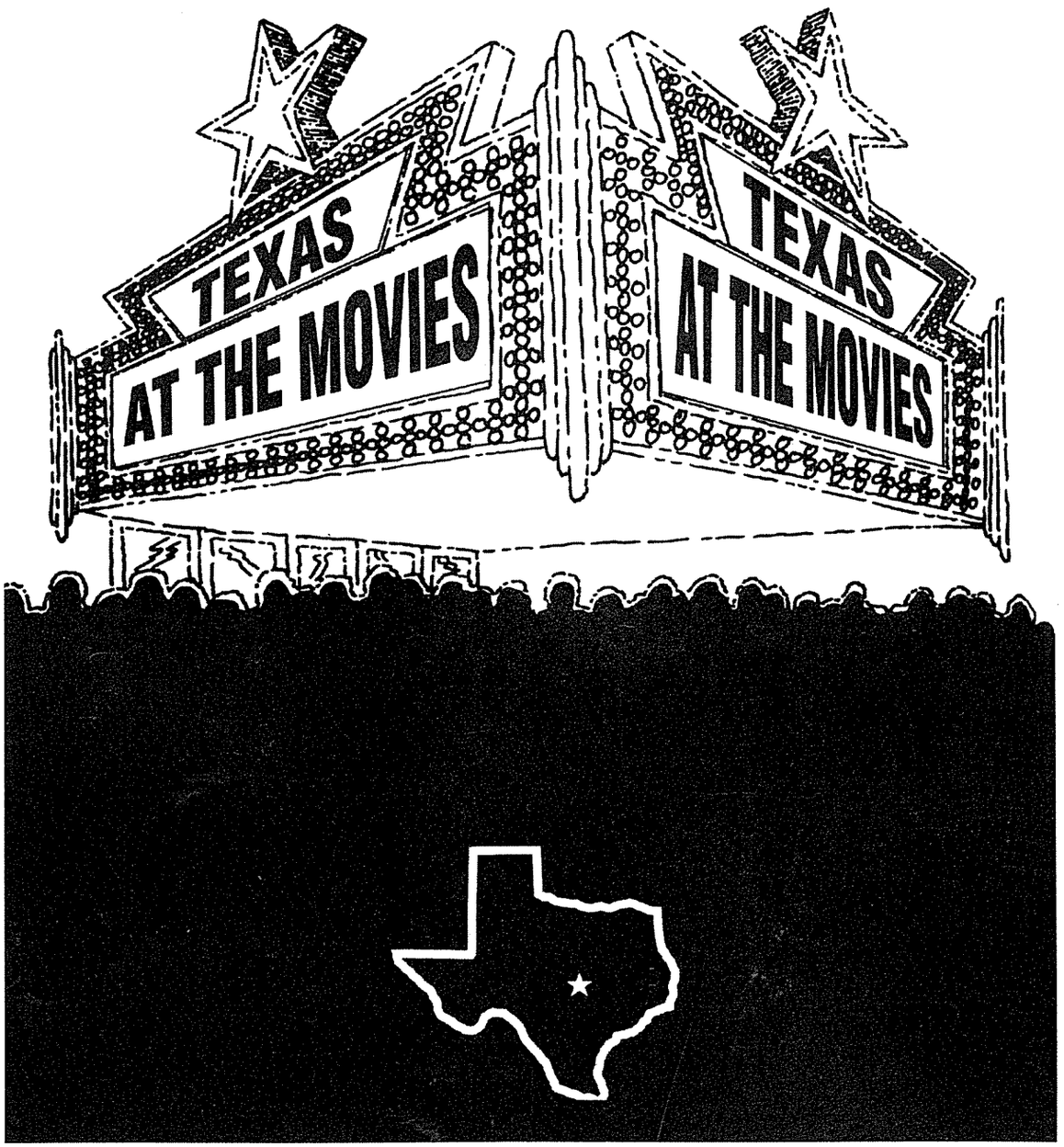
8TH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

AUGUST 1-2. 1996



8TH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

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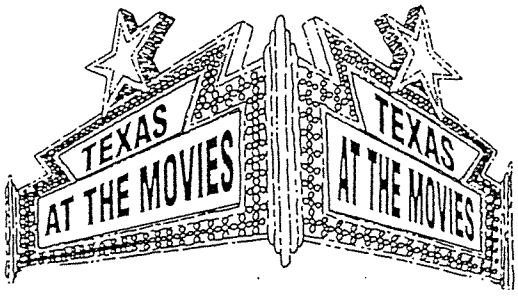

c/o Kelly, Hart & Hallman
301 Congress Avenue, Suite 2000
Austin, Texas 78701
(512) 495-6400
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MEMORANDUM

TO: Attendees

FROM: Planning Committee

DATE: August 1, 1996

On behalf of the Environmental and Natural Resources Section of the State Bar, the Air and Waste Management Association, Southwest Section, and the Water Environment Association of Texas, welcome to the Eighth 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 July 31 and August 1, 1997. 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.

Barry R. McBee, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
John M. Baker, *Commissioner*
Dan Pearson, *Executive Director*

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Protecting Texas by Reducing and Preventing Pollution

April 19, 1996

Mr. Walter L. Sutton, Jr.
Acting Regional Counsel
Environmental Protection Agency
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-7233

Dear Mr. Sutton:

On March 15, Mr. Rick Lowerre sent you a draft report criticizing TNRCC's public participation process. In the enclosed analysis we suggest that Mr. Lowerre is very narrowly construing the concept of public participation. We do not believe that such a narrow emphasis on contested case evidentiary hearings is either fair or appropriate. Although our process is not perfect and will be continually reviewed and improved by the Commission, we believe that the current system is consistent with the "EPA Policy Statement of Public Participation" which contains no requirement for contested case hearings on every permitting matter.

Mr. Lowerre suggests that, in Texas, public participation programs for permits have always been limited. As the report demonstrates, we provided public notice on approximately 2000 permitting actions since September 1, 1995. Public notice is given in compliance with statutory requirements and when questions or comments from the public are received, the technical staff responds to them. Our permit engineers and staff attorneys spend a considerable amount of time answering questions from the public, educating concerned citizens on both the scientific and legal requirements of the permit and, as the questions are raised, the staff reconfirms the review and position the staff is taking on the permit. The timing and methods of notice are, we believe, consistent with the EPA Policy Statement. We are currently reviewing all notice provisions and would welcome both your and Mr. Lowerre's input on how our notice provisions might be strengthened.

When there is considerable public interest expressed, we often will hold one or more public meetings in the local area to encourage give and take between the public, the applicant and the TNRCC staff. This is in addition to the public meetings that may be required by statute (e.g., Texas Health and Safety Code 361.0791 requiring public meetings for hazardous waste management permits). We have found this to be often a cheaper, easier and more effective way

to assure public participation than a complex contested case hearing which can be a very frustrating forum for unsophisticated members of the public who do not believe that they should have to hire an attorney to provide input. I believe that the Commission will be encouraging more extensive use of this type of forum to "communicate with and listen to all sectors of the public," as the EPA Policy Statement urges.

Mr. Lowerre criticizes the way the agency has implemented recent state legislation, SB 1546 and SB 1125. Mr. Lowerre overlooks the new procedural rules which in fact dramatically increase the opportunity for public participation--now, every hearing request is placed on the Commission agenda with the right of the hearing requestor to share information and concerns directly with the three Commissioners. Most determinations, prior to September 1, 1995, where handled by the Office of Hearing Examiners with little, if any, involvement by the Commissioners.

The public now has the ability to submit information and concerns to the Commissioners, very often has the ability to personally address the Commissioners, and the Commissioners have the ability to require the applicant and the E.D.'s staff to respond to those concerns. The exchange takes place in a posted, public hearing. This, we believe, satisfies the "exchange of views and open exploration of issues, alternatives, and consequences" standard contained in the EPA Policy Statement. Although we believe that this represents a dramatic improvement, the Commission is not satisfied and will continue to explore ways to enhance this exchange of views.

Mr. Lowerre's report does reflect that often, as a result of this dialogue, the Commissioners will suggest that the concerns over the permitting matter be referred to Alternative Dispute Resolution. This has and, I believe, will become an increasingly common approach. ADR provides a forum for both further education of the public as well as for the resolution of issues or concerns surrounding the permit. Permit provisions can be strengthened or changed, applicants can accommodate concerns that may not be directly tied to the permit itself, even matters outside the jurisdiction of the Commission, and it happens in a "win-win" context, instead of the traditional "win-lose" format of a contested case hearing.

The fact that the Executive Director construes S.B. 1546 as a legislative directive to scrutinize requests for contested case hearings does not translate into a desire to limit public participation. Once the E.D. points out that a requestor does not appear to have a justiciable interest, the requestor has the opportunity to respond to that position, to supplement the request, and to explain why the E.D.'s point of view is incorrect. The Public Interest Counsel offers his view, and the applicant is given the opportunity to state a position. Only then does the Commission, with the benefit of all the information and points of view, determine whether a contested case hearing, with all the attendant financial and other costs, should be held to further develop information for the Commission's benefit.

We have compared our process to the process the EPA uses. In 40 CFR Part 124, the decisions to grant an evidentiary hearing appear to rest at the complete discretion of the Regional Administrator. Even if a denial of a hearing request is appealed to the Environmental Appeals Board, there appear to be no standards setting forth circumstances in which EPA would be required to hold an evidentiary hearing.

Mr. Lowerre's very narrow focus causes him to lose sight of the fact that contested case hearings are not ends but are only a means to an end. Adversarial hearings must serve an informational purpose and should result in a clear picture of the law and the facts surrounding a permitting decision to the ultimate decision makers, the Commissioners. If the hearing is not going to address issues germane to the permit, within the jurisdiction of the Commission, then the request may be viewed as "unreasonable" and denied. This process is new to both the E.D. and to the Commission and Mr. Lowerre's snapshot does not give a fair picture of this State's evolving approaches to encourage public input and participation. Mr. Lowerre's real interest is revealed in his report--contested case hearings, with all their attendant costs, provide Mr. Lowerre and his clients "leverage;" he criticizes ADR as providing applicants "little incentive" to agree to "solutions." We do not see such "leverage" as a required or desired goal in the EPA Policy Statement.

Mr. Lowerre's statements concerning judicial review of Commission decisions are just flat wrong. Neither the recent legislation nor the new procedural rules have narrowed the scope of judicial review in the least. Anyone who could challenge a Commission action under Texas Water Code Section 5.351 may still do so. Anyone whose request for a full contested case hearing was denied may challenge that action as well as the underlying permitting action. The legislation did not change in any way the standard for "standing" in the judicial context and, quite frankly, we do not understand what Mr. Lowerre is talking about.

Enclosed is a detailed analysis of the report Mr. Lowerre generated. We believe his statistics are misleading and incomplete; but his report has highlighted to us the difficulty in fully documenting all public participation--we do not adequately capture all the phone calls, the public meetings, the exchange of information that forms the basis of full public participation. This report has encouraged us to better capture that information. Mr. Lowerre does ignore that fact that 100% of the hearing requests do result in a public hearing. The fact that a number of them do not result in contested case hearings does not mean that public participation has been denied, only that the substance of the debate has taken precedence over procedure and that the participants have not had to hire an attorney to speak for them.

In conclusion, we believe that Texas fully complies with the EPA Policy Statement of Public Participation. We are also aggressively reviewing all avenues for public participation, from notice requirements to increased resources devoted to Alternative Dispute Resolution. A better, focused use of contested case hearings is not only consistent with EPA practice and policies but should be applauded as a judicious use of all participants' resources.

Sincerely,

Dan Pearson
Executive Director

DP/JP/jhh

Enclosure

cc: Jane Saginaw, Regional Administrator, EPA Region VI
Richard Lowerre, Henry, Lowerre, Johnson, Hess & Frederick
Barry R. McBee, Chairman, TNRCC
Ralph Marquez, Commissioner, TNRCC
John Baker, Commissioner, TNRCC
Geoffrey S. Connor, General Counsel, TNRCC

Response of TNRCC Executive Director

to

March 1996 Draft Report

prepared by

Henry, Lowerre, Johnson, Hess & Frederick

entitled

"A Review of Recent Decisions on Public Participation
by the Texas Natural Resource Conservation Commission"

Description of Decisions

Case #

1 Docket No. 96-0086-AIR, Applications by Citgo Refining and Chemicals, Inc.

The Commission had no discretion to grant these hearing requests which involved renewal of existing air permits. Section 382.056(d) (added by S.B. 1125) mandates that no requests are "reasonable" and no contested case hearing should be held on air permit renewals, if there is no increase in emissions or new types of emissions, and if there is no history of serious permit violations. This a perfectly reasonable legislative directive that eliminates wasted resources; permits, having once been opened to challenge in contested case hearing when first issued, should be renewed if nothing has changed. Violations of the permits are handled through the enforcement process; if there is a history of violations, the permit can be challenged.

It is misleading of Mr. Lowerre to include non-discretionary matters in his statistics purporting to show a trend of denial of hearings requests. Tthe fact that no hearing is permitted by statute does not mean that the Commission or ED did not note the concerns expressed by the 20 neighbors. Those concerns were shared with the Commissioners and could have resulted in Commission questions or directives to staff--meaningful public input was achieved because public notice of the renewals is still required.

2 Docket No. 96-0083-MWD, Acme Brick Company

Although the ED recommended granting of the hearing requests, the ED is in full support of the use of ADR in permitting matters as a much preferable alternative to a formal contested case proceeding. By participating in ADR, the Hubbards and the Walkers were afforded a much less expensive and intimidating opportunity to participate in the process.

3 Docket No. 96-0084-MWD, William David Hefner

On this item, Mr. Gildermaster discussed the application with TNRCC staff and withdrew his hearing request. Mr. Lowerre's letter incorrectly states a purported "unwritten requirement" by TNRCC that a requestor must plead "all the facts" in support of a hearing request. The ED recommended denial of the hearing request because, in the ED's view, Mr. Gildermaster did not allege any fact that reasonably showed he was an affected person, in light of the tiny volume of proposed discharge and Mr. Gildermaster's distance from the discharge point. Mr. Gildermaster had an opportunity to respond to the ED's position and to submit additional support for his hearing request, but chose instead to withdraw his request.

Mr. Lowerre suggests that the ED should provide assistance to requestors to help them make adequate hearing requests. Other participants in the process may be in a better position to provide that help and often spend considerable time doing just that. The Public Interest Counsel's phone

number is generally supplied in the notices and the PIC provides this sort of assistance as does the agency Ombudsman. The ADR Coordinator also affords the public an opportunity to express their concerns. The ED, by giving a response to a hearing request, does serve an educational function by alerting the requestor of both the requirements of a valid hearing request and how the requestor may have fallen short in fulfilling those requirements. The requestor still has the opportunity to respond by amending its request or providing additional information; and if additional time is needed, continuances to the agenda setting are liberally granted. The ED also reviews the concerns expressed against the permit requirements to make sure nothing has been overlooked in the review process.

Mr. Gildermaster, even though he voluntarily withdrew his hearing request, still had input into the process because the Commission was made aware of his concerns about Lake Houston.

4 Docket No. 96-0085-MWD, Buffalo Creek Utility

It is not uncommon for citizens to voice genuine concerns over a permit for reasons that do not fall within the jurisdiction of the TNRCC. The policy of the agency is to be clear about those issues over which the agency has no jurisdiction, rather than refer the matter for hearing knowing that the issues to be raised will not be allowed. Under the current practice, sending the matter to the Commissioners provides an additional opportunity for the requestors to show a justiciable interest. Why Mr. Lowerre considers this "a waste of time and money" is unclear, if meaningful public participation is really his goal. Contested case hearings are merely an indirect (and often lawyer dominated and legalistic) means of communicating concerns to the Commission.

5 Docket No. 96-0087-MSW, Browning-Ferris, Inc., (Mexia Landfill)

Several weeks before this item went to agenda, staff informed Mr. Clark they were available to discuss the application and his concerns. Mr. Clark never contacted the Executive Director's staff but did talk with the Public Interest Counsel (PIC). The Executive Director's staff spent over two hours discussing the application with the PIC, who subsequently withdrew his objections to the application. Meanwhile, the general concerns about this amendment were shared directly with the Commission.

For Mr. Lowerre to label Mr. Clark a "nearby" landowner, when he lives 13 miles from the site, seems a bit of a stretch. Asking for hearings is not the only route for input; Mr. Clark was free to discuss his concerns with the technical staff and was encouraged to do so. Because he chose not to, no substantive response could be made.

6 Docket 95-1699-MSW, Browning Ferris, Inc., (Tessman Road Landfill)

The ED's responses were intended to put the requestors on notice of what were seen to be deficiencies in the hearing requests. The requestors were free to respond. In addition, the ED attempted to define, for the benefit of the Commission and the requestors, what issues might be

relevant and within the jurisdiction of the Commission should a contested case hearing be held. Again, often the public complains of issues and circumstances which cannot be addressed through the permitting proceeding. The application involved an expansion of an existing landfill. Many of the requestors would not have been satisfied by anything short of closure, an unrealistic expectation and something a contested case hearing would not provide.

The Commission, after reviewing the requests, did remand the matter to SOAH, and a hearing on the merits will be held. SOAH, at the preliminary hearing, may admit as parties anyone who satisfies the "party status" test and will also take additional public comment.

7 **Docket No. 95-1694-SLG, Douglas M. Yarborough**

This item involved several requests for reconsideration of the grant of a sludge registration. EPA does not require authorizations for sewage sludge beneficial use sites. Texas' requirements for adjacent landowners' notice, notice to local officials, and the opportunity for comments, offer much greater public participation that is required under NPDES.

Because this is not a permit case, it does not raise the same issues as other cases Mr. Lowerre is analyzing. However, the Commission recognized the concerns brought by the requestors and granted an evidentiary hearing. This was the first time in agency history that a sewage sludge beneficial use application was referred for a contested case hearing. This represents an expansion in the scope of contested case hearings and public participation, contrary to Mr. Lowerre's theory of restriction.

8 **Docket No. 95-1621-AIR Application by CLSW, Ltd., dba Chemline**

This is another air permit renewal in which a contested case hearing is no longer authorized by statute. See #1 explaining S.B. 1125.

Although there was an unresolved violation related to this renewal at the time of the ED's initial filing, this violation was resolved before consideration by the Commission. In addition, the violation did not constitute a recurring pattern of egregious conduct demonstrating a consistent disregard for regulatory process.

Although no contested case hearing is provided for, the requestor's concerns were shared with the Commission at a public meeting. Mr. Lowerre mischaracterizes the application in #9, see below.

9 **Docket No. 95-1620-AIR, Application by CLSW, Ltd., dba Chemline**

This application was for a permit for an existing facility, not a new facility (as Mr. Lowerre incorrectly asserted). The permit holder failed to file a timely application to renew its existing permit, and it was required to apply for a new permit. There were no changes to the facility and there was no increase in allowable emissions or any new air contaminants from the old permit to

the new permit. The commission concluded that since this was an existing facility and there was no increase in allowable emissions that this matter was very similar to those cases where a hearing request would be unreasonable as a matter of law under Section 382.056(d). Thus, the Commission exercised its discretion to deny this hearing request as unreasonable. Mr. Lowerre may not agree with the result, but it is not an "incorrect decision" as a matter of law.

