.B. 1 made changes to the term "benefit" with relationship to bribery provisions of the Penal Code. S. B. 1 changed the definition of the word "benefit" which previously was defined as "anything reasonably regarded as economic gain or economic advantage, including benefit to any other person in whose welfare the beneficiary is interested, but does not include a contribution or expenditure made and reported in accordance with law." Tex. Penal Code §36.01(5)(Vernon 1988). S.B. 1 changed the word "economic" to "pecuniary" to the effect that "benefit" is anything reasonably regarding a pecuniary gain or pecuniary advantage for a person. Also, a change was made to include a benefit to any other person in whose welfare the beneficiary has a direct and substantial interest. Tex. Penal Code Ann. §36.01(3). Finally, S.B. 1 deleted the last part of the previous definition: "but does not include a contribution or expenditure made and reported in accordance with law." Tex. Penal Code Ann. §36.01(3).

S.B. 1 also added subparagraph (4) to §36.02(a) of the Penal Code; the prohibition against bribery. This subparagraph provides that any benefit that is a political contribution as defined by the Election Code is illegal if the benefit was offered, conferred, solicited, accepted or agreed to pursuant to an express agreement to take or withhold a specific exercise of official discretion if such exercises would not have been taken or withheld but for the benefit. §36.02(a)(4) Tex. Penal Code Ann.

In addition, S.B. 1 added §36.07 to the Penal Code concerning the acceptance of honorarium. This section makes if a Class A misdemeanor for a public servant to solicit, accept or agree to accept an honorarium in consideration for services that the public servant would not have been requested to provide but for his/her official position or duty. In light of this law, the TEC held that a legislator and/or public servant could accept transportation and lodging expenses incurred in attending a conference or similar event. Tex. Ethics Comm. Op. No. 17 (1992). The legislator in question was asked to speak at a conference in his capacity as a legislator and was offered a fee for giving the speech together with the payment of his travel and lodging. The TEC held that §36.07 of the Penal Code prevented the legislator from being paid to give the speech, but he could be reimbursed for his travel and lodging expenses.

IV. REVOLVING DOOR PROVISION

One of the changes caused by S.B. 1 had major implications for state agency employees and officers. S.B. 1 amended Tex. Rev. Civ. Stat. Ann. art. 6252-9b by adding §7A (now §571.054 of the Gov't Code). This section provides that a member of a governing body or executive head of a regulatory agency may not make an appearance before, or a communication to, an officer or employee of that agency with the intent to influence agency action before the second anniversary of the date that the person left his/her position with

the agency. The TEC held that these restrictions only apply to board members and executive directors or regulatory agencies who leave the agency on or after January 1, 1992. Tex. Ethics Comm. Op. No. 11 (1992).

In addition, §572.054 of the Gov't Code prevents a former state officer or employee of a regulatory agency who ceases employment with that agency on or after January 1, 1992 from representing any person or receiving any compensation for services rendered on behalf of any person regarding a particular matter in which the former officer or employee participated during his/her employment with the agency. This includes not only situations where the state employee was personally involved in a particular case or proceeding, but also covers those matters and cases that were within the state officer's or employee's official responsibility. The provisions of this section apply to state officers and employees of regulatory agencies that are compensated as of the last date of state employment at or above the amount prescribed by the General Appropriations Act for Step 1 Salary Group 17 of the position classifications salary schedule.

S.B. 1 also provided that if another law restricts the representation of a person before a particular state agency by a former state officer or employee of that agency, then the other law is controlling over the provisions of §572.054. §572.054(e) of the Gov't Code. For example §26.0283 of the Tex. Water Code related to the permit application process and former agency employees. Given the language of §572.054(e), it appears that the other law will supersede and be controlling even if the law is less restrictive than the prohibitions set forth in the Gov't Code.

Violations of the prohibitions are a Class A misdemeanor, punishable by imprisonment in jail for up to one year or a fine of up to $4,000, or both.

The TEC has held that a former hearings examiner of a state agency may represent parties in administrative hearings before the agency after leaving agency employment. Tex. Ethics Comm. Op. No. 197 (1994). The TEC held that subject to §572.054(b) of the Gov't Code, the employee may represent a person before his former agency as long as he does not work on a matter in which he participated or for which he had responsibility as a sate employee. The former state employee may work on matters that are similar to matters he worked on as a sate employee, and he may work for a person or entity that he dealt with as a state employee as long as he does not work on a matter that he worked on as state employee or a matter over which he had responsibility as a state employee.

The TEC has held that only the highest ranking employee of a state agency is considered to be an "executive head" of the agency for purposes of §7A (§574.054 of the Gov't Code). Tex. Ethics Comm. Op. No. 23 (1992).

A former state officer or employee of a regulatory agency covered by Gov't Code §572.054(b) commits an offense if they represent any person or receive any compensation for services rendered on behalf of any person regarding a particular matter in which the former officer of employee participated during the period of state service or employment, either through personal involvement or because the case or proceeding was a matter within their official responsibility. Tex. Ethics Comm. Op. No. 167 (1993). Further, an agency may refuse to deal with a former officer or employee who attempts to represent a person in violation of the statute. id.

The TEC held that former employees of the Texas Natural Resources Conservation Commission are subject to the revolving door provisions in §572.054 of the Gov't Code with the following exceptions: A former TNRCC employee who participated in the handling of a permit application covered by Health and Safety Code §§361.0885 and 382.0591, or Water Code §26.0283 is subject to those provisions, not to §572.054 of the Gov't Code, for purposes of determining whether he/she may represent a person in regard to a permit matter before the TNRCC. Tex. Ethics Comm. Op. No. 233 (1994).