10 Docket No. 95-1680-MWD, City of Rusk

While notices offering the opportunity to request a hearing clearly ask requestors to use the words "I request a hearing", the Commission does not deny hearing requests for the lack of "magic words". Rather the Commission tries to look to the intent of the writer. When a request is unclear, the PIC or the ADR section (rather than the ED) may contact the requestor to inquire about the requestor's intent.

In this case, ADR staff did contact the Tchokoevs, determined they wanted a hearing; and at agenda, a hearing was granted.

11 Docket 95-1677-IWD, U.S. Department of the Air Force (Brooks AFB)

The Commission, to facilitate public input, referred this item to ADR to allow the requestors the opportunity to discuss their concerns with the applicant and the ED's staff. For this item, the ED responded only to the Rodriguez/Hernandez request because it was the only timely-filed hearing request. The ED recommended denial because the technical staff believed there to be no fact issue on odors from this facility, because the discharge is not sewage but treated groundwater, and felt obliged to bring this to all participants' attention.

12 Docket No. 95-1769-IWD, Acme Brick Company

This situation is illustrative of the many different types of correspondence the Commission may receive on pending applications. The Commission routinely receives many requests from individuals or organizations that wish to be kept informed of pending applications. TNRCC welcomes those inquiries and responds to them but has never interpreted interest in an application to necessarily constitute a formal hearing request. The notices published and sent to the interested persons clearly state how further information may be obtained and how they may request a hearing or participate less formally in the process.

Ms. Shahan's request, as the staff determined upon contacting her, was not actually related to this application. She is not an adjacent landowner to the site. Her request was corrected and she did participate in the other, correct proceeding.

13 Docket No. 95-1676-AGR, Billy E. Newsom Dairy

Mr. Lowerre incorrectly, and rather cavalierly, accuses the ED of hoping "that the Commissioners will decide, even in an obvious case, to deny the hearing request." The ED's position on hearing requests are based on the staff's best understanding of the law, the rules, and the policies of the Commission. Since September 1, there has been an evolutionary process as the procedures have been tested and the participants, including the Commission, have learned from the results. Before September 1, the Office of Hearings Examiners made many of the decisions in private that are now being made quite publicly by the Commissioners.

No one has been ready to experiment with "short cuts" until the process is better tested--and the suggestion that the ED should short cut the public process, substituting his judgment for that of the Commissioners and depriving the applicant of the ability to have input into this new process, is a rather presumptuous suggestion on the part of Mr. Lowerre. It is the Commissioners, not the ED or Mr. Lowerre, who have been given the statutory responsibility to refer matters to SOAH for hearing. The ED, in some future cases, may exercise the right of direct referral provided for in the procedural rules.

14 Docket No. 95-1471-MWD, City of Orange

This case was sent to ADR, which allows the parties an opportunity to discuss their concerns directly with the applicant. In this case, the parties mediated and reached a settlement agreement. Mr. Lowerre advocates a hearing be ordered as a first priority and that ADR serve as a secondary approach. The very purpose of the ADR process is to avoid the expense and time required of the contested case process. This is the preferred approach by the agency and is consistent with goals for significant citizen participation opportunity and cost effective regulatory oversight.

15 Docket No.95-1622-AIR, Registration by Odeco, Inc.

The ED's staff participated in a public meeting in Houston on October 3, 1995. The applicant withdrew their application and neither the application nor these hearing requests were considered by the Commission. The ED did not file any comments on these hearing requests since the application was withdrawn and the requests for hearing were moot.

This is an example of full public participation outside of the contested case process.

16 Docket No. 95-1619-AIR, Application by Spence Concrete Company

The ED's staff participated in a public meeting in McAllen on February 2, 1995 that resulted in approximately 145 persons withdrawing their hearing requests. Some of the hearing requestors only lived in this area during winter months and left no forwarding address or phone number when they returned to their summer home.

Although this air permit renewal was covered by the S.B. 1125 prohibition, full public participation was encouraged through the public meeting. This approach is often a better education tool and informational exchange mechanism than a contested case--imagine a contested case with 145-170 parties trying to participate.

17 **Docket No. 95-1635-MWD, San Jacinto River Authority**

Another example of a successful ADR, saving the time and expense of a contested case hearing.

18 **Docket No. 95-1636-MWD, City of Kerrville**

ADR successful once again in which full public participation was provided.

19 **Docket No. 95-1477 MWD, Cameron Co. FWSD**

The Index on page 5 of the draft report should be changed to reflect that Walter Kittelbarger and John Thobe also requested hearings.

On page 19, 1st underlined paragraph, the statement that "...several individuals who live and work near the plant... requested hearings" is accurate with respect to Mary Lou Campbell who also requested hearings on behalf of the Sierra Club and the Audubon Society but inaccurate with respect to John Thobe who lives in Laguna Vista, approximately 8 miles from the plant across the Laguna Madre, and with respect to Walter Kittelbarger who lives in Port Mansfield, approximately 35 miles north of the plant.

On page 19, 2nd underlined paragraph, the statement that the "ED recommended denial of all requests" is inaccurate because, based upon additional information submitted by Texas Shrimp Association in its reply to the ED's response, at agenda the ED amended the recommendation and recommended that the Texas Shrimp Association had a valid hearing request. The Commission chose to send the matter to ADR before it went to SOAH for a hearing on the request.

Because these decisions on hearing requests were not made in public meetings by the Commission before September 1, it would be just as accurate to say that the Sierra Club and other organizations have requested and been denied hearings in similar cases before the new laws were enacted. The result may have depended on which Assistant Chief Hearing Examiner considered the request because there were no rules or guidelines which governed the process. All the new Commission rules did was adopt the Texas Supreme Court's test on "associational standing"; the Commission has applied no stricter test than the Supreme Court ruled was the law.

20 **Docket No. 95-1555-MWD, Guadalupe Blanco River Authority**

Another successful use of ADR.

21 Docket No. 95-1477 MWD, City of Midland

This is another example of public participation which is not required by EPA under NPDES. This application deals with wastewater disposal by irrigation.

On page 20, 1st underlined paragraph, the statement that "both James A. Walton and Robert C. Floyd expressed concerns about soil damage and water runoff problems" is accurate with respect to Mr. Floyd but inaccurate with respect to Mr. Walton. Mr. Walton complained about ponding after rains due to soil saturation and odors.

Refer to page 20, 2nd underlined paragraph, last sentence. The precise reason why the ED recommended denial of Mr. Walton's hearing request was because there was not a sufficient basis to support his request for hearing based upon odors because there was no specific information (other than his vague statement that his ranch adjoins the property where the water is being disposed) on the location of his property relative to the irrigation fields and because he did not explain how his property would be affected by ponding on the irrigation fields. Mr. Walton had the opportunity to respond to these questions and supply additional information; instead both hearing requests were withdrawn.

22 Docket No. 95-1193-UIC. Intercontinental Energy Corporation

The draft report does not mention that the ED requested a continuance of the matter for four weeks and scheduled a five hour public meeting in Live Oak County to discuss the technical issues of the PAA.

The draft report asserts that the ED argued that the TNRCC had never held a hearing on this type of amendment and that it was minor amendment. Although the ED did state that a hearing request on a PAA had never been granted, the ED's substantive recommendation was that the amendment met the technical requirements of the rule and should be granted on that basis. The ED also pointed out that the Commission always has discretion to hold a hearing on any matter. In addition, the ED did not argue that the PAA was a minor amendment. Instead, the ED argued that the PAA is a unique kind of amendment based on the fact that there is a unique procedural rule to address PAAs.

The draft report does not mention that the Commission considered this item at two different agendas. Each of these lasted at least an hour and a half and included public comment.

The draft report erroneously claims that the ED has taken the position that SB 1546 does not apply to requests for hearing where there are rules that are more restrictive than SB 1546 and that the purpose of SB 1546 is simply to reduce public participation. The ED supports full public participation as demonstrated by the public notice of the amendment, the 5 hour public meeting and the 3 hours of discussion before the Commission.

The ED does not understand the relevance of this erroneous claim to the IEC PAA. "Affected person" issues were never discussed during the Commission's consideration of the PAA. Instead, the referral of the PAA to SOAH for a hearing on the merits leaves it to SOAH to determine "party" status. The only issue discussed by the Commission was whether a PAA should be treated more like a major or a minor amendment. This issue is not addressed at all by SB 1546 and SB 1546 does not prohibit the Commission from referring a matter to contested case hearing if the Commission feels that the development of evidence on conflicting assertions of fact will help it make a final, informed decision. That is what happened in this case as the Commission referred the matter to SOAH for a party status hearing.

23 Docket No. 95-1472-MWD, City of Mineola

Based, at least in part, upon the public participation that was provided, the applicant chose to withdraw the application. Should the application be refiled, full public participation will again be afforded.

24 Docket No. 95-1558-MWD, Montgomery County MUD No. 15

It is not unusual for hearing requests to be withdrawn when the participants discover what a contested case, evidentiary proceeding actually entails. Many requestors believe that they are requesting a "town hall" type of meeting where they can offer comments and criticism instead of being subjected to a trial where they must present witnesses, understand the rules of evidence, be cross-examined, and possibly be responsible for transcript and other costs. This may very well have been the situation in this case.

25 Docket No. 95-1556-IWD, Hinton

The position of the ED in this case was not an attempt to prevent public comment (all protests are provided to the Commission for consideration), but a recognition that not everyone wants to participate in a contested case proceeding in order to express their concerns.

The ED's response contains a detailed analysis of why the alleged impacts to Pogue from Hinton's operations are not factually plausible and Mr. Pogue had the opportunity to respond. This kind of dialogue is what public participation should entail with the ED responding to concerns that are raised.

26 Docket No. 95-1554-IWD, Smith Crushed Stone

Mr. Lowerre incorrectly states that the ED "recommended denying Mrs. Stuver a hearing because...her concerns about groundwater quality and noise... are not...protected under the laws governing the permit." He also believes that the ED argued "that issues of groundwater contamination cannot be considered in a hearing on wastewater matters." Mr. Lowerre apparently

misread the ED's filing. What the ED actually said was, "Mrs. Stuver's concerns about groundwater quantity and noise...are not protected under the laws applicable to the application in Chapter 26 of the Water Code...".

The ED also recommended denying Mrs. Stuver's concerns about groundwater quality because she had not alleged a personal justiciable interest relating to groundwater. The ED does not deny Commission jurisdiction over a claimed groundwater impact. The point was that Mrs. Stuver had not shown that the plant actually affected or threatened to affect her in this regard. This was encouragement to Mrs. Stuver to supply additional information.

27 Docket No. 95-1552-IWD, Gerard Hoekman

On page 6, the Index should reflect that the application is for a Subchapter B Confined Animal Feeding Operation.

On page 24 and 25, 2nd underlined paragraph, the statement that the "ED recommended denial of all requests as unreasonable requests" is inaccurate. The ED recommended denial of the hearing requests because the hearing requesters were not "affected persons".

On page 25, 2nd underlined paragraph, last sentence, the ED did not state that the protestants' concerns are unfounded and unreasonable, although one could reasonably infer that the ED was not convinced that the protestants' concerns were valid. Responding to those concerns is part of the public participation dialogue and is not a refusal to consider public input or indicative of a belief of infallibility, as Mr. Lowerre suggests. Public participation does not necessarily require the "presentation of evidence" by an attorney but can take many less formal forms--including the exchange of information through dialogue, debate, or ADR.

28 Docket No. 95-1550-IWD, Everest Exploration

On page 6, the Index should be changed to reflect that although the Commission denied the hearing request, upon consideration of a motion for rehearing, the Commission referred the matter to ADR where the case was settled and the hearing request withdrawn.

On page 25, 1st underlined paragraph, the second to the last sentence should more accurately read "In her reply to the response to her hearing request, Lisemba also filed a detailed summary...."

On page 25, 2nd underlined paragraph, 2nd sentence, the statement that the ED advised the Commission that the concerns over discharges were unreasonable because there could be no discharges since the permit prohibits discharges is inaccurate. The fact that the permit prohibited discharges did enter into the ED's analysis of whether Ms. Lisemba was an affected person and was a strong factor in the ED's recommendation that she was not an affected person.

Staff reviewed Ms. Lisemba's list of alleged violations, agency files, consulted with TNRCC field staff and concluded that there was overall compliance with the wastewater permit, that unauthorized discharges had not caused a discharge into the watershed, and that violations cited were largely insignificant or related to the IHW license not at issue with this permit action.

On page 26, in the 1st sentence of the "comment" paragraph, the ED hasn't refused to accept recreational use of a water body as sufficient for standing if the potential for direct injury can be shown as stated in the ED's response to the Motion for Rehearing.

On page 26, in the last sentence of the "comment" paragraph, the statement that the staff misled the Commission regarding the facts on key issues raised by the protestants is untrue. In addition, Mr. Lowerre overlooks the fact that this matter was considered at several Commission meetings with an examination of many of the issues surrounding the permit. This could have been a very effective forum to concentrate on substantive issues instead of the narrow procedural issues concerning the hearing request. It was not until the ADR session, at which Ms. Lisemba did not appear (only Mr. Lowerre), were the substantive issues addressed and resolved.

29 Docket No. 95-1474-MWD, City of Lakewood Village

Another successful example of ADR.

30 Docket No. 95-1486-MWD, City of Whitesboro

On page 26 and 27, 2nd underlined paragraph, 1st sentence, the quoted passage should more accurately read "ownership of adjacent property alone, does not suffice to support a claim of a personal justiciable interest." The next sentence should further explain that the reason the ED argued that odors were not a relevant issue in this application was because the Cains did not own property within the 150 foot buffer zone.

On page 27, in the "comment" paragraph, Mr. Lowerre states that the ED knew that the Cains had a number of concerns other than odors but was not willing to look beyond the hearing request if they were relevant concerns that could be a valid basis for a hearing. Because the hearing request only referenced odor concerns, the ED's response only analyzed those concerns.

31 Docket No. 95-1475-MWD, Johnson Co. FWSD No. 1

On page 27, the 2nd underlined paragraph should also reflect that, in addition to the reason stated in this paragraph, the ED also recommended denial of Arlington's request because Arlington was unlikely to be affected by the discharge because the city limit boundary is 10 miles downstream.

On page 27, "comment" paragraph, 2nd sentence, according to TNRCC rules, the test for whether a local government is an "affected person" is whether it has authority over the issues contemplated by the application. Of course, even if the local government doesn't have authority over the issues

contemplated by the application it can still show it is an affected person if it has supporting facts (such as being a reasonably short distance downstream from a discharge). In this particular matter, the E.D. recommended granting the request of the City of Burleson.

32 Docket No. 95-1470-MWD, City of Springtown

Another successful example of ADR.

33 Docket No. 95-1478-MWD, City of Crandall.

Mr. Lowerre creates a misleading impression about the ED's position by a misquote. The ED's position was that "Commission rules [not the permit, as Mr. Lowerre states] protect against odors by prohibiting any wastewater treatment plant units...from being located within 150 feet of the nearest property line," unless a buffer zone variance is received. Therefore, a hearing on odors would have been recommended as appropriate for those within the buffer zone. The recent Commission decision in this matter suggests that such a policy may be too restrictive; the evolutionary process continues, including grappling with the issue presented here of whether odor concerns from an existing plant are better handled through enforcement procedures rather than permit hearings.

Mr. Lowerre also alleges that the ED failed "to determine or ask the requesters if they own land or live downstream." In fact, the ED's recommendation to deny standing claims based on proximity to the discharge route rests on a factual determination that the requesters did not live along the discharge route. When making standing recommendations, the ED has the list of adjacent and downstream landowners who received notice, so there is a factual basis for determining who is adjacent and downstream; if the information is incorrect, the requestor can correct the record when responding.

34 Docket No. 95-1469-MWD, City of The Colony

It is too early in the process to make conclusory statements about the Commission "repeatedly" doing anything. The Commission reviews each request and permit on its own merits and did take Mrs. Laster's concerns into account before authorizing issuance of the permit. The Commission obviously concluded that a 16,000 gallon a day discharge of treated domestic wastewater was not going to adversely affect Mrs. Laster's recreational interests in Lewisville Lake and did not need the assistance of a contested case hearing to reach that conclusion.

35 Docket No. 95-1473-MWD, Last Days Evangelical Assn.

Page 7, in the Index, the statement that "requests were made by fourteen nearby landowners" is inaccurate unless one believes that 2 miles downstream is "nearby".

Page 30, 1st underlined paragraph - Same comment as above.

Page 30, in the "comment" paragraph, the implication that the ED consistently uses a one-mile threshold for affected persons in order to convince people to withdraw requests for hearing is untrue. Often the PIC or the Ombudsman will have more contact with requestors than the ED staff.

The one mile threshold is a "rule of thumb" that was often used by the Office of Hearing Examiners when that Office ruled on hearing requests. The change under the new procedures is that the Commission must now make a case by case determination in a public meeting with all participants offering arguments and comments. Depending upon the size and nature of the discharge and the strength of the arguments, the Commission is free to reject the "rule of thumb."

36 Docket No. 95-1543-IHW. Heat Energy Advanced Technology, Inc. (HEAT)

Based on the limited information provided by the Coalition in its hearing request, the ED initially recommended denial of the request, stating that the Coalition had not shown that any of its members were "affected persons," or that its very generalized concerns could be reasonably addressed in a permit renewal hearing. The applicant and the Coalition later submitted additional information, and both also made detailed presentations when the hearing request was initially considered at agenda. As a result, the staff stated at that agenda that due to the conflicting nature of the additional information provided by the applicant and the coalition, the case might be an appropriate one for referral to SOAH for an affected person hearing.

After the affected person hearing was held, SOAH recommended granting the hearing request and recommended that the Coalition be found to have met the test for a hearing but also recommended that the hearing not commence until the applicant had implemented the terms of a pending air agreed order. The ED responded to the SOAH recommendation by arguing that the Commission should overrule the SOAH recommendation on the basis that the Coalition had not supported the request with "competent evidence" with regard to the standing of any of its members.

The draft report asserts that the ED's arguments would effectively require the protestants to offer expert testimony and to fully address the merits of the application in order to be granted a hearing. In fact, the ED's exceptions to the PFD specifically recognized the limitations of lay testimony. However, both Section 5.115 of the Water Code and the Commission's rules effectively put the burden of proof on protestants to support their hearing request with some kind of "competent evidence," which could be lay testimony or some other type of evidence. In this case, the ED argued that the Coalition had not met this burden because it offered only one witness who claimed to be affected by the facility, but whose testimony was internally contradictory and did not show any real connection between his health complaints and the operations of the HEAT facility. The ED's arguments were based on the Coalition's failure to offer any convincing evidence in support of its request, rather than the fact that it offered only lay testimony.

It is also inaccurate to analyze all of the Commission rulings based upon some "standing" test. Not only must hearing requests be made by "affected" persons (those with "standing"), but the

request must also be reasonable and supported by competent evidence. These tests are not absolute restrictions on the ability of the Commission to send a matter to contested case hearing--even in the absence of a hearing request, any one Commissioner can send a matter to hearing. The Commission makes case-by-case determinations on how its decision making can best be served. The Commission, in this case, may very well have taken into account the fact that this is a permit renewal (not a new facility), that the terms of the permit were not being liberalized in any way, that the public complaints might be better addressed through enforcement action rather than a permitting hearing, and that many of the complaints were generalized concerns about the neighborhood and community rather than about this specific facility. Not only was the public afforded two meetings before the Commission, they were afforded a standing hearing at SOAH. There is no doubt the Commission heard and understood all of the public input offered.

37 Docket No. 95-1487-AIR, Application by Frisby Bell Gin Company

This renewal was governed by the exclusion from hearing legislated by SB 1125.

The renewal of this permit did not result in an increase in allowable emissions nor the emission of any air contaminant not previously emitted--as Mr. Lowerre noted, new pollution control equipment was being added. There were no unresolved violations related to this renewal. Therefore, as a matter of law, the hearing requests on this permit renewal were unreasonable and the Commission is precluded from holding a hearing on this application.

38 Docket No. 95-1484-AIR, Application of Gibson-Homans Company

This is another application of SB 1125. It is unclear under what authority Mr. Lowerre asserts a "legal right" to a hearing when the Legislature has spoken to the contrary.

This case was considered shortly after the new procedures were implemented and the Hellsterns, afforded an affirmative opportunity to respond, could certainly have made such a request to the Commission. It is certainly the process now to afford ample opportunity and encouragement to respond.

39 Docket No.95-1468-AIR, Registration by Rainbow Materials, Inc.

Mr. Lowerre again confuses public participation with a right to a contested case hearing. There was an exceptional amount of public input concerning this standard exemption.

The ED's staff participated in a very well attended public meeting in Leander on September 14, 1995. The ED's staff met with citizen representatives to answer questions and provide additional information.

The only request before the Commission was the late-filed request of Sen. Wentworth. The Senator appeared before the Commission to discuss his views for the need for a public hearing to held. His hearing request was denied by the Commission as untimely.

While 234 requests for hearing were submitted on this registration, only 124 were submitted within the time required by Commission rule. None of the requests were from persons residing in a permanent residence within 440 yards of the proposed plant. Section 382.058 states that "only those person actually residing in a permanent residence within 440 yards of the proposed plant may request a hearing under Section 382.056(d) as a person who may be affected."

The comment that staff routinely "works with, if not encourage[s]" applicants to reconfigure their facilities to avoid public participation is a very unfair characterization. Staff routinely works with every applicant. Anyone can read the statute and understand the 440 yards distance limitation. The ED helped organize the public meeting held in the community--hardly an avoidance of public participation.

40 Docket 95-1405-AGR, C&W Manhattan Associates

Another successful example of ADR.

41 Docket 95-1252-UIC USX

The draft report does not mention that, before the agenda meeting, staff met with the landowner for an hour and one-half to answer his questions about the proposed amendment and about the PAA restoration process in general. The report also fails to mention that the ED, based on the agreement of all parties, requested the Commission to delay action for six months to allow additional monitoring.

42 Docket No. 95-1189-AIR, Application by North Texas Cement Company

This application for amendment was to remove a permit condition restricting the types of fuel to allow for burning of tire derived fuels. This change resulted in an insignificant increase in emissions that did not amount to a modification as defined by the Texas Clean Air Act. In addition, there was no increase in allowable emissions in the existing permit. Therefore, there was no public notice of this application. The Commission denied this hearing request as unreasonable based on the fact that the change did not amount to a modification and did not increase allowable emissions over the existing permit.

The Commission was made aware of the concerns so the goal of public participation was achieved.

43 Docket No. 95-1328-AIR, Application of Sanderson Farms, Inc.

Legal staff contacted members of Ms. Corn's family, whom she purported to represent. Some were reached and said that she did not, in fact, represent them, and that they were not interested in a hearing. One family member gave inconsistent answers (i.e., stated that she had not consulted them, but did not clearly state whether they considered themselves involved in the hearing request). The ultimate evaluation of the "reasonableness" of the hearing requests was based upon Ms. Corn and Mr. O'Connor. The Commission denied these hearing requests as unreasonable based upon air dispersion modeling which show that it was unlikely that these persons would be affected by emissions from the proposed facility.

The Commission is mandated to deny hearing requests where there is no increase in allowable emissions, even if there may be an increase in actual emissions.

Hearing requests denied by Commission are considered in an open meeting and the hearing requestors are advised that they may attend these meetings and address the Commission. In addition, they are advised that under Commission rules they may file a response to any comments filed on their hearing requests. This affords an opportunity to challenge the position of the ED or any other potential party.

year or beginning of next year. If interested in more info, put name on form and place in box labelled book.

E. CLE forms are in lobby. Leave completed forms in tray.

F. Also in lobby is stamp to validate parking, assuming you found some.

G. Also in lobby is message board.

H. Lunch will be next door and in lobby.

I. At close of program, cash bar and reception in lobby.

J. After breaks, instead of bells, we'll have music to let you know we are starting up again.

K. Finally, in course materials, there are evaluation forms. Please complete. We especially welcome your comments for future programs.

L. For example, last year, those of you who attended know Elvis appeared, as did Priscilla.

Although overwhelming majority of attendees enjoyed Elvis, a small minority of commenters thought it inappropriate and silly. I want to assure you that we have seriously considered those comments . . .

→ "NOT" [Indiana Jones]

Let's Rock & Roll

IV. Our first moderator - Jennifer Keane

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EIGHTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

August 1 - 2, 1996
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 1997 Ninth 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 1997 conference.

8. Suggested themes for the 1997 conference.

9. Other comments.

SPEAKER	ORAL PRESENTATION	COURSE MATERIALS	COMMENTS
State Superfund -- Key Issues			
Mehron Azarmehr	5 4 3 2 1	5 4 3 2 1	
RCRA/Superfund -- Significant Developments			
Mary Reagan	5 4 3 2 1	5 4 3 2 1	
Air Quality			
Susan Owen	5 4 3 2 1	5 4 3 2 1	
Jeff Saitas	5 4 3 2 1	5 4 3 2 1	
Eric Groten	5 4 3 2 1	5 4 3 2 1	
Practical Remediation Technologies - Organics			
Evan Nyer	5 4 3 2 1	5 4 3 2 1	
Practical Remediation Technologies - Metals			
Mike Studer	5 4 3 2 1	5 4 3 2 1	
EPA Region VI Update			
Myron Knudson	5 4 3 2 1	N/A	
TNRCC Procedural Rules			
Geoff Connor	5 4 3 2 1	5 4 3 2 1	
Standing and Other Issues			
Greg Cooke	5 4 3 2 1	5 4 3 2 1	

SPEAKER	ORAL PRESENTATION	COURSE MATERIALS	COMMENTS
Sensible Regulation			
Ralph Marquez	5 4 3 2 1	5 4 3 2 1	
TNRCC Enforcement Guidelines			
John Riley	5 4 3 2 1	5 4 3 2 1	
Joe Vogel	5 4 3 2 1	5 4 3 2 1	
Water Quality			
Bob Sweeney	5 4 3 2 1	5 4 3 2 1	
Pollution Prevention			
Andrew Neblett	5 4 3 2 1	5 4 3 2 1	
Emergency Response			
Don Fawn	5 4 3 2 1	5 4 3 2 1	
Ethical Concerns of Environmental Practitioners			
Kerry Russell	5 4 3 2 1	5 4 3 2 1	
GLO Programs			
Frank Gonynor	5 4 3 2 1	5 4 3 2 1	
Ashley K. Wadick	5 4 3 2 1	5 4 3 2 1	

SPEAKER	ORAL PRESENTATION	COURSE MATERIALS	COMMENTS
Texas Property Rights Law and Takings Issues			
Pete Schenkkan	5 4 3 2 1	5 4 3 2 1	
Toxic Tort - Case Management Orders			
Larry Goldenthal	5 4 3 2 1	5 4 3 2 1	
Defending Criminal Investigations -- Do's and Don'ts			
Wayne Meissner	5 4 3 2 1	5 4 3 2 1	
The Future of Regulatory Reform			
Tom McGarity	5 4 3 2 1	5 4 3 2 1	
TNRCC Policies			
Barry McBee	5 4 3 2 1	5 4 3 2 1	
Assessing Risk Assessment			
Jim Embree	5 4 3 2 1	5 4 3 2 1	
Harmonized Risk Based Cleanup			
John Conner	5 4 3 2 1	5 4 3 2 1	
Voluntary Cleanup			
Chuck Epperson	5 4 3 2 1	5 4 3 2 1	
Impact of Contamination on Property Value			
Rudy Robinson	5 4 3 2 1	5 4 3 2 1	
Employment Issues in Environmental Law			
Henry Robinson	5 4 3 2 1	5 4 3 2 1	

SPEAKER	ORAL PRESENTATION	COURSE MATERIALS	COMMENTS
Open Mike			
Jeff Saitas	5 4 3 2 1	N/A	
Jim Phillips	5 4 3 2 1	N/A	
Minor Hibbs	5 4 3 2 1	N/A	
Bob Sweeney	5 4 3 2 1	N/A	
Philip Holder	5 4 3 2 1	N/A	
Group	5 4 3 2 1	N/A	

Coming Soon!

The Environmental and Natural Resources Law section, in cooperation with West Publishing, is pleased to announce a new addition to West's Texas Practice Series, entitled *Texas Environmental Law*. This work is written and edited by more than fifty experienced environmental law practitioners from throughout the state. West Publishing's *Texas Environmental Law* will provide a comprehensive overview of pertinent state environmental statutes, regulatory programs, and case law, presented in a manner that is informative, practical, and reader friendly. The purpose of this work is to provide useful information about the practice of environmental law in Texas not only to practitioners of environmental law, but also to other practitioners, environmental consultants, corporate managers, and private citizens. Attached is a copy of the draft Table of Contents.

If you are interested in receiving more information about the publication of *Texas Environmental Law*, please fill out the attached form and return it to the front desk.

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Texas Environmental Law

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EIGHTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

Thursday and Friday, August 1-2, 1996

"AT THE MOVIES"

THURSDAY, AUGUST 1, 1996

7:30 - 8:30 **Registration/Continental Breakfast - *"Breakfast Club"***

8:30 - 8:45 **Introductions** - Jeff Civins

Welcoming Remarks - *"Look Who's Talking"*

Margaret Menicucci, Chair
Environmental and Natural Resources Law Section

Joe King, Immediate Past President
Water Environment Association of Texas

Phil Daily, Section Chair
Air & Waste Management Association, Southwest Section

Moderator: *Jennifer Keane*
Baker & Botts, L.L.P., Austin

8:45 - 9:05 **State Superfund -- Key Issues - *"Die Hard"***

Speaker: *Mehron Azarmehr*
Assistant Attorney General, Natural Resources Division

9:05 - 9:30 **RCRA/Superfund -- Significant Developments-*"Die Hard II, Die Harder"***

Speaker: *Mary Reagan*
Winstead, Sechrest & Minick, P.C., Austin

9:30 - 10:15 **Air Quality - *"Gone With The Wind"***

Speakers: *Susan Owen*, TNRCC
Jeff Saitas, TNRCC
Eric Groten
Brown McCarroll & Oaks Hartline, L.L.P., Austin

10:15 - 10:30 **Coffee Break - *"The Big Sleep"***

10:30 - 11:00 **Practical Remediation Technologies - Organics - *"The Money Pit"***

Speaker: *Evan Nyer*
Geraghty & Miller, Tampa, Florida

11:00 - 11:30 **Practical Remediation Technologies - Metals - *"Ironweed"***

Speaker: *Mike Studer*
Entact, Dallas

11:30 - 12:00 **EPA Region VI Update - *"North Dallas 40"***

Speaker: *Myron Knudson*
EPA, Region VI, Dallas

12:00 - 1:25 **Lunch - *"Jaws"***

Moderator: *Roliff Purrington*
Mayor, Day, Caldwell & Keeton, *L.L.P.*

1:25 - 2:15 **TNRCC Procedural Rules - *"The Crying Game"***

Speaker: *Geoff Connor*
TNRCC

Standing and Other Issues - *"Stand and Deliver"*

Speaker: *Gregg Cooke*
Haynes & Boone, P.C., Austin

2:15 - 2:45 **Sensible Regulation - *"It's A Mad Mad Mad Mad World"***

Speaker: *Ralph Marquez*
TNRCC

2:45 - 3:30 **TNRCC Enforcement Guidelines - *"Hang 'Em High"***

Speakers: *John Riley*, TNRCC
Joe Vogel, TNRCC

3:30 - 3:45 **Cookie Break - *"Goodbye Mr. Chips"***

3:45 - 4:15 **Water Quality - *"Crimson Tide"***

Speaker: *Bob Sweeney*
TNRCC

4:15 - 4:45 **Pollution Prevention - *"Remains of the Day"***

Speaker: *Andrew Neblett*
TNRCC

4:45 - 5:15 **Emergency Response - *"Clear and Present Danger"***

Speaker: *Don Fawn*
TNRCC

5:15 - 6:00 **Cash Bar Reception - *"Cocktail"***

FRIDAY, AUGUST 2, 1996

8:00 - 8:30 **Registration/Continental Breakfast - *"Breakfast at Tiffany's"***

Moderator: *David Bolduc*
TNRCC

8:30 - 8:55 **Ethical Concerns of Environmental Practitioners - *"True Lies"***

Speaker: *Kerry Russell*
Lloyd, Gosselink, Fowler, Blevins & Mathews, P.C.

8:55 - 9:25 **GLO Programs - *"Prince of Tides"***

Speakers: *Frank Gonynor*
Eastham, Watson, Dale & Forney, L.L.P., Houston

Ashley Wadick
GLO

9:25 - 9:55 **Texas Property Rights Law and Takings Issues - *"To Kill a Mockingbird"***

Speaker: *Pete Schenkkan*
Graves, Dougherty, Hearon & Moody, Austin

9:55 - 10:20 **Toxic Tort - Case Management Orders - *"Dances with Wolves"***

Speaker: *Larry Goldenthal*
Woodard, Hall & Primm, L.L.P., Houston

10:20 - 10:35 **Coffee Break - *"Dazed and Confused"***

10:35 - 11:00 **Defending Criminal Investigations -- Do's and Don'ts - *"Dead Man Walking"***

Speaker: *Wayne Meissner*
Fitzgerald & Meissner, Austin

11:00 - 11:30 **The Future of Regulatory Reform - *"The Turning Point"***

Speaker: *Tom McGarity*
University of Texas School of Law, Austin

11:30 - 12:00 **TNRCC Policies - *"The Ten Commandments"***

Speaker: *Barry McBee*
TNRCC

12:00 - 1:25 **Lunch - *"Tortilla Flats"***

Moderator: *Carol Batterton*
TNRCC

1:25 - 1:55 **Assessing Risk Assessment - *"Weird Science"***

Speaker: *Jim Embree*
Geomatrix, San Francisco, California

1:55 -2:40 **Harmonized Risk Based Cleanup - *"Risky Business"***

Speaker: *John Conner*
Groundwater Services, Inc., Houston

Voluntary Cleanup - *"For A Few Dollars More"*

Speaker: *Chuck Epperson*
TNRCC

2:40 - 3:05 **Impact of Contamination on Property Value - *"Home Alone"***

Speaker: *Rudy Robinson*
Austin Valuation, Austin

3:05 - 3:30 **Employment Issues in Environmental Law - *"9 to 5"***

Speaker: *Henry Robinson*
Kelly, Hart & Hallman, P.C., Fort Worth

3:30 - 3:45 **Ice Cream Bar Break - *"Like Water For Chocolate"***

3:45 - 5:00 **Open Mike - *"The Wild Bunch"***

Moderator: John Baker, TNRCC

Speakers: *Jeff Saitas,* TNRCC
Jim Phillips, TNRCC
Minor Hibbs, TNRCC
Bob Sweeney, TNRCC
Philip Holder, SOAH

5:00 **Adjourn - *"The Great Escape"***

Texas Environmental Superconference
Co-sponsored by:

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

This course is approved by the State Bar of Texas for **13.25 Hours in Continuing Legal Education Credits, including 1 hour of Ethics,** and for credit towards the continuing legal requirements for certification by the Texas Board of Legal Specialization in Real Estate Law and in Administrative Law.

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EIGHTH ANNUAL
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Open Mike *"The Wild Bunch"*

30. **Jeff Saitas**
Jim Phillips
Minor Hibbs
Bob Sweeney
Philip Holder

State Superfund -- Key Issues

"Die Hard"

Mehron Azarmehr

MEHRON AZARMEHR

Mehron Azarmehr received his B.A. and M.S. degrees in economics from the University of North Texas and J.D. degree from St. Mary's University School of Law. Prior to joining the Office of the Attorney General, Mr. Azarmehr worked as a briefing intern at the Texas Supreme Court. Mr. Azarmehr was appointed as an assistant attorney general in 1992 in the Environmental Protection Division (now the Natural Resources Division).

He currently serves as Associate Editor-in-Chief of Texas Environmental Law Journal and is the Chair-Elect of the Executive Counsel of the Environmental and Natural Resources Law Section of the State Bar of Texas

His publications include: *Natural Resource Damages Under CERCLA*, 22 Envt'l L. Rep. 10655 (October 1992); *Status of Joint and Several Liability Under CERCLA After Bell Petroleum*, 24 Envt'l L. Rep. 10250 (May 1994); and *CERCLA Joint and Several Liability: Alive and Well After Bell Petroleum*, 25 Envt'l Rep. (BNA) 1138 (September 1994).

STATE SUPERFUND UPDATE

MEHRON AZARMEHR
ASSISTANT ATTORNEY GENERAL

Office of the Attorney General
Natural Resources Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548

EIGHTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

Austin, Texas
August 1-2, 1996

I. INTRODUCTION

In 1985, the Texas Legislature amended the Texas Solid Waste Disposal Act ("TSWDA") to create the "State Superfund" program. The purpose of this program is to address abandoned or inactive sites within the State that do not qualify for action under the federal Superfund program and cannot be resolved under the hazardous waste program or by other means. The Texas Superfund statute is contained in portions of the TSWDA. TEX. HEALTH & SAFETY CODE ANN. §§ 361.131-361.137 and 361.181-361.203 (Vernon 1992 & Supp. 1996). The Texas Natural Resource Conservation Commission ("TNRCC") is the agency charged with carrying out the Texas Superfund program. *See*, TSWDA §§ 361.181, 361.191, 361.224, 361.228, 361.343-344, and 361.271-273. Pursuant to the authority granted to it by the Superfund statute, the TNRCC has promulgated agency rules, that may be found in 30 Texas Administrative Code, Chapter 335, Subchapters A, K, and S.