There are of course other ethical issues that are not covered by this paper. The representation of multiple parties in CERCLA, asbestos and other actions is one of these. The author refers readers to Consent and Disclosure in Superfund Negotiations: Identifying and Avoiding Conflicts of Interest Arising From Multiple Client Representation, David Littell, 17 *Harvard Environmental Law Review* 225 (1993) for a thorough treatment of this issue.

Open Mike

"Are You Lonesome Tonight"

Walter Bradley
Beverly Hartsock
Minor Hibbs
Kevin McCalla

WALTER C. BRADLEY

MR. BRADLEY WENT TO WORK FOR THE TEXAS AIR CONTROL BOARD IN FEBRUARY OF 1972 AFTER SERVING FOUR YEARS IN THE U.S. AIR FORCE. HE HOLDS A BACHELORS DEGREE IN BIOLOGY FROM TEXAS CHRISTIAN UNIVERSITY AND A MASTERS DEGREE IN PUBLIC ADMINISTRATION FROM SOUTHWEST TEXAS STATE UNIVERSITY. MR. BRADLEY BEGAN HIS CAREER WITH THE AGENCY AS A COMPLIANCE OFFICER FROM 1972 TO 1974. HE MANAGED THE AGENCY'S FEDERAL GRANTS PROGRAM, STAFF DEVELOPMENT AND TRAINING PROGRAM, AND PUBLIC INFORMATION OFFICE FROM 1974 TO 1986 AT WHICH TIME HE BECAME ASSISTANT TO THE AGENCY'S DEPUTY EXECUTIVE DIRECTOR. WHILE SERVING IN THAT CAPACITY, HE ALSO MANAGED A PROGRAM THAT INCLUDED THE TACB'S RESEARCH DIVISION, HEALTH EFFECTS DIVISION AND TECHNICAL SERVICES DIVISION UNTIL 1991 WHEN HE BECAME DIRECTOR OF PROGRAM DEVELOPMENT IN WHICH HE OVERSAW THE DEVELOPMENT OF SUCH PROGRAMS AS THE SMALL BUSINESS TECHNICAL ASSISTANCE PROGRAM AND THE STAGE II VAPOR RECOVERY PROGRAM. MR. BRADLEY ALSO SERVED AS THE TACB'S AIR QUALITY LIAISON FOR ISSUES RELATING TO THE TEXAS-MEXICO BORDER.

WITH THE CONSOLIDATION OF THE TACB INTO THE TEXAS NATURAL RESOURCE CONSERVATION COMMISSION, MR. BRADLEY BECAME THE EXECUTIVE ASSISTANT FOR THE OFFICE OF AIR QUALITY WHERE HE MANAGES THE DAILY OPERATIONS OF THAT OFFICE.

Beverly Ann Hartsock

Office of Policy and Regulatory Development

Beverly Hartsock serves as the Deputy Director for the Office of Policy and Regulatory Development of the Texas Natural Resource Conservation Commission. As Deputy Director, Beverly oversees development of regulations, regulation revisions, and policy positions established or adopted by the agency in the air, water, or waste management areas. Prior to serving in this position, Beverly was the Deputy Director for the Office of Air Quality overseeing the state's air quality program including its permitting, enforcement, monitoring, mobile source, and planning functions. Beverly has worked with the agency since 1978. Prior to that time, she worked with the Texas Department of Health and the University of Texas in vaccine and biological production.

Ms. Hartsock holds a Bachelor of Arts Degree in Biology with Honors from the University of Texas at Austin and holds a Master of Arts Degree in Botany from the University of Texas at Austin. Beverly is a member of Phi Beta Kappa. She is also a member of the Air and Waste Management Association and serves as Vice President of the State and Territorial Air Pollution Program Administrators.

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Biographical Sketch
Minor Hibbs
Director
Industrial and Hazardous Waste Division
Texas Natural Resource Conservation Commission

Minor Hibbs graduated from Cornell University in Ithaca, New York in 1976 with a B.S. in Civil and Environmental Engineering. He has worked in the Industrial and Hazardous Waste Programs of the Texas Natural Resource Conservation Commission and its predecessor agencies since April of 1977. He was Manager of the Permits Section of the Commission's Industrial and Hazardous Waste Division since September of 1985. His current position is Director of the Industrial and Hazardous Waste Division. Mr. Hibbs is a registered professional engineer in the state of Texas.

BIOGRAPHICAL SKETCH
John A. Riley

John A. Riley received a bachelor of science degree in biology from Cornell University in 1979 and went on to earn his juris doctor from the Boston University School of Law in 1983.

In 1982, John served as a law clerk with Exxon Co., U.S.A. tax department in Houston. After graduating law school, John was an assistant district attorney in Brooklyn, New York. During his seven year tenure, John prosecuted primarily homicide cases. Of his approximately fifty cases that went to verdict, twenty-five were murder cases. John served as Attorney; Director for Hearings Attorneys; Administrative Law Judge; and, Deputy Commissioner for the Energy Resources Division at the Texas General Land Office during 1987-1989.

John was also a litigation associate at Callan, Regenstreich, Koster and Brady in New York City. John has appeared as an expert legal commentator on Court TV.

Since September 1994, John has been employed at the TNRCC. During October 1994, the agency was reorganized and John was appointed director of the Enforcement Coordination and Litigation Division (ECL). The forty-three division staff consist of attorneys, legal assistants, technical advisors, support staff and a special investigations unit. The ECL division works in a cooperative effort with other divisions to ensure timely and appropriate handling of all agency enforcement cases.

Lydia González Gromatzky

Lydia González Gromatzky is Acting Director of the Legal Services Division of the TNRCC. She is a graduate of the University of Texas School of Law. After graduation, she joined the Austin office of a Houston law firm (Hays, McConn, Price and Pickering). She joined the Texas Water Commission as a staff attorney in the Legal Division in 1988.