Potential Superfund sites receive a Hazardous Ranking Score; those sites which score at least a 5.0 on the Hazardous Ranking scale are proposed to be listed on the State Superfund Registry. Sites are not actually listed on the Registry until after a series of notices, opportunities for agreements, public meetings, and the completion of a remedial investigation and feasibility study ("RI/FS"). Each proposed site will be formally listed on the State Superfund Registry by a final administrative order provided site studies document that the facility poses an imminent and substantial endangerment to the environment or to public health and safety. TSWDA § 361.181.

To date, the TNRCC has listed 28 sites and proposed 17 others for listing on the State Superfund Registry. In addition, two sites — Fabsteel and Coffield Refinery — are being remediated by the present owner or operator pursuant to TSWDA § 361.183(a), and another

site — Col-Tex Refinery — is undergoing an RI/FS. Attachment A provides information about the locations of these sites and the progress of the cleanups. The State Superfund Quarterly Status Report, published by the TNRCC, provides more detailed information about each site. The most recent quarterly report, published in June 1996, may be accessed at ***http://www.tnrcc.state.tx.us/waste.pcd/tss.html*** or by contacting the TNRCC Pollution Cleanup Division at 1-800-633-9393.

Remediation at State Superfund sites must be achieved, first, by responsible parties, second, with the aid of federal funds, and third, if necessary, with state funds from the Hazardous and Solid Waste Remediation Fee Fund. There are eight phases in the Superfund process. Appendix B outlines these phases. Due to the large and growing number of Superfund sites in Texas, the bankruptcy or unavailability of responsible parties, and the complex nature of the environmental problems, which may have developed over many years, the Superfund process takes time.

Although State Superfund is patterned after federal Superfund (Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C.A. §§ 9601 *et seq.*), it differs in several ways from CERCLA. This paper will focus on those differences and will briefly discuss each. This paper will also discuss the procedures under Texas Superfund for the listing of sites, identification of potentially responsible parties, determination of liability, and the administrative and judicial remedies available to the TNRCC.

II. State Registry

As required by TSWDA § 361.181, the TNRCC annually publishes an updated state registry identifying "each facility that may constitute an imminent and substantial endangerment

to public health and safety or the environment due to a release or threatened release of hazardous substances into the environment." TSWDA § 361.181(a). Section 361.181 also requires the TNRCC to identify the "relative priority for action" at each facility listed on the state registry. TSWDA § 361.181(b). However, before listing a facility on the state registry, the TNRCC must determine whether the potential endangerment to public health and safety or the environment can be resolved in one of the following two ways: (1) by the present owner or operator under the federal Resource Conservation and Recovery Act of 1976 (42 U.S.C.A. §§ 6901 *et seq.*), or (2) by some or all of the potentially responsible parties ("PRPs") identified in Section 361.271, under an agreed administrative order issued by the TNRCC. TSWDA § 361.183(a).

Once the Executive Director of the TNRCC determines that a facility is eligible for listing, the TNRCC must provide public notice and opportunity to comment pursuant to Section 361.184. If requested, the TNRCC will hold a public meeting regarding the proposed listing. TSWDA § 361.184(c). The PRPs have 90 days from the date of notice of intent to list in which to submit a "good faith offer" for the performance of the RI/FS or a similar approved study. TSWDA § 361.185(a).

The PRPs making the offer then have an additional 60 days to negotiate an agreed administrative order regarding the scope of work. In this agreed order, a PRP need not admit liability or agree to perform the remedial action. *Id.* To encourage the PRPs to perform the RI/FS, Section 361.185(c) provides an incentive: the TNRCC may not assess its oversight costs against the PRPs who fund or perform the study. Such oversight costs may be assessed against non-participating PRPs only. *Id.*

At the completion of the RI/FS, the TSWDA requires the TNRCC to select a proposed remedial action and then hold a public meeting to discuss the selection. TSWDA § 361.187(a). After the public meeting, the PRPs have another 60 days in which to submit a good faith offer to fund or perform the remedial action. TSWDA 361.187(d). If some or all of the PRPs submit a good faith offer, they have an additional 60 days in which to negotiate the terms of the agreed order. *Id.* As with the investigation phase, the TNRCC may assess its oversight costs against non-participating PRPs only. TSWDA § 361.187(e).

After consideration of all good faith offers to fund or perform the remedial action, the TNRCC is required to issue a final administrative order that must, among other things, list the facility on the state registry, specify the selected remedial action, list the liable parties, and order those parties to remediate the facility. TSWDA § 361.188. The TNRCC may file a cost recovery action or may seek administrative and/or civil penalties against PRPs who fail to comply with the final administrative order. TSWDA § 361.197 and 361.198; *see also* TSWDA § 361.252.

III. The "Superfund"

The Texas Superfund statute creates a fund — the Hazardous and Solid Waste Remediation Fee Fund — from which the TNRCC can pay for a cleanup action in the event that private parties cannot be located or will not voluntarily pay for the cleanup. TSWDA § 361.133.

IV. Liability Provisions

In addition to the authority to issue administrative orders under Section 361.188, the TNRCC is authorized, under Section 361.272, to issue an administrative order to a "person responsible for solid waste if it appears that there is an actual or threatened release of solid waste

that presents an imminent and substantial endangerment to the public health and safety or the environment." Section 361.272 governs solid waste facilities that currently store, process, or dispose of solid waste, and also those that stored, processed, or disposed of solid waste in the past. TSWDA § 361.272(a). The TNRCC may issue a Section 361.272 order to restrain a PRP from allowing or continuing the release or threatened release, as well as to require a PRP to provide and implement a remedial action plan designed to eliminate the release or threatened release. TSWDA § 361.272(b). Under Section 361.274, such an order does not require prior notice or a hearing before the TNRCC. In addition, the TNRCC may file a civil suit for injunctive relief as an alternative to issuing an administrative order. TSWDA § 361.273.

A. Prohibited Releases

One of the key differences between Texas and federal Superfund liability is that different substances are actionable. CERCLA liability is based upon release or threatened release of a "hazardous substance." CERCLA § 9607(a)(4). On the other hand, the TSWDA creates liability for release of any "solid waste" that presents "an imminent and substantial endangerment." TSWDA § 361.272. The TSWDA broadly defines "solid waste" to include almost all discarded material, whether solid, liquid, semi-solid, or contained gases. TSWDA § 361.003(34). The definition of "solid waste" includes "hazardous substances," i.e., hazardous substances are a subset of solid waste. TSWDA § 361.003(34)(B).

The CERCLA definition of "hazardous substance" expressly excludes petroleum, including crude oil or any fraction thereof, which is not listed in CERCLA as a hazardous substance — this is known as the "petroleum exclusion." CERCLA § 9601(14). The TSWDA definition of "solid waste" excludes "waste materials that result from activities associated with

the exploration, development, or production of oil or gas;" however, it does not expressly exclude "petroleum." TSWDA § 361.003(34)(A).

Under the State Superfund program, for a release of solid waste to create liability, it must constitute an "imminent and substantial endangerment." TSWDA § 361.272. The TNRCC considers that a danger is "imminent" if, given the entire circumstances surrounding the case, exposure of persons or the environment to hazardous substances is more likely than not, in the absence of preventive action. 30 TEX. ADMIN. CODE § 335.342. "Substantial" danger exists if, given the current state of scientific knowledge, the harm to public health and safety or the environment, that would result from exposure, could cause adverse environmental or health effects. *Id.* Whether a release is prohibited under the State Superfund program is thus dependent upon the circumstances of each case.

B. Liable Parties: Potentially Responsible Parties

Although the categories of responsible parties under State Superfund are similar to the categories of those under CERCLA, the specific language differs. Under State Superfund, a person is potentially responsible if the person:

(a) is an owner or operator of a solid waste facility;

(b) owned or operated a solid waste facility at the time of processing, storage, or disposal of any solid waste;

(c) by contract, agreement, or otherwise, arranged to process, store, or dispose of, or arranged with a transporter for transport to process, store, or dispose of, solid waste owned or possessed by the person, by any other person or entity at:

(i) the solid waste facility owned or operated by another person or entity that contains the solid waste; or

(ii) the site to which to solid waste was transported that contains the solid waste; or

(d) accepts or accepted any solid waste for transport to a solid waste facility or site selected by the person. TSWDA § 361.271.

While there are no reported Texas cases on this point, a textual analysis of Section 361.271 would extend the scope of persons liable under State Superfund beyond that under CERCLA. Section 361.271 imposes liability upon former owners and operators at the time of processing, storage, or disposal of *any solid waste*. Similarly, the "arranger" and "transporter" provision imposes liability on any person who arranged for the processing, storage, or disposal of *solid waste*. As pointed out above, these provisions impose liability for the disposal of any solid waste at a listed site, even though the waste was neither hazardous waste nor hazardous substance. Under CERCLA, the scope of liability for former owners or operators, arrangers, and transporters is limited to situations where the waste in question is a "hazardous substance." 42 U.S.C.A. § 9607(a).

1. Prior Owners and Operators

Similarly, although there are no reported cases addressing this issue, the language of TSWDA § 361.271(a)(2) may be interpreted to impose broader liability upon prior owners and operators than that imposed under the federal Superfund. While the federal statute imposes liability upon those who owned or operated the property "at the time of disposal," the state

statute imposes liability upon prior owners and operators who owned the property "at the time of *processing*, *storage*, or disposal." TSWDA § 361.271(a)(2) [emphasis added]. The broader language in Section 361.271(a)(2) may be used to argue that the statute imposes liability upon prior owners and operators even though no disposal occurred during their tenure at the site.

2. No Exclusion for Lenders

Unlike the federal statute, the Texas statute does not contain any exclusion to the definition of "owner" for persons holding "indicia of ownership" primarily for protecting a security interest in a site. This dissimilarity might seem to raise the issue of whether the Texas legislature intended to include lienholders as PRPs under the State Superfund statute; however, a review of case law indicates otherwise.

Texas follows the lien theory of mortgages. Under this theory, the mortgagee is not the owner of the property and is not entitled to its possession, rentals or profits. *Taylor v. Brennan*, 612 S.W.2d 592 (Tex. 1981). Neither a mortgage nor a deed of trust conveys title to land. *Karcher v. Bousquet*, 672 S.W.2d 289 (Tex. App. — Tyler 1984, writ ref'd n.r.e.). Thus, a holder of a deed of trust or other equitable lien is not an owner under Texas law. However, once a lienholder forecloses upon the lien, the lienholder becomes the owner and is subject to liability under the TSWDA. Section 361.271(b) exempts from liability political subdivisions that acquire ownership of a site through bankruptcy, tax delinquency, or abandonment, so long as the political subdivision does not cause or contribute to the release or threatened release at the site.

C. Joint and Several Liability

Like the federal scheme, State Superfund makes all PRPs jointly and severally liable for eliminating the release or threatened release. TSWDA § 361.276. However, unlike the federal

program, the State Superfund statute expressly sets forth a method for determining whether the cleanup costs are divisible. Section 361.276 provides that, if a party can prove by a preponderance of the evidence that the release is "divisible," then that person is liable only for the portion of the release that is attributable to that person. In order to be considered "divisible," the waste must be capable of being managed separately under the remedial action plan. TSWDA § 361.276, 30 TEX. ADMIN. CODE § 335.342.

D. Contribution

Under CERCLA, parties who have settled with the government are not liable for contribution claims regarding matters addressed in the settlement. CERCLA § 113(f). The State Superfund statute does not provide such protection for settling parties. If some but not all of the PRPs agree with the State to take remedial action, the State may seek a judgment against the non-settling parties for the total amount of the remediation costs, including oversight costs, less the amount that settling parties have agreed to pay. TSWDA § 361.277(a). Under State Superfund, a non-settling party is not barred from bringing an action against a settling party. In an action for contribution brought by a non-settling party against a settling party, the non-settling party has the burden of proving that the amount of costs that the settling party paid was unreasonable. TSWDA § 361.277(b).

In adjudicating a contribution claim among liable parties, the TSWDA directs the district court to apportion costs according to:

(1) the relationship between the parties' actions and the remedy required to eliminate the release,

(2) the volume of waste for which each party is responsible,

(3) consideration of the waste characteristics if those characteristics affect the cost to eliminate the release, and

(4) a party's cooperation with state agencies and the degree of care exercised. TSWDA § 361.343.

This apportionment relates to costs among liable parties and does not affect a person's liability to the State. *Id.*

E. Defenses

The defenses to liability available under the State Superfund statue mirror the defenses under the federal scheme. A liable party may avoid cleanup liability only by establishing, by a preponderance of the evidence, that the release or threatened release was caused solely by: (1) an act of God, (2) an act of war, or (3) the acts or omissions of a third person that did not occur in connection with a "contractual relationship," and the defendant exercised due care with respect to the solid waste and took precautions against foreseeable acts and omissions of a third party. TSWDA § 361.275.

1. Innocent Landowner Defense

As in the federal scheme, the standard of proof for the so-called "innocent landowner" defense is very high. In order to qualify for this defense, the defendant must have made "appropriate inquiry into the previous ownership and uses of the property." Section 361.275(f) incorporates verbatim the CERCLA language used to determine whether a purchaser made "appropriate inquiry." Section 361.275 directs a district court to consider:

(1) any specialized knowledge or experience of the defendant,

(2) the relationship of the purchase price to the value of the property if the property were uncontaminated,

(3) commonly known or reasonably ascertainable information about the property,

(4) the obvious or likely presence of contamination of the property, and

(5) the defendant's ability to detect the contamination by appropriate inspection.

2. TNRCC Policy Regarding Application of Defenses

TNRCC Rule 335.350 sets forth the TNRCC policy concerning the application of § 361.275 defenses. Generally, a PRP may submit documentation proving qualification for the defense, but only in those cases where it is unequivocally demonstrated that the defense applies would the Executive Director agree to exclude a PRP from being named in an administrative order. The rationale for this policy is this: the statute anticipates that defenses and claims of divisibility will be advanced in district court where the PRP can prevail if it can prove the defense or claim by a preponderance of the evidence. Thus, the Executive Director will not generally evaluate defensive claims and will include all PRPs in an administrative order. Any decision by the Executive Director on a defensive claim will have no *res judicata* or collateral estoppel effect on a PRP's ultimate liability as subsequently determined by the district court. 30 TEX. ADMIN. CODE § 335.350(d).

V. Appeals of TNRCC Administrative Orders

Under CERCLA, PRPs may not challenge an administrative order until: (1) the government has sued to enforce the order, compel remedial action, or recover response costs; (2) remedial work has been completed and reimbursement is sought; or (3) a citizens' suit has been filed. CERCLA § 113(h). Under the State scheme, a PRP may challenge the terms of a TNRCC

§ 361.188 or § 361.272 order in district court as soon as the order is received or published. The PRP must file a petition before the 46th day after it receives the order, and the PRP must pursue the action with reasonable diligence. TSWDA §§ 361.321 and 361.322. The filing of an appeal does not act as an "automatic stay" of the site remediation, unless the court enjoins the remedial action under its general equity jurisdiction. TSWDA § 361.322.

The TSWDA provides a different standard of review for TNRCC orders issued under § 361.272 than those issued under § 361.188. *See* TSWDA § 361.322.

A. TNRCC § 381.272 Orders

Under § 361.322, which governs the appeals of § 361.272 orders, once a PRP files a timely petition for review in a state district court, the burden of proof shifts to the TNRCC. Thus, although the TNRCC is nominally the defendant, in fact it has all the burden of a plaintiff in a *de novo* proceeding. The TNRCC must prove by a preponderance of the evidence the following: (1) there is an actual or threatened release of (2) solid waste or hazardous substances that is (3) an imminent and substantial endangerment to the public health and safety or the environment and (4) the person named in the order is a person responsible under § 361.271. TSWDA § 361.322(g). However, if the appealing party challenges only the appropriateness of the selected remedial action in the TNRCC order, then the appealing party has the burden of proving that the remedial action is arbitrary or unreasonable. TSWDA § 361.322(h). In the event the district court upholds the validity of the order, it must enjoin the named parties to comply with the order. TSWDA § 361.322(j).

B. TNRCC § 361.188 Orders

Section 361.322 refers to § 361.272 orders but does not mention § 361.188 orders. Therefore, the standard of review and the burden of proof articulated in § 361.322 would not appear to apply to § 361.188 orders. Moreover, there is no provision in the TSWDA that specifically governs appeals of § 361.188 orders. Therefore, one may argue that Section 361.321, which is the general appeals provision for the TSWDA, provides the applicable standard of review for § 361.188 orders. Under § 361.321, the district court must uphold a TNRCC order unless the appealing party shows that the order is "invalid, arbitrary, or unreasonable." TSWDA § 361.321(e).

VI. Judicial Actions

In addition or as an alternative to pursuing administrative actions against PRPs, the TNRCC may seek relief in state district court.

A. Cost Recovery

The State Superfund statute requires that the TNRCC file a cost recovery action within one year after completion of all remedial action against all PRPs who have not complied with the terms of a § 361.188 order. TSWDA § 361.197(a). In a cost recovery suit brought under § 361.197, the TNRCC may seek to recover the following: (1) the costs of the RI/FS, remedial design, and remedial action; (2) civil penalties for failure to comply with a TNRCC order; and (3) up to three times the state's costs if the court finds the PRP's defenses to be "unreasonable, frivolous, or without foundation." TSWDA § 361.197.

B. Injunctive Relief

As an alternative to issuance of administrative orders, the TNRCC may, through the Office of the Attorney General, file suit in a state district court to restrain a PRP from allowing or continuing a release or threatened release, or to require a PRP to take actions "necessary to provide and implement a cost effective and environmentally sound remedial action plan designed to eliminate the release or threatened release." TSWDA § 361.273.

C. Recovery of Litigation Costs

If the State prevails in the appeal of an administrative order, an action to enforce an administrative order, a civil suit seeking injunctive relief, or a cost recovery suit under § 361.197, the State may recover attorney's fees, costs to prepare and provide witnesses, and reasonable costs of investigating and assessing the site. TSWDA § 361.341. Additionally, if an appeal or third-party claim is found by the court to be frivolous, unreasonable, or without foundation, the court may assess damages against the party bringing the frivolous action in an amount up to triple the costs incurred by the state or third-party defendant. TSWDA § 361.341(d)

On the other hand, if the court finds that the administrative order appealed from is frivolous, unreasonable, or without foundation with respect to a party named in the order, the party may recover reasonable attorney's fees and costs from the state. TSWDA § 361.342.

VII. SETTLEMENTS

The TNRCC encourages PRPs to enter into negotiated settlements to develop and implement an effective cleanup plan. While one of the TNRCC's objectives is to arrive at a comprehensive settlement with all the PRPs and provide for a complete investigation and cleanup of a facility, the TNRCC may consider and enter into partial settlements and

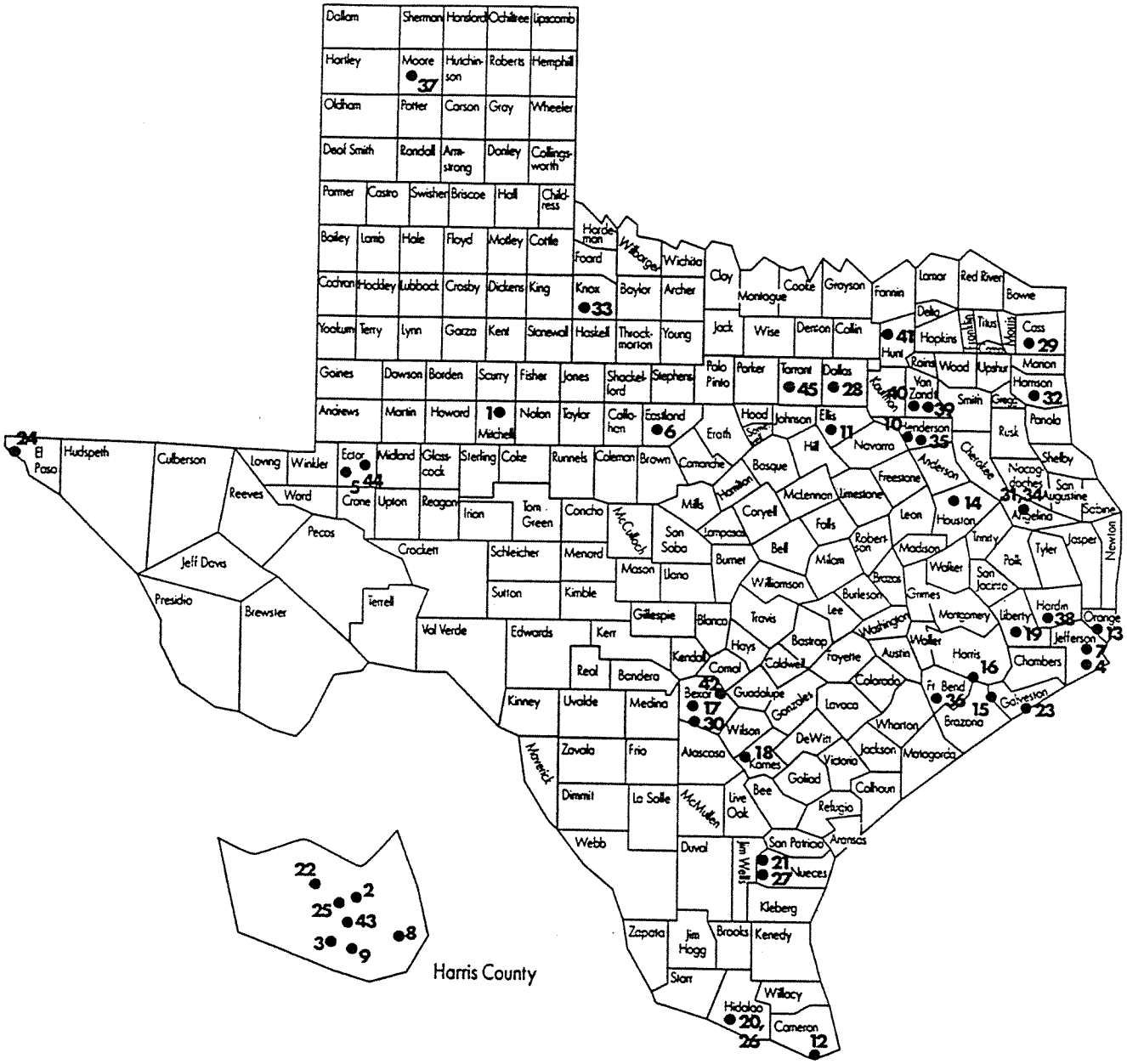
subsequently seek relief against the non-settling PRPs. 30 TEX. ADMIN. CODE § 335.351. Moreover, in certain situations, the TNRCC may agree to a remediation that is funded by federal and state as well as the private sources — "mixed funding." Rule 335.351 lists the specific circumstances in which mixed funding may be used. 30 TEX. ADMIN. CODE § 335.351(c).

Like CERCLA, the State Superfund program recognizes "*de minimis* settlements." If a PRP can meet the conditions listed in Rule 335.351(d), the TNRCC has the discretion to enter into a final settlement agreement with that PRP for a minor portion of the response costs at a facility. 30 TEX. ADMIN. CODE § 335.351(d).

VIII. CONCLUSION

Given the uncertainties surrounding the reauthorization of CERCLA and the trend at the Environmental Protection Agency, at least at Region 6, of shifting more Superfund responsibility to the states, state Superfund programs are taking on greater importance. While Texas' Superfund statutory scheme is modeled after the federal statute, key differences exist. Some of these differences include the type of substances that are actionable, the scope of liability for prior owners and operators, and the procedure for appeals of agency orders.

1996 State Superfund Registry



1. Col-Tex Refinery, Mitchell County
2. Houston Scrap, Harris County
3. Houston Lead, Harris County
4. State Marine, Jefferson County
5. Precision Machine, Odessa County
6. Sonics International, Eastland County
7. Maintech International, Jefferson County
8. Federated Metals, Harris County
9. Gulf Metals, Harris County
10. Wortham Lead Salvage, Henderson County
11. Texas American Oil, Ellis County
12. Niagara Chemical, Cameron County
13. International Creosoting, Jefferson County
14. McBay Oil & Gas, Houston County
15. Aztec Mercury, Brazoria County
16. Solvent Recovery Services, Fort Bend County
17. Harris Sand Pits, Bexar County
18. Butler Ranch, Karnes County
19. PIP Minerals, Liberty County
20. Hayes-Sammons Warehouse, Hidalgo County
21. Baldwin Waste Oil, Nueces County
22. Waste Oil Tank Service, Harris County
23. Hall Street, Galveston County
24. Unnamed Plating Site, El Paso County
25. La Pata Oil, Harris County
26. Munoz Borrow Pits, Hidalgo County
27. South Texas Solvents, Nueces County
28. Bestplate, Dallas County
- ♦ 29. Double-R Plating Company, Cass County
- ♦ 30. Pioneer Oil & Refining Co., Bexar County
- ♦ 31. Higgins Woods Preserving, Angelina County
- ♦ 32. Marshall Wood Preserving, Harrison County
- ♦ 33. Thompson-Hayward Chemical, Knox County
- ♦ 34. Old Lufkin Creosoting, Angelina County
- ♦ 35. Harvey Industries, Henderson County
- ♦ 36. Hagerson Road Drum, Fort Bend County
- ♦ 37. American Zinc, Moore County
- ♦ 38. Toups, Hardin County
- ♦ 39. JCS Company, Van Zandt County
- ♦ 40. Jerrell B. Thompson, Van Zandt County
- ♦ 41. Hi-Yield, Hunt County
- ♦ 42. Aztec Ceramics, Bexar County
- ♦ 43. Jensen Drive Scrap, Harris County
44. Permian Chemical, Ector County
45. Tricon America, Inc., Tarrant County

♦ Denotes Proposed State Registry Sites

Listing of State Superfund Sites by County

ANGELINA COUNTY
•Higgins Wood Preserving
•Old Lufkin Creosoting

BEXAR COUNTY
•Aztec Ceramics
Harris Sand Pits
•Pioneer Oil and Refining Co.

BRAZORIA COUNTY
Aztec Mercury

CAMERON COUNTY
Niagara Chemical

CASS COUNTY
•Double R Plating Co.

DALLAS COUNTY
Bestplate, Inc.

EASTLAND COUNTY
Sonics International

ECTOR COUNTY
Precision Machine and Supply
•Permian Chemical Co.

ELLIS COUNTY
Texas American Oil

EL PASO COUNTY
Unnamed Plating

FORT BEND COUNTY
•Hagerson Road Drum
Solvent Recovery Services

GALVESTON COUNTY
Hall Street

HARDIN COUNTY
•Toups

HARRIS COUNTY
Federated Metals
Gulf Metals Industries, Inc.
Houston Lead
Houston Scrap
•Jensen Drive Scrap
La Pata Oil Co.
Waste Oil Tank Service

HARRISON COUNTY
*Fabsteel
•Marshall Wood Preserving

HENDERSON COUNTY
•Harvey Industries, Inc.
Wortham Lead

HIDALGO COUNTY
Hayes-Sammons Warehouse
Munoz Borrow Pits

HOUSTON COUNTY
McBay Oil and Gas

HUNT COUNTY
•Hi-Yield

JEFFERSON COUNTY
International Creosoting
Maintech International
State Marine

KARNES COUNTY
Butler Ranch

KNOX COUNTY
•Thompson Hayward Chemical Co.

LIBERTY COUNTY
Pip Minerals

MILAM COUNTY
*Coffield Refinery

MITCHELL COUNTY
Col-Tex

MOORE COUNTY
•American Zinc

NUECES COUNTY
Baldwin Waste Oil
South Texas Solvents

TARRANT COUNTY
•Tricon American, Inc.

VAN ZANDT COUNTY
•JCS Co.
•Jerrell B. Thompson Battery

• Denotes sties proposed to State Registry

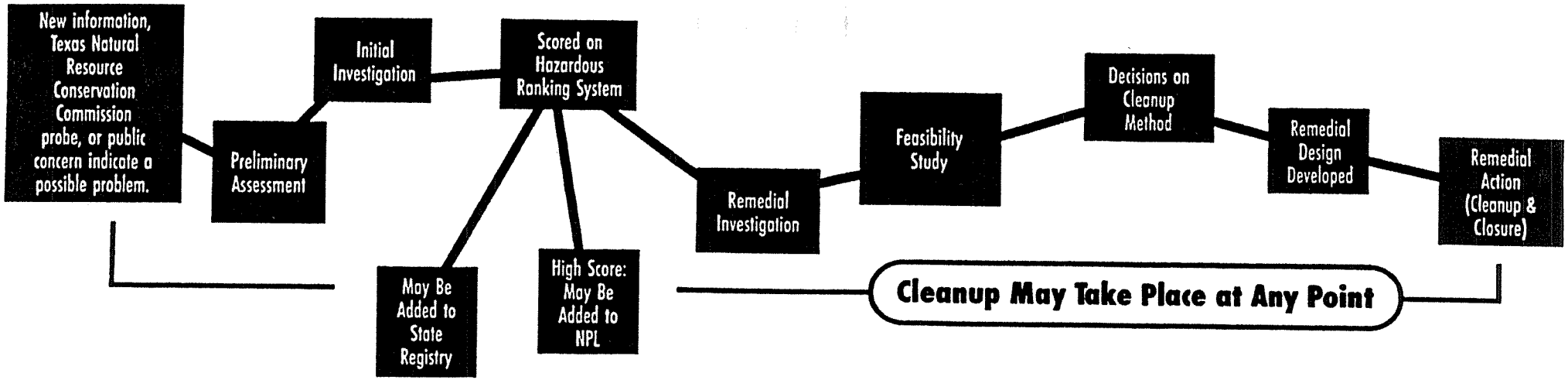
* Denotes sites under administrative order

Charting ➡ the ➡ Progress

	Initial Response	Site Studies	Remedy Selected	Remedy Design	Cleanup Ongoing	Cleanup Complete
American Zinc		➡				
Aztec Ceramics		➡				
Aztec Mercury		➡	➡	➡		
Baldwin Waste Oil		➡				
Bestplate		➡	➡	➡		
Butler Ranch		➡			➡	
Coffield		➡				
Col-Tex		➡				
Double-R Plating		➡				
Fabsteel		➡	➡	➡	➡	➡
Federated Metals		➡				
Gulf Metals		➡				
Hagerson Road		➡				
Hall Street		➡				
Harris Sand Pits		➡				
Harvey Industries Inc		➡				
Hayes-Sammons		➡				
Higgins Wood		➡				
Hi-Yield		➡			➡	
Houston Lead		➡				
Houston Scrap		➡			➡	
International Creosoting		➡				
J.B. Thompson		➡				
JCS Company		➡				
Jensen Drive Scrap		➡				
La Pata Oil		➡	➡		➡	➡

	Initial Response	Site Studies	Remedy Selected	Remedy Design	Cleanup Ongoing	Cleanup Complete
Maintech International		➡				
Marshall Wood		➡				
McBay Oil and Gas		➡	➡ (partial)	➡ (partial)	➡ (partial)	
Munoz Borrow Pits		➡				
Niagara Chemical		➡	➡			
Old Lufkin Creosoting		➡				
Permian Chemical		➡				
Pioneer Oil and Refining		➡				
PIP Minerals		➡	➡			
Precision Machine		➡				
Solvent Recovery		➡				
Sonics International			➡	➡		
South Texas Solvents		➡				
State Marine		➡				
Texas-American Oil		➡				
Thompson-Hayward		➡				
Toups		➡				
Tricon America		➡				
Unnamed Plating		➡				
Waste Oil Tank		➡	➡		➡	
Wortham Lead		➡	➡			

Steps in the Superfund Process



RCRA/Superfund --
Significant Developments

"Die Hard II, Die Harder"

Mary Reagan

MARY REAGAN

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M. Reagan, "Solid Waste," Texas Environmental Law, Texas Practice Series, West Publishing Company (expected publication date, Spring, 1996).

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Pollution Prevention, Environmental Law Seminar, State Bar of Texas, April 1991.

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July 25, 1996

RCRA AND SUPERFUND SIGNIFICANT DEVELOPMENTS

I. INTRODUCTION

This article will summarize significant regulatory, legislative and case law developments affecting the RCRA and Superfund programs in the last year.

II. RCRA

A. Regulatory Update

1. Organic Air Emissions. The U.S. Environmental Protection Agency ("EPA") has issued a final rule staying the applicability of organic air emissions standards to owners and operators of tanks and containers used for the management of hazardous wastes generated by organic peroxide manufacturing processes. 60 *Fed. Reg.* 50426 (Sept. 29, 1995), effective Dec. 6, 1995. (amend. 40 C.F.R. Parts 264 and 265). Pursuant to the stay, the organic air emission standards set forth in 40 C.F.R. Parts 264 and 265, Subparts CC, will be inapplicable to such units, with the exception of recordkeeping requirements in 40 C.F.R. §§ 264.1089(i) and 265.1090(i), provided that the owner or operator of the unit: (1) identifies that the unit is used to manage hazardous waste from organic peroxide manufacturing processes that produce more than one functional family of organic peroxides, which are the predominant products manufactured by the process; (2) prepares documentation explaining that the installation and operation of the Subpart CC standards would create an undue safety hazard; and (3) submits a one-time notification to EPA or the authorized state. The stay takes effect in authorized states.

2. Used Oil. EPA has issued an administrative stay of 40 C.F.R. § 279.10(b)(2) applicable to mixtures of used oil destined for recycling and either characteristic hazardous waste or waste listed as hazardous because it exhibits a characteristic. 60 *Fed. Reg.* 55202 (Oct. 30, 1995), effective Dec. 29, 1995. Pursuant to § 279.10(b)(2) such mixtures are regulated as a hazardous waste only if the resultant mixture exhibits a hazardous waste characteristic. The administrative stay reinstates regulatory requirements applicable to hazardous waste mixtures, including land and disposal restrictions. The stay will remain in effect until EPA completes rule-making to ensure that the regulation of such used oil mixtures in consistent with the decision of the Court of Appeals for the District of Columbia in *Chemical Waste Management v. EPA*, 976 F.2d 2 (D.C. Cir. 1992) *cert. denied*, 113 S.Ct. 1961 (1993). This stay was vacated by the court in *Safety-Kleen Corp. v. EPA*, discussed *infra*.

3. Military Munitions Waste and the Definition of "On-Site". EPA has proposed a rule identifying when conventional and chemical military munitions become hazardous waste and revising the definition of the term "on-site." 60 *Fed. Reg.* 56468 (Nov. 8, 1995) (prop. amend. 40 C.F.R. Parts 260-265 and 270). Promulgated pursuant to the Federal Facility Compliance Act of 1992, which amended the Resource Conservation and Recovery Act ("RCRA"), the proposed rule provides that unused military munitions in the military stockpile become solid waste when: (1) they are removed from storage in the stockpile for the purpose

of disposal or treatment prior to disposal; (2) they are leaking or deteriorated to a point where they cannot be used on recycled; or (3) when the Department of Defense ("DOD") or authorized military service personnel declare them to be a solid waste, whichever comes first. The use of munitions for their intended purpose does not constitute waste management. The rule proposes alternate approaches for the regulation of unexploded ordinances and other munitions remaining at closed ranges and would codify EPA policy on immediate responses to emergencies involving munitions and other explosives, including an exemption from permitting and manifesting requirements. The proposal also includes new standards for military magazines or bunkers used to store hazardous waste munitions. The standards provide consistency between RCRA technical standards and DOD standards for munitions storage and would exempt military munitions from manifest and other transportation requirements if they are being shipped to other DOD facilities under DOD's munitions tracking system.

The proposal also revises the definition of "on-site" for all generators to include contiguous property under the control of one person that is divided by a public or private right-of-way, even if access is by travelling along (as opposed to across) the right-of-way to gain entry. The revision would allow transportation without a manifest between such properties.

4. Petroleum Refinery Wastes. EPA has proposed rules to list three residuals from petroleum refining processes as hazardous wastes. 60 *Fed. Reg.* 57747 (Nov. 20, 1995) (prop. amend. 40 C.F.R. Parts 261, 266, 268, 271, and 302). The proposal would also amend the hazardous substance designation and reportable quantities specified under CERCLA. The wastes proposed for listing are: (1) clarified slurry oil ("CSO") storage tank sediment and/or in-line filter/separation solids from petroleum refining operations; (2) spent hydrotreating catalysts; and (3) spent hydrorefining catalysts. The proposal would also apply universal treatment standards to the wastes proposed for listing.

In addition, EPA is also proposing to exclude from the definition of solid waste certain oil-bearing residuals from specified petroleum industry sources. Specifically, oil-bearing residuals that are inserted into the refining process (including the petroleum coker) along with normal process streams would be excluded if these materials are not stored on the land or accumulated speculatively before recycling and if the resulting coke product does not exhibit a characteristic of hazardous waste. The proposal would also exempt certain refinery mixtures from the definition of hazardous waste. Excluded are mixtures of clarified slurry oil storage tank sediment and/or inline filter/separation solids with tank wastewaters, provided that the waste is discharged to the oil recovery sewer before primary oil/water/solids separation, and ceramic support media separated from spent hydrotreating/hydrorefining catalysts.

In proposing to list CSO storage tank sediment and filter/separation solids, EPA has requested comments on whether the listing should be contingent on waste management practices ("contingent management"). Specifically, EPA has stated that RCRA authorizes the consideration of potential waste mismanagement in waste listing decisions, and in the case of CSO residuals, has found that certain waste management scenarios pose greater risks than others. EPA has therefore proposed three options for these wastes: (1) listing CSO residuals only if the waste is applied in a land treatment unit; (2) listing CSO residuals unless they are disposed in a licensed landfill; or (3) listing CSO residuals unless certain conditions are met to promote

proper disposal of the waste. In addition, EPA has requested comment on whether specific waste management standards, *i.e.*, unit design and operating standards could be used to create more narrow waste listings.

5. Public Participation. EPA has issued a final rule relating to public participation in hazardous waste permitting. 60 *Fed. Reg.* 63417 (Dec. 11, 1995) (amend. 40 C.F.R. Parts 9, 124 and 270). The new rules require an applicant for a permit to store, treat or dispose of hazardous waste to hold an informal public meeting prior to submission of the permit application and to advertise the meeting in the newspaper, by broadcast announcement, and on a sign posted at or near the proposed facility. The rule also requires the permitting agency to mail notice to interested persons upon receipt of the permit application. The rule also authorizes the permitting agency to require that the applicant maintain an information repository accessible to the general public and containing all documents, reports, data and other information sufficient for public understanding of the application and permitting process. The public participation requirements do not apply to permit modifications under 40 C.F.R. § 270.42 or to applications for post closure care permits. The rules will not take effect in authorized state until the states adopt the rules as part of the authorized state program.

6. Identification and Listing. EPA has proposed rules amending standards for the identification and listing of hazardous waste. 60 Fed. Reg. 66344 (Dec. 21, 1995) (prop. amend. 40 CFR Parts 260, 261, 266 and 268). The purpose of the proposed rules is to exempt from hazardous waste regulation those solid wastes currently designated as hazardous waste even though they contain constituent concentrations at levels that pose very low risk to human health and the environment. The proposal would affect low-risk solid wastes that are designated as hazardous because they are listed, or have been mixed with or derived from listed hazardous wastes. Under the proposal generators of listed hazardous waste that meet self-implementing exit levels would no longer be subject to hazardous waste regulation.

The proposal establishes risk-based exit levels for 376 constituents. The list of constituents was developed by combining constituents listed in 40 CFR Part 261, Appendix VII, Basis for Listing Hazardous Waste, and Appendix VIII, Hazardous Constituents, and 40 CFR Part 264, Appendix IX, the Groundwater Monitoring List. EPA is soliciting comments on additions and deletions to the list, as well as its risk methodology.

No prior governmental approval is required before wastes are eligible to exit; however, persons claiming an exemption must comply with testing and notification requirements to ensure that only eligible wastes exit the hazardous waste system. Notice of the exemption claim must be given to the public. In addition, testing and recordkeeping requirements are imposed to ensure that exempt wastes remain eligible for the exemption. Failure to satisfy the conditions would void the exemption.

EPA is also proposing to establish risk-based treatment requirements under its land disposal restriction ("LDR") program for certain of the hazardous constituents for which exit levels are proposed. The risk-based LDR levels would have the effect of capping, or limiting treatment of those waste constituents where the current technology-based universal treatment standards ("UTS") require lower concentrations. EPA is proposing levels to cap UTS treatment

requirements for approximately 70 wastewater constituents and 90 nonwastewater constituents. If a claimant finds that all constituents in a waste are below exit levels at the point of generation and if the claimant meets all requirements for filing an exit claim, the LDR treatment standards will not apply; however, all listed wastes which as generated contain constituents exceeding exit level must meet LDR requirements even if the waste subsequently becomes exempt from hazardous waste regulation.

EPA is also requesting comment on options for conditional exemptions from the hazardous waste system. Conditional exemptions would allow wastes with higher concentrations of hazardous constituents to leave the system. EPA has proposed two approaches: (1) establishing national conditional exemptions based on unit type either with or without assuming additional management controls; and (2) granting conditional exemptions to qualified state programs that ensure additional management controls.

7. Underground Storage Tanks. EPA has issued an immediate final rule codifying the prior approval of Texas' underground storage tank program and incorporating by reference appropriate provisions of State statutes and regulations. 61 *Fed. Reg.* 1223 (Jan. 18, 1996) (amend. 40 C.F.R. Part 282), effective March 18, 1996.

8. Land Disposal Restrictions. EPA issued a supplemental notice of proposed rule-making relating to its proposed Phase IV land disposal restrictions. 61 Fed. Reg. 2338 (Jan. 25, 1996) (prop. amend. 40 C.F.R. Parts 148, 261, 268, and 271). In the supplemental proposal, EPA is proposed treatment standards for hazardous wastes from mineral processing operations and determined by EPA to be ineligible for excluded status under the Bevill Amendment. *See* 54 *Fed. Reg.* 36592 (Sept. 1, 1989). The proposal would apply the Universal Treatment Standards ("UTS") to these wastes. The proposal would also amend the definition of solid waste to provide that metal-bearing secondary materials that are generated by and recovered within the mineral processing industry are not solid wastes provided that persons managing these materials comply with specified conditions, requiring a one-time EPA notification and designed to ensure legitimate recycling, groundwater protection, removal of materials at unit closure, and integrity of the process unit. Wastewater treatment impoundments cannot quality as process units under the proposal.

EPA is also proposing that wastes from beneficiation units that receive metal-bearing secondary materials for legitimate recovery retain their Bevill status provided that: (1) the wastes result from operations processing greater than 50 percent raw materials; (2) the addition of secondary materials is not used as a means of surreptitious disposal or sham recycling. If any mineral processing hazardous waste or any other hazardous waste is disposed with, mixed with, or combined with a Bevill waste, the resulting waste is a hazardous waste.

EPA also proposes to continue using the TCLP as the basis for determining whether mineral processing wastes and manufactured plant wastes exhibit the Toxicity Characteristic.

Finally, the proposal would exclude from the definition of solid wastes (1) processed scrap metal that is recycled; (2) shredded circuit boards destined for metal recovery that are managed in containers prior to recovery.

The comment period on the Phase IV supplemental proposal was extended to April 24, 1996. 61 *Fed. Reg.* 12054 (March 25, 1996).

9. Organic Air Emissions. EPA has issued clarifying amendments to organic air emissions standards for tanks, surface impoundments, and containers. 61 *Fed. Reg.* 4903 (Feb. 9, 1996) (amend. 40 C.F.R. Parts 262, 264, 265, and 270). The clarifying amendments relate to: (1) applicability; (2) definitions; (3) schedule for implementation of air emission standards; (4) general standards; (5) waste determination procedures; (6) standards for tanks, containers, and surface impoundments; (7) closed-vent systems and control devices; (8) inspection and monitoring devices; (9) recordkeeping requirements; (10) reporting requirements; (11) alternative control requirements; and (12) effective date.

The rules clarify that deferred applicability of the standards to remedial activities applies to remedial activities under the authority of RCRA corrective action, CERCLA response, similar Federal authorities, or similar State authorities. In addition, the deferred applicability to hazardous waste management units used "solely" to treat or store radioactive waste does not apply to units receiving materials other than radioactive mixed waste after June 6, 1996, unless the addition is pursuant to requirements imposed under the Atomic Energy Act or the Nuclear Waste Policy Act.

The rule also clarifies the definition of "cover" and adds a definition of the term "enclosure" to distinguish between these two terms and amends the term "waste stabilization" to exclude the process of adding non-reactive material to the surface of the waste.

The rule clarifies the use of implementation plans and schedules for units intended to be replaced or removed and units undergoing closure. The rule also clarifies the methods by which an owner/operator demonstrates that the required treatment or destruction has been accomplished.

The rule clarifies waste determination procedures applicable to units exempted from using air emission controls by specifying procedures to determine the average volatile organic ("VO") concentration of each hazardous waste at its point of waste origination. The rule also specifies that for waste generated as part of a batch process that is not performed repeatedly, the owner/operator shall perform a waste determination of the VO concentration of the waste in the batch.

The rule clarifies tank standards as follows: (1) a pressure tank must be designed and operated so that the internal pressure is above atmospheric pressure and the tank operates as a closed system, with no detectable emissions occurring during routine operations, including filling and emptying; (2) tanks meeting the specified waste management requirements can operate fixed-roof type covers without additional air emission controls; (3) for tanks through which the waste surface is not viewable, an owner/operator may elect to use engineering

calculations and modelling to determine if the surface of the hazardous waste managed in a tank has turbulent flow that would be visible; (4) the continual or usual performance of mixing operations causing splashing, frothing, or visible turbulent flow is prohibited but may be allowed when necessary to perform intermittent operations such as waste sampling or waste transfer; and (5) the owner/operator must design and operate the conservation vents to minimize emissions to the atmosphere and maintain tank integrity in accordance with sound engineering design specifications and practices. The rules clarify compliance demonstration and waste transfer requirements applicable to containers.

The rule clarifies that carbon management requirements apply only to carbon that is hazardous waste. Inspection and monitoring requirements are amended to specify that, after the initial leak detection monitoring, an owner/operator is not required to monitor system components which continuously operate under negative pressure. The rules also clarify that filling operations associated with tanks equipped with an internal floating roof shall be as continuous as possible, based on the amount of waste and the nature of the waste handling operations.

10. Definition of Solid Waste. EPA has issued a final rule correcting the text of a regulatory exclusion from the definition of solid waste for recovered oil inserted into the petroleum refining process. 61 *Fed. Reg.* 13103 (March 26, 1996) (amend. 40 C.F.R. Part 261), effective May 28, 1996. This clarifies that the regulatory exclusion applies to recovered oil that is inserted into the refining process at a point at which the process removes or will remove at least some of the contaminants. Formerly, the rule had been overly restrictive, requiring reinsertion "prior to crude distillation or catalytic cracking."

11. Land Disposal Restrictions. EPA issued a final rule promulgating the Phase III land disposal restrictions which establish treatment standards for: (1) hazardous wastes form the production of carbonate pesticides and from primary aluminum production; (2) hazardous wastes exhibiting the reactivity characteristic; and (3) characteristic hazardous wastes managed in surface improvements and injection wells whose ultimate discharge is regulated under the Federal Clean Water Act ("CWA") and the Safe Drinking Water Act ("SDWA"), 61 *Fed. Reg.* 15566 (Apr. 8, 1996) (amend. 40 C.F.R. Parts 148, 268, 271, and 403), effective April 8, 1996.

In a related *Federal Register* Notice, EPA partially withdrew and amended the Phase III rule-making based on programmatic changes under the Land Disposal Program Flexibility Act of 1996. 61 *Fed. Reg.* 15661 (Apr. 8, 1996) (amend. 40 C.F.R. Parts 148, 268, and 403), effective April 5, 1996. The Land Disposal Program Flexibility Act of 1996, discussed *infra,* provides that characteristic hazardous wastes are not prohibited from land disposal if they no longer exhibit a characteristic at the point of land they are managed in: (1) a treatment system whose ultimate discharge is regulated under the CWA; (2) a CWA-equivalent treatment system; or (3) a Class I nonhazardous injection well regulated under the SDWA. Accordingly, the EPA notice withdraws those portions of the Phase III rule that are inconsistent with this Act, *i.e.*, the treatment standards for decharacterized wastewaters promulgated in response to the court's holding in *Chemical Waste Management v. EPA*, 976 F.2d 2 (D.C. Cir. 1992), *cert. denied* 507 U.S. 1057 (1993). Thus, treatment standards for such wastes will require only that the wastes be deactivated (*i.e.*, rendered nonhazardous) before they are land disposed. Wastes for

which the treatment standard is a method of treatment (*i.e.*, high TOC ignitables) and reactive cyanide wastes must be treated to satisfy the existing treatment standard before land disposal in CWA or CWA-equivalent systems.

On June 28, 1996, EPA issued a technical correction for the final rule and partial withdrawal. 61 *Fed. Reg.* 33680 (June 28, 1996) (amend. 40 C.F.R. Parts 148 & 268), effective June 28, 1996.

12. Hazardous Waste Combustors. EPA has proposed rules jointly under RCRA and the Clean Air Act ("CAA") to revise standards for hazardous waste incinerators, hazardous waste-burning cement kilns, and hazardous waste-burning lightweight aggregate kilns. 61 *Fed. Reg.* 17358 (April 19, 1996) (prop. amend. 40 C.F.R. Parts 60, 63, 260, 261, 264, 265, 266, 270 & 271). The standards limit emissions of chlorinated dioxins and furans, other toxic organic compounds, toxic metals, hydrochloric acid, chlorine gas, and particulate matter. These standards are considered Maximum Achievable Control Technology ("MACT") under the CAA. In addition, EPA is proposing to add hazardous waste-burning lightweight aggregate kilns to the list of source categories under CAA § 112(c)(5) and to exempt secondary lead facilities subject to MACT from RCRA emission controls.

13. Management Standards for Contaminated Media. EPA has promulgated a proposed rule to provide management standards for contaminated media (*i.e.*, soils, sediments and groundwater) that are managed during remedial actions. 61 *Fed. Reg.* 18780 (April 29, 1996) (prop. to amend. 40 C.F.R. Parts 260, 261, 262, 264, 268 & 271; prop. to be codified at 40 C.F.R. Part 269). The rule, known as the Hazardous Waste Identification Rule ("HWIR")--Media, is the outgrowth of efforts among EPA, stakeholders, and States over the last several years to reform application of RCRA hazardous waste management requirements to remediation wastes. The proposal, which codifies new Part 269, establishes "bright-line" concentrations for media to distinguish between higher- and lower-risk waste. Media that contain levels of contamination above the Bright Line would be managed as hazardous contaminated media under revised Subtitle C standards. Contaminated media with all constituent concentrations below the Bright Line would be eligible for a determination by EPA or an authorized State overseeing the cleanup that the media do not contain hazardous waste.

In the proposal, EPA has also requested comment on the unitary approach favored by industry and reflected in S. 1274, discussed *infra*. Under this approach, all remediation wastes (not just media) that would otherwise be hazardous wastes would not be subject to hazardous waste regulation when managed in accordance with an approved remedial action plan ("RAP"). Management standards would be set forth in the RAP and tailored on a site-specific basis to be protective of human health and the environment. No Bright Line concentrations would apply.

EPA also requested comment on various hybrid approaches which retain the Bright Line but provide that remediation wastes below this concentration are not hazardous when managed according to a RAP or remedial management plan ("RMP").

Under the proposal, existing rules providing for the designation of corrective action management units ("CAMUs") for remediation wastes would be withdrawn, since the

HWIR-media rule would then provide the needed flexibility for management of such wastes. The proposal would grandfather CAMUs that have been approved by EPA or a State by the publication date of the final HWIR-media rule.

14. Corrective Action. EPA has issued an advanced notice of proposed rule-making relating to the corrective action program. 61 *Fed. Reg.* 19432 (May 1, 1996). The notice: (1) introduces EPA's strategy for promulgating corrective action regulations; (2) provides a general status report on the corrective action program; and (3) emphasizes areas of flexibility within the current program and describing existing and proposed improvements to the program.

The notice introduces EPA's Subpart S Initiative to identify and implement improvements to the corrective action program requiring corrective action for all releases of hazardous waste and hazardous constituents from solid waste management units. In 1990, EPA proposed the Subpart S rules to implement the program. *See* 55 *Fed. Reg.* 30798 (July 27, 1990). These rules were never finalized except for those portions relating to corrective action management units ("CAMUs") and temporary units, and the program has been run largely through guidance.

EPA has developed five objectives for the Subpart S Initiative: (1) create holistic approaches to cleanups at RCRA facilities so that cleanup of regulated units and SWMUs are consistent; (2) establish protective, practical cleanup expectations; (3) shift more of the responsibilities for achieving cleanup goals to the regulated community; (4) focus on opportunities to streamline and reduce costs; and (5) enhance opportunities for timely, meaningful public participation. Through the notice, EPA is soliciting input from stakeholders on the contents of a proposed rule to implement these objectives expected by Fall, 1997.

In the meantime, EPA will continue to implement the program in cooperation with the States in accordance with the following outline:

1. Prioritize the corrective action universe:
   a. Meet the goal of assessing and prioritizing all hazardous waste treatment, storage or disposal facilities by end of FY96.
   b. Focus resources on high priority areas at high priority facilities.
2. Increase the amount of corrective actions:
   a. Continue to authorize states for corrective action.
   b. Do not duplicate work already performed by another Federal or state program
   c. Encourage alternate state authorities to conduct analogous work at RCRA facilities.
   d. Utilize the expertise of other Federal/state agencies where appropriate (*e.g.*, the U. S. Fish and Wildlife Service for ecological, wetlands issues).
   e. Increase the number of voluntary actions, including actions at facilities without a permit or an order, actions outside of an existing permit or order, and actions required under permit or order but with no Agency oversight.

f. Disinvest or substantially reduce oversight at lower priority facilities and high priority facilities where the owner/operator has proven his or her capability.

3. Continue to implement the stabilization initiative:
   a. Implement stabilization actions as early in the process as possible.
   b. Phase and focus RFIs to collect any information needed to implement stabilization actions.
   c. Use existing corrective action program environmental indicators as stabilization performance measures.
   d. Include meaningful opportunities for public participation throughout the process including during extensive or long-term stabilization actions.
4. Streamline the corrective actions process where possible:
   a. Implement stabilization actions where possible, then disinvest and move on to other facilities.
   b. Focus RFI data collection and tailor investigations to specific site conditions.
   c. Use existing pertinent data.
   d. Communicate remediation expectations to facility owners/operators early in the process.
   e. Use innovative technical tools, including new site characterization techniques and treatment technologies when appropriate and beneficial.
   f. Avoid unnecessary procedural steps whenever feasible (*e.g.*, eliminate the CMS if a desirable remedy can be identified without one).
   g. Use presumptive remedies when appropriate.
   h. Focus on plausible remedies, if a CMS is necessary.
   i. Conduct CMS concurrent with RFI when possible
   j. Utilize site-specific performance standards instead of detailed review of work plans and remedy designs when possible.
   k. Consider non-residential land use scenarios when appropriate, while recognizing that ecological risks may end up driving media cleanup standards and remedy designs when using industrial land use assumptions.
5. Continue to involve the public in all stages of the corrective action process.

15. Land Disposal Restrictions. EPA has issued a notice of data availability relating to its Phase IV proposed rule. 61 *Fed. Reg.* 21418 (May 10, 1996). The notice relates to: (1) treatment standards for TC metal wastes; (2) treatment standards for wood preserving wastes; (3) solid waste exclusion for recycled wood preserving wastewaters; and (4) capacity issues. The notice also clarifies the applicability of LDRs to slags resulting from smelting of lead acid batteries.

16. Organic Air Emissions. EPA has issued a notice postponing the effective date of organic air emission standards for tanks, surface impoundments, and containers until October 6, 1996. 6 *Fed. Reg.* 28508 (June 5, 1996) (amend. 40 C.F.R. Parts 264, 265, 270 and 271). The notice retains the final compliance date of December 8, 1997, by which all required air emission equipment must be operational.

B. Case Law Update

1. ***Meghrig v. KFC Western, Inc.*, 116 S.Ct. 1251 (1996).** The owner of property contaminated with petroleum products brought an action against prior owners under RCRA for restitution of cleanup costs. The U.S. Supreme Court held that the citizen suit provisions of RCRA do not authorize a private cause of action to recover the prior cost of cleanup if the wastes do not continue to pose a danger to health or environment at the time of suit. The Court left open the question of whether parties could seek injunctive relief requiring payment of cleanup costs or recover cleanup costs based on a showing that the site presently poses an imminent or substantial endangerment under RCRA § 6972(a)(1)(B).

2. ***U.S. v. Marine Shale Processors, Inc.*, 81 F.3d 1329 (5th Cir. 1996).** The Fifth Circuit held that a hazardous waste treatment facility's illegal storage of K-listed hazardous waste without a permit or interim status prevents the facility from obtaining interim status to store other types of listed hazardous waste. The court also held that material manifested as K001 waste did not cease to be K001 waste even though the facility added an absorbent to it, because the absorbent did not significantly change the waste's composition. The waste still satisfied the K001 regulatory definition of "sludge."

3. ***Marine Shale Processors v. EPA*, 81 F.3d 1371 (5th Cir. 1996).** The Fifth Circuit held that EPA was not constitutionally barred from considering a facility boiler and industrial furnace ("BIF") permit application during the pendency of the government's lawsuit alleging the illegal incineration of hazardous waste.

4. ***U.S. v. Marine Shale Processors, Inc.*, 81 F.3d 1361 (5th Cir. 1996).** The Fifth Circuit vacated a district court holding that material produced from contaminated soil processed at a hazardous waste treatment facility is exempt from LDRs under the "product" rule (40 C.F.R. § 266.20). The matter was remanded to the district court to determine whether the treatment facility engaged in legitimate or sham recycling.

5. ***Safety-Kleen Corp. v. EPA*, No. 92-1629 (D.C. Cir. January 19, 1996).** The U.S. Court of Appeals for the District of Columbia held that EPA could not use an administrative stay to temporarily rescind its used oil mixture rule. The court vacated the stay, finding that, while administrative agencies may use a stay to postpone an effective date of a regulation that has not been adopted, it may not suspend adopted rules without notice and comment.

C. Legislative Update

1. **H.R. 2036.** On March 26, 1996, President Clinton signed into law the Land Disposal Program Flexibility Act of 1996. The Act amends RCRA § 3004 to provide that solid waste identified as hazardous solely on one or more characteristics shall not be subject to land disposal restriction if the waste: (1) is treated in a treatment system that subsequently discharges pursuant to a permit issued under CWA § 402, is pretreated pursuant to CWA § 307, or is treated in a zero discharge system that engages in CWA-equivalent treatment prior to any permanent land disposal; and (2) no longer exhibits a characteristic of hazardous waste prior to land disposal. In addition, characteristic hazardous wastes are not subject to LDRs if they no longer exhibit a characteristic at the point of disposal in a Class I injection well. Certain cyanide-bearing wastes are not eligible for exclusion. The legislation directs EPA to complete a study within five years to characterize the risks to human health and the environment associated with wastes managed in accordance with the Act.

The Act also amends RCRA § 4010 to provide that owners/operators of new or existing municipal solid waste landfill units or lateral expansions thereof that dispose of less than 20 tons per day of municipal solid waste are not subject to groundwater monitoring if: (1) there is no evidence of groundwater contamination from the unit or expansion; and (2) the unit or expansion serves a community that experiences an annual interruption of at least three months of surface transportation preventing access to a regional facility, or that has no practicable waste management alternative and the unit is located in an area receiving less than or equal to 25 inches of precipitation per year. States may require groundwater monitoring at such units or expansions if necessary to protect groundwater resources. States may allow the use of methods besides monitoring wells to detect releases. The legislation also authorizes the suspension of groundwater monitoring requirements if the operator demonstrates there is no potential for migration of hazardous constituents from the unit to the uppermost aquifer during the active life and post-closure care period.

2. **S. 1274.** This bill, introduced in the 104th Congress and sponsored by Lott (R-MS), would amend the Solid Waste Disposal Act to exempt from the definition of hazardous waste, remediation waste that is managed under a remedial action plan. The term "remediation waste" is defined as any solid waste or any medium (including groundwater, surface water, soil, and sediment) generated during the implementation of a remedial action that: (1) is, or is derived from, a hazardous waste; (2) contains or is mixed with a listed hazardous waste; and (3) exhibits a characteristic of hazardous waste. Under the bill, a remedial action plan specifying the remediation waste and the remediation method and schedule would be issued or approved by EPA or an authorized State pursuant to its compliance authority. Thereafter, the remediation waste would be exempt from Subtitle C. The bill contains provisions for certification of State programs to approve remedial action plans. The bill further provides that petroleum-contaminated media and debris that fail the toxicity characteristic due to organics and are subject to corrective action are not hazardous wastes.

Status: Industry, EPA and Senate staff are currently in talks to develop compromise language.

III. SUPERFUND

A. Case Law Update

1. ***Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996).** The U.S. Supreme Court overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) and held that the Commerce Clause does not authorize Congress to abrogate States' sovereign immunity recognized under the Eleventh Amendment. In *Union Gas*, the Court had held that a State may be liable under CERCLA. *Seminole* arose in the context of the Indian Gaming Regulatory Act, which authorizes an Indian tribe to sue a State to enforce a State duty to negotiate a compact between a State and tribe relating to Indian gambling activities in the State. The Indian Gaming Regulatory Act reflected an exercise of the Indian Commerce Clause; however, the court found no basis for distinguishing between the Indian Commerce Clause and the Interstate Commerce Clause for purposes of Congress' power to abrogate States' rights under the Eleventh Amendment.

By overruling *Union Gas*, States apparently will no longer be subject to CERCLA liability, absent a waiver of sovereign immunity. In a footnote, however, the Court suggested that State would continue to be responsible for complying with duties imposed under Federal statutes, citing the Emergency Planning and Community Right-to-Know Act and the citizen suit provisions of the Clean Water Act as examples.

2. ***U.S. v. Olin Corporation*, No. CIV. A. 95-0526-BH-S, 1996 WL 276984 (S.D. Ala. May 20, 1996).** The federal district court dismissed a consent decree under CERCLA on grounds that: (1) Congress did not clearly express its intent that the liability provision of CERCLA is retroactive; and (2) the application of CERCLA violates the Commerce Clause. In declaring that CERCLA is not retroactive, the district court relied on *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994), which requires a court: (1) to determine whether Congress has expressly stated a statute's reach, and if not, whether the text and legislative history have clearly prescribed Congress' intent to apply the provision retroactively; (2) if not, to determine whether the provision actually has retroactive effect on the parties in the litigation; and (3) if so, to apply the traditional presumption against retroactivity absent a clear congressional intent to the contrary. In applying the *Landgraf* factors, the court found that CERCLA contains no language explicitly stating it is retroactive and that the legislative history lacks clear congressional intent to make CERCLA liability retroactive. The court noted that the government, in early cases arising under CERCLA, had argued that CERCLA is not retroactive. It also determined that retroactive CERCLA liability is more egregious than the compensatory relief which the court refused to apply retroactively in *Landgraf*; therefore, according to the court, CERCLA liability is the kind that does not apply retroactively without clear congressional intent. The court disregarded the holdings in other cases that CERCLA should be applied retroactively because it is a remedial statute. The court said that legislation cannot be remedial if the conduct being remedied was lawful at the time of its occurrence. The court said that it found nothing in the Justice Department brief or pre-*Landgraf* cases concerning the statutory language of CERCLA or its legislative history that demonstrates that CERCLA §§ 106(a) and 107(a) must be understood to operate retroactively because a contrary reading would render them ineffective. Accordingly, the court held that these sections are not retroactive.

In addition, the court held that EPA's attempt in this case to apply CERCLA liability against the defendant exceeds the power of Congress under the Commerce Clause. Relying on *U.S. v. Lopez*, 115 S.Ct. 1624, declaring the Gun Free Schools Zone Act unconstitutional, the court said that the government must demonstrate that its use of CERCLA is limited to regulation of economic activity which substantially affects interstate commerce. In addition, it must also show that the statute has a jurisdictional element which would ensure, through case-by-case inquiry, that the statute affects interstate commerce. The court said nothing in CERCLA provides for such a case-by-case inquiry. The court said that the activity has virtually no effect on interstate commerce. The court relied on the remedial investigation which indicated that there is little or no migration between the two aquifers and no evidence that contaminants travel across state lines.

B. Legislative Update

1. **S. 1285.** This bill, entitled the "Accelerated Cleanup and Environmental Restoration Act of 1995," would reauthorize and amend CERCLA. The bill is co-sponsored by Senator Robert Smith (R-NH) and Senator Chafee (R-RI) and has been revised since it was originally introduced in September, 1995. This discussion is based on the draft reform plan issued in March, 1996.

(a) Title I. Community Participation. This title establishes Community Response Organizations ("CROs") comprised of 15-20 local citizens to increase community participation in site cleanups and creates Technical Assistance Grants ("TAGs") to be used by the community to interpret information regarding proposed remedial actions. Site managers must consult with the CRO prior to remedy implementation. Community participation in long-term removal actions at site not yet listed on the National Priorities List ("NPL") is authorized.

(b) Title II. State Role. The title allows States to veto listing of new NPL sites and to delist existing NPL sites; provides flexibility to request all or only portions of Federal CERCLA authorities; requires EPA to act on delegation requests within specified time frames; allows States with full authority to apply their own remedy selection and liability laws and requires States with partial authority to apply Federal Standards; and authorizes use of the Fund to make capacity building grants to delegated States.

(c) Title III. Voluntary Cleanup. This title authorizes grants of up to $25 million in yearly funding for States to manage voluntary cleanup programs at non-NPL sites, but includes certain sites from assistance, authorizes interest-free loans to local governments of up to $200,000 per site to promote "Brownfields" redevelopment; releases purchasers of contaminated property from liability if they did not contribute to the contamination and conducted appropriate inquiries prior to the purchase; limits the liability of lenders or lessors; excludes from liability landowners whose property was contaminated by a contiguous NPL site, if they did not contribute to the contamination and are not designated as an owner/operator.

(d) Title IV. Selection of Remedial Actions. This title requires selected remedies to be protective of human health and the environment and establishes a protectiveness risk range of 10^{-4} to 10^{-6}; requires remedial actions to be selected according to site-specific conditions and risks based on reasonably anticipated future land use; establishes an accelerated remedy selection process consisting of work plan development, facility evaluation, remedial action planning, and remedial action; requires assessment of the actual or planned future use of the contaminated land and water resources based on enumerated factors; establishes a higher level of protection for groundwater that is currently uncontaminated; eliminates the preference for permanence; allows EPA to make a finding of "technical impracticability"; creates an independent technical Remedy Review Board to re-examine past Records of Decision ("RODs") and recommend alternative remedies if the new remedy selection process would save $1.5 million over the current remedies; increases the duration of emergency response actions to 24 months and the spending cap up to $4 million per site; allows delisting and reuse of the uncontaminated portions of NPL sites, and provides expedited delisting of NPL sites upon completion of remedy; allows for pre-enforcement review of remedy decisions, if the cost of the proposed remedy is over $15 million for a given operable unit or over $27 million per site.

(e) Title V. Liability Allocations. This title relieves from liability "de minimus" parties defined as persons who are liable for one percent or less of total pre-1981 site liability, or contributed not more than 110 gallons of liquid material containing hazardous waste or not more than 200 pounds of solid material containing hazardous waste; establishes an aggregate liability cap of 10 percent for generators and transporters at municipal solid waste sites for disposal of solid waste or sewage sludge; relieves from liability religious and charitable organizations, fiduciaries; contiguous property owners, prospective purchasers and railroads; provides no liability relief to PRPs found guilty of illegal activities; establishes an "orphan share" mechanism to fund liability relief and assigns the cost of such shares to the Fund; establishes a mandatory, non-binding allocation process for all NPL multi-party sites where response costs were incurred after date of enactment and there is a generator or transporter with liability arising from pre-1981 activities; establishes a similar allocation process for NPL owner/operator and chain of title sites, holds any PRP unwilling to accept the allocator's final report liable under current system of joint, several, strict, retroactive liability; and provides increased liability protection for response action contractors.

(f) Title VI. Federal Facilities. This title allows delegation of Federal facilities to qualified States and provides standards for remediation and reuse of Federal facilities.

(g) Title VII. Natural Resource Damages. This title eliminates non-use damages; allows for *de novo* review of a trustee's assessment; and imposes restoration standards.

(h) Title VIII. Miscellaneous. This title requires a "results oriented" engineering approach to accelerate response actions; limits new NPL listing to 125 sites

per year for the next seven years and capping the list thereafter; increases the duration of emergency response actions to 24 months and the authorized spending cap to $104 million per site; and amends RCRA to exclude remediation waste from management under RCRA.

(i) Title IX. Funding. This title authorizes continuation of the Superfund program at $1.75 billion for fiscal years 1996-2000; and reauthorizes current Superfund taxes.

Status: The Senate Environment and Public Works Committee held hearings April 23-24, 1996, on a new draft reform plan co-sponsored by Senator Smith and Senator Chafee (R-RI).

2. **H.R. 2500.** This bill, entitled the Reform Superfund Act of 1995, is sponsored by Representative Oxley (R-Ohio). This bill would reform the liability provisions of CERCLA by eliminating liability at municipal landfills and for small business that contributed small amounts of waste to a site. PRPs would be eligible for a "retroactive liability discount" reimbursing them for a significant portion of the cleanup cost. In addition, liability would be determined through an allocation process by a neutral allocator based on factors such as amount and toxicity of hazardous substances contributed. The bill provides limited judicial review of the allocation decision.

The bill would require remedies to protect human health and the environment from realistic and significant risks through cost-effective means. The bill brings private property and commercial damages under State law and eliminates non-use natural resources damages and contingent valuation methodology. The bill authorizes delegation of CERCLA authorities to States and creates an exclusion for remediation waste and activities from LDRs, facility-wide corrective action, and minimum technology requirements ("MTRs"). The bill reauthorizes Superfund taxes and specifies that the Fund may not be used for administrative overhead. Private parties and EPA would be barred from initiating an administrative or judicial action against a party conducting a "Brownfields" cleanup.

Status: Negotiations with House Democrats and the Clinton Administration are ongoing.

Air Quality

"Gone With The Wind"

Update on Implementation of the Texas Federal Operating Permit Program

Susan Owen

Susan Owen

Susan has been employed as a staff attorney for the Texas Natural Resource Conservation Commission since 1990. In the fall of 1992, she volunteered to be the staff attorney who would assist in the development and implementation of the Texas Federal Operating Permits Program. Since that time, Susan has done little but eat, sleep and breathe issues related to the operating permit program.

Susan received her law degree from the Texas Tech School of Law in 1988 and a B.A. in advertising from Texas Tech University in 1983.

UPDATE ON IMPLEMENTATION OF THE TEXAS
FEDERAL OPERATING PERMIT PROGRAM

1. EPA summer blockbusters:

a) Interim Approval Criteria. On August 29, 1994, EPA proposed changes to its interim approval criteria that would allow state programs, such as Texas, that do not include minor new source review as an applicable requirement, to be eligible for interim approval (40 CFR Part 70 Operating Permits Program Interim Approval Criteria, 59 Federal Register 44572, August 29, 1994). On June 20, 1996, EPA promulgated the final rule, 40 CFR Part 70, Operating Permits Program Interim Approval Criteria, 61 Federal Register 31433.

b) Interim approval for Texas operating permit program. On June 7, 1995, EPA proposed source category-limited interim approval for the Texas federal operating permit program, 40 CFR Part 70, Clean Air Act Proposed Interim Approval Operating Permits Program for the State of Texas, 60 Federal Register 30037. On June 25, 1996, EPA promulgated the final approval of the Texas permit program, 61 Federal Register 32693, Clean Air Act Final Interim Approval of Operating Permits Program; the State of Texas. Some sources subject to the interim program will have six months from July 25, 1996 to submit their applications to the TNRCC, while others will have 12 months.

c) EPA's federal operating permit program. On July 1, 1996, the final rule implementing 40 CFR Part 71 (Part 71) was published, 40 CFR Parts 9, 55, and 71, Federal Operating Permit Program, 61 Federal Register 34202. This rule sets out the version of the operating permit program that EPA would implement in the event it had to run the program for a state. This should only happen if a state has failed to submit an approvable program or if a state's program is disapproved.

d) Compliance Assurance Monitoring and Any Credible Evidence. EPA proposed its Enhanced Monitoring Program, on October 22, 1993, 58 Federal Register 54648. This proposal resulted in quite a bit of controversy so EPA stopped the development of the enhanced monitoring program and is now focused on developing a Compliance Assurance Monitoring (CAM) approach. Also included in that proposal were revisions to 40 CFR Parts 51, 52, 60, and 61 that were intended to eliminate language in those rules that required use of a reference method test as the sole means by which compliance with the particular standard would be determined and allow "any credible evidence" to be used to establish a violation.

Although the CAM proposal has never been published in the Federal Register, EPA is going to put the draft proposal on its bulletin board in August 1996. CAM is scheduled to be promulgated sometime in the spring of 1997. EPA has indicated that it will pull the "any credible evidence" sections out of the October 22, 1993 Enhanced Monitoring rule. The latest draft of these sections will also appear in some manner on the EPA bulletin board in August 1996. EPA plans to go final on the "any credible evidence" issue in December 1996.

2. TNRCC sneak previews:

a) General Operating Permits. On June 4, 1996, the TNRCC proposed the first General Operating Permits (GOP), 21 Texas Register 4955. The GOP's are an alternative form of federal operating permits that are adopted by rule. The GOP's proposed focus on oil and gas operations (SIC codes 1311, 1321, 4922, and 4923) and bulk fuel storage terminals, (SIC code 5171). The public comment period was scheduled to end on July 19, 1996. If everything goes according to schedule, the GOP's should be effective on October 14, 1996.

b) Grandfather rulemaking. At the July 10, 1996, TNRCC agenda, the commissioners authorized the staff to go forward with a rulemaking that would limit the applicability of certain sections in 30 TAC Chapter 112, Federal Operating Permits (Regulation XII), that relate to grandfather issues. Since the TNRCC has recently addressed grandfather issues in 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, the provisions in Regulation XII concerning actual and presumptive grandfather rates were no longer practical.

3. Coming Attractions:

a) Minor new source review. Since 1993, the TNRCC has taken the position that state minor new source review programs are not applicable requirements for purposes of the federal operating permit program. In both of the rules noted above, EPA has declared, in no uncertain terms, that state's minor new source review programs are applicable requirements for purposes of the operating permit program. The Commissioners met in executive session on July 24, 1996 and authorized the TNRCC general counsel and the staff to pursue challenging both the June 25, 1996, Texas interim approval notice and the June 20, 1996 interim approval criteria rule. The focus of this lawsuit will presumably be the minor new source review issue.

b) Revisions to TNRCC Regulation XII. The TNRCC staff will begin working on a proposal to revise 30 TAC 122, Regulation XII, Federal Operating Permits, with the goal of having the regulation ready for rulemaking sometime in late October, early November 1996.

c) Forms and Guidance. The Operating Permit Program staff have put all of the application forms for the interim program, except for compliance certification forms, on the TNRCC bulletin board. On August 15, 1996, the staff plans to put the following guidance documents on the bulletin board:

1. Federal Operating Permit Application Guidance
2. General Operating Permit Application Guidance
3. Potential to Emit

4. Definition of a Site
5. Responsible Official
6. Model Applications and Permits (A through F)
    A. Petroleum Bulk Fuel Terminal
    B. Coal Fired Electric Utility
    C. Gas Fired Electric Utility
    D. Natural Gas Handling Plant (Nonattainment Area)
    E. Natural Gas Handling Plant (Attainment Area)
    F. Natural Gas Processing Plant
7. Operating Permit Toolboxs

4. General information:

a) TNRCC publications. Attached is a copy of a TNRCC publication concerning access to the TNRCC OnLine Services. Also included are copies of publications regarding how to get copies of TNRCC rules as well as information about the TNRCC data clearinghouse.

b) Organization Chart. Last, but not least, is a copy of the May 29, 1996, TNRCC organization chart.

What T C Information Is OnLine?

While the menus of the BBS and Web sites are arranged differently, information from the following categories is found on both:

Address/Phone/Fax Directory

Administration
(Web Site only)

Air Quality

Calendar of Events

Commissioners and Commission Agenda

Compliance

Employment/Job Postings

Environmental Education
(K-12) (Web Site only)

GIS/Maps
(Web Site only)

Organizational Chart
(Web Site only)

Permitting

Policy/Rules

Pollution Prevention/Recycling

Press Releases

Publications

Public Electronic Reporting
(BBS only)

Regulatory Forum
(Web Site only)

Small Business Assistance

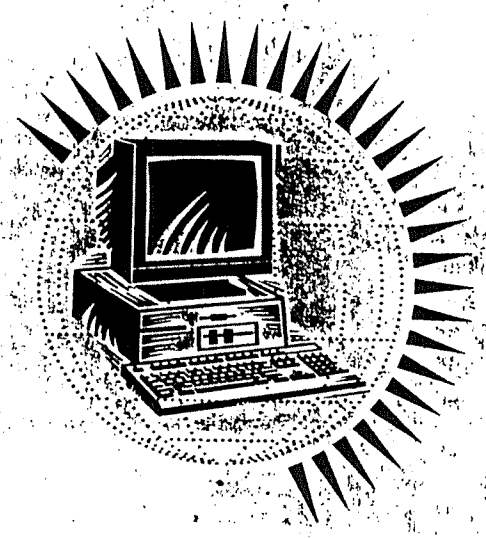
State of Texas Environmental Electronic Reporting System
(STEERS) (BBS only)

Waste Management

Water Resource Management

R DIVISION MC# 197
TNRCC
PO BOX 13087
AUSTIN TX 78711-3087

Texas Natural Resource Conservation Commission



OnLine Services

Bulletin Board
512/239-0700

Internet
www.tnrcc.state.tx.us

4/96

What OnLine Information Services Are Available?

The TNRCC Electronic Bulletin Board System (BBS) and World Wide Web Site (Web site) provide you with timely, low cost and paperless access to agency information and services.



The TNRCC's BBS is in a text-only format and provides menu driven screens from a simple phone call through your personal computer and modem. The BBS contains more than 47 major menu items. Lists and reports can be viewed online as ASCII text. Data that cannot be viewed online is retrievable as data files in formats such as WordPerfect, Paradox, dBASE, etc. Most bulletin board data can be downloaded.



The TNRCC Web site on the Internet provides easy search and retrieval with great flexibility. The Web site contains a homepage of hypertext links to a wide collection of regulatory and environmental information in a graphical format. In addition, information available on the BBS can be directly accessed at various points on the Web site.

How Do I Access These Services?

BBS:

The TNRCC BBS operates on any personal computer. It supports up to 14,400 baud modems and follows the most common communication settings: NO parity; 8 databits; 1 stopbit; FULL duplex (N,8,1,F). Set your communications package (software) to emulate ANSI.

From your computer and modem, dial:

512 / 239-0700

When you make the initial call, you will go through a brief registration process and be supplied with an account and access to the main menu screen.

Toll-free access via the Comptroller's "Window on State Government," dial: 1/800/227-8392

Simply sign onto the bulletin board, then select "BBS News and Table of Contents," and menu item #3, "Connect to Other Government BBBs." This will give you a menu of State bulletin boards, including TNRCC OnLine.

Web Site:

Access to our agency homepage can be obtained using a personal computer through an Internet service provider whose services can be obtained for a monthly fee.

Once connected, you need a graphical Internet browser to view and search hypertext documents. A browser may be obtained from your Internet service provider. After you turn your browser on, open the following location or universal resource locator (url):

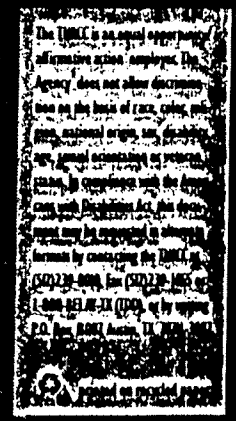
http://
www.tnrcc.state.tx.us

You will then have access to our homepage and a number of hypertexted documents about our agency and the environment of Texas.

If you need further information, have a problem accessing information or have suggestions, please feel free to contact:



Technical Support Help Desk
Information Resources Division
Texas Natural Resource Conservation Commission
512/239-0911



Secretary of State Home Page

URL: http://www.sos.state.tx.us

From the Home Page, view the "Texas Administrative Code, Updated to ... *date*" category. Then view the "Title 30. Environmental Quality" category for TNRCC rules. If you have questions pertaining to the rules posted on the Secretary of State's Web page, please call the *Texas Register* at 1-800-226-7199 for assistance.

Modem

Texas Register on the Secretary of State's Electronic Bulletin Board

(512)463-2975 (modem)

On-line subscription service prices are based on the number of users beginning at $35/year for 1 user.

Printed and Diskette Copies

Printed *Texas Register* Subscriptions

Rates: year - $95; 6 months - $75; single issue - $7

Printed Copies of the Texas Administrative Code are available from the Secretary of State as well. Prices vary according to the number of pages and are subject to change. Some prices for Section 30, "Environmental Quality" Chapters include: Chapter 115 (370 pages, $40); Chapter 290 (58-page booklet, $20); Chapter 330 (228-page booklet, $45); and, Chapter 335 (167-page booklet, $25).

Diskette Copies of the *Texas Register*

Subscription service prices are based on the number of users beginning at $200/year for 1-10 users.

West Publishing Company

P.O. Box 64526

St. Paul, MN 55164-0526

Phone: (612)687-7000 or 1-800-328-9352, Fax: (612)687-7302

Official Texas Administrative Code, Title 30:

Environmental Quality

Purchase Price: $140

Subscriptions: (prices vary based on rule changes)

Published in cooperation with the *Texas Register*, it is the only official compilation of all the rules adopted by 15 natural resource agencies, including the TNRCC. Semi-annual softbound supplements are issued. This eliminates the need for collation and substitution of pages required by a loose-leaf format.

TNRCC

P.O. Box 13087

Austin, TX 78711-3087

Phone: (512)239-0028, Fax: (512)239-4488

World Wide Web

Down-loadable Compressed Files

TNRCC - Office of Policy - Current Rules

URL: http://www.tnrcc.state.tx.us/oprd/rules/indxchap.html

For technical assistance call the TNRCC Help Desk: (512)239-0911.

Modem

Down-loadable Compressed Files

TNRCC On-Line Bulletin Board System: (512)239-0700 (modem) This system operates on any PC compatible computer. It supports up to 14,400 baud modems and follows the most common communication settings: NO parity; 8 databits; 1 stopbit; FULL duplex (N, 8, 1, F). For technical assistance call the TNRCC Help Desk: (512)239-0911.

You can also obtain toll-free access to TNRCC On-Line from other State bulletin boards, including the State Comptroller's Window on State Government (toll-free access in Texas): 1-800-227-8392. Once you sign on to the bulletin board, select "BBS News and Table of Contents" and then select "Connect to Other Government BBSs." This will give you a menu of State bulletin boards, including TNRCC On-Line.

Printed and Diskette Copies

Phone: (512)239-0028, Fax: (512)239-4488

Both printed and diskette copies of TNRCC rules are available through TNRCC Agency Publications. The initial copy is free and the customer is allowed to reproduce as many additional copies as needed. Should the TNRCC be requested to reproduce additional copies, a fee will be charged as per General Services Commission guidelines. Subscription service is not available through the TNRCC.

For more information regarding specific TNRCC rules and regulations, please contact:
Office of Policy and Regulatory Development
(512)239-4900

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RULES

TNRCC Rules

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Code or Rule?

Laws enacted by the Texas Legislature appear in the form of statutes or codes such as the Texas Water Code. These usually are general statements of regulatory policy that the Legislature has decided should be observed by the public.

In these statutes or codes, the Legislature often directs that state agencies develop the specifics or details of these regulatory policies. These specific requirements are adopted with public input by state agencies and are called rules. The Texas Administrative Code is a compilation of the current rules issued by all state agencies.

Both statutes and rules have the force of law. However, if there is a conflict in meaning, a statute or code always takes precedence over a rule.

Statutes such as the Texas Water Code and the Health and Safety Code are available from the West Publishing Company.

Rules for the Texas Natural Resource Conservation Commission (TNRCC) are available from the sources listed in this publication.

Rules

When ordering only portions of the rules, reference the following TNRCC Chapters or Texas Administrative Code (TAC) Sections:

101. General Rules
104. Board Certification Criteria for Air Pollution
111. Control of Air Pollution from Visible Emissions & Particulate Matter
112. Control of Air Pollution from Sulfur Compounds
113. Control of Air Pollution from Toxic Materials
114. Control of Air Pollution from Motor Vehicles
115. Control of Air Pollution from Volatile Organic Compounds
116. Control of Air Pollution by Permits for New Construction or Modification
117. Control of Air Pollution from Nitrogen Compounds
118. Control of Air Pollution Episodes
119. Control of Air Pollution from Carbon Monoxide
120. Control of Air Pollution from Hazardous Waste or Solid Waste Management Facilities
121. Control of Air Pollution from Municipal Solid Waste Facilities
122. Federal Operating Permits
261. General Provisions
263. Final Approval by Executive Director - Evaluation of Request for Contested Case Hearing
264. Alternative Dispute Resolution
265. Contested Case Hearings
275. Special Provisions
277. Use Determination for Tax Exemptions for Pollution Control Property
279. Water Quality Certification
281. Applications Processing
284. Private Sewage Facilities
285. On-Site Wastewater Treatment
286. On-Site Wastewater Treatment Research Council
288. Water Conservation Plans, Guidelines & Requirements
289. Weather Modification
290. Water Hygiene
291. Water Rates
292. River Authorities
293. Water Districts
294. Underground Water Management Areas
295. Water Rights, Procedural
297. Water Rights, Substantial
299. Dams & Reservoirs
301. Levee Improvement Districts, District Plans of Reclamation, and Levees & Other Improvements
303. Operation of the Rio Grande
304. Watermaster Operations
305. Consolidated Permits
307. Texas Surface Water Quality Standards
308. Criteria and Standards for National Pollutant Discharge Elimination System (NPDES)
309. Effluent Limitations
310. Use of Reclaimed Water
311. Watershed Protection
312. Sludge Use, Disposal & Transportation
313. Edwards Aquifer
314. Texas Pollutant Effluent Standards
315. Pretreatment Regulations for Existing & New Sources of Pollution
317. Design Criteria for Sewerage Systems
319. General Regulations Incorporated into Permits
320. Program for Assessment of Water Quality
321. Control of Certain Activities by Rule
322. Community Wastewater Planning
323. Waste Disposal Approvals
325. Certificates of Competency
327. Spill Prevention and Control
329. Drilled or Mined Shafts
330. Municipal Solid Waste
331. Underground Injection Control
332. Composting
334. Underground & Aboveground Storage Tanks
335. Industrial Solid Waste & Municipal Hazardous Waste
336. Radiation Rules
337. Enforcement
338. Water Well Drillers Rules
339. Pump Installers Rulers
340. General Rules (Water Well Drillers Board)
341. Practice & Procedure
343. Oil & Hazardous Substances
344. Landscape Irrigators
345. Advisory Committee Rules
351. Regionalization

Sources

TNRCC Rules are available from a number of sources both public and private. The list included here outlines the public sources for obtaining the rules. Prices are subject to change and should be used as guidelines only. Please contact each company or agency directly for more detailed information when comparing products.

Many chapters of Title 30 of the Texas Administrative Code undergo frequent revision due to the scope and complexity of federal and state mandates and other rule-making initiatives. Consequently, a printed copy of a TNRCC rule may have a very short "shelf-life." Many public libraries are equipped to offer citizens access to the Internet and/or electronic bulletin boards. Therefore, we strongly encourage you to consider obtaining electronic access to the rules or a subscription service where provided from the following sources.

Texas Register

P.O. Box 13824
Austin, TX 78711-3824
Phone: (512)463-5561 or 1-800-226-7199

Both the *Texas Register* and the Texas Administrative Code are available from the Secretary of State's Home Page on the World Wide Web. On-line subscriptions to the *Texas Register* are also available from the Secretary of State's electronic bulletin board. The Secretary of State also provides printed and diskette copies of both the *Texas Register* and the Texas Administrative Code. Costs for these services vary. Price information may be obtained by calling the *Texas Register*.

The *Texas Register* is published twice each week. Government documents contained in each issue of the *Texas Register* include emergency, proposed, withdrawn and adopted sections of all state agency rules in chronological order. Quarterly and annual indexes are included in the subscription. The *Texas Register* is the official source for state agency rules.

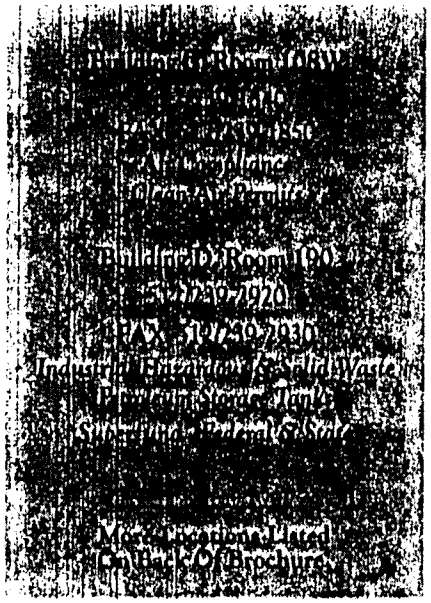
World Wide Web

The *Texas Register* and the entire Texas Administrative Code are available for on-line viewing to anyone with Internet access and a web browser. Prices for this service are based on the number of users, beginning at $50 per year for 1-10 users. The Texas Administrative Code is viewable in Hyper-Text Markup Language (HTML) from the following location:

Another Source for TNRCC Files and Reports

In addition to the customer services offered by the Customer Reports & Services Unit, the Information Resources Division has a Records Management Unit that maintains files, microfiche and hard copy computer reports for public access. These files and reports can be checked out for review, or copies may be obtained at a nominal fee. The Records Management Unit has four separate Record Services locations, as follows:

TNRCC Record Services Locations



Operating hours for all locations are 8 a.m. - 5 p.m. Monday through Friday.

The TNRCC mailing address is:
Texas Natural Resource
Conservation Commission
PO Box 13087
Austin TX 78711-3087

The TNRCC physical address is:
12100 Park 35 Circle, Bldg. A, Austin, TX 78753

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TNRCC Data Clearinghouse

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

An Overview of the Information Resources Customer Reports & Services Unit

The Customer Reports & Services Unit (Information Resources Division) serves as the data clearinghouse for various types of reports and data existing in TNRCC automated production system databases. This data can be requested by governmental agencies, schools and universities as well as private individuals and businesses. The primary objective of the Customer Reports & Services team is to make accessible the data and information within the Texas Natural Resource Conservation Commission's automated files.

As a focal point for dispensing data and information from the agency's automated digital files, the Customer Reports & Services Unit plays a vital role in linking the customer with data. We achieve our objective by matching customer needs with the appropriate automated system and providing the requested data in the prescribed format.

Types of Data and Reports

Some of the more frequently requested types of data and reports are as follows:

Texas Solid Waste System Activity File - Contains waste manifest information on generators/shippers of hazardous and solid waste from 1987 to present.

Petroleum Storage Tank Registration File - Contains information on registered aboveground and underground storage tanks.

Air Permit Renewals - A listing of air permit renewal notices that are mailed during a specified month for renewal in eight months.

Leaking Petroleum Storage Tank Database - Contains information on reported leaking petroleum storage tanks in Texas.

Industrial Solid Waste Registration Master File - Contains information on names, addresses, etc., of permitted hazardous and solid waste facilities.

Notices of Violations - A listing of air permit violations that occurred during a specified time period.

Air Permit Applications - A listing of air permit applications received by TNRCC during a specified month or time period.

Title V Sources - A file on diskette listing all major emission sources that are potential Title V Sources.

Air Permit Holders - A listing of companies that have air permits by county, region or the entire state.

SIC and SCC - A listing of air sources by either SIC (Standard Industrial Classification) or SCC (Source Classification Code) classification.

State Summary File - A file on diskette that lists by company the actual air emissions of the EPA criteria pollutants and the date of the company's last emission inventory.

Emissions Inventory Questionnaire - A comprehensive summary listing of emission information, facilities, abatement devices, etc., for a specified account.

Modeling Extract with Fugitive Emissions - A listing and diskette (EPA's ISC2 format) of all emission sources within a designated radius of a selected point.

Emissions Summary Report (EMISUM) - A listing that provides a means by which emissions from an account may be viewed without obtaining a complete Emissions Inventory Listing.

Water Quality Reports - Information on wastewater permits or surface water quality monitoring samples.

State Water Districts - Selected information concerning water districts in Texas.

Water Utilities - Information on water and sewer utilities.

Public Drinking Water Systems Inventory - Listing of surface, ground and public [illegible]ply systems.

Air Compliance History Reports - A listing of enforcement activities at an account during a selected date range for certain parameters.

Certified Wastewater Operators - Reports of wastewater facilities, operators and their facilities, operation companies, and approved certified operator training courses.

Fees and Charges

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How to Place an Order

A few simple steps will assist us in improving OUR customer services to YOU. Please submit in writing any request for data to the following address:

Information Resources Division, MC 197
TNRCC
PO Box 13087
Austin TX 78711-3087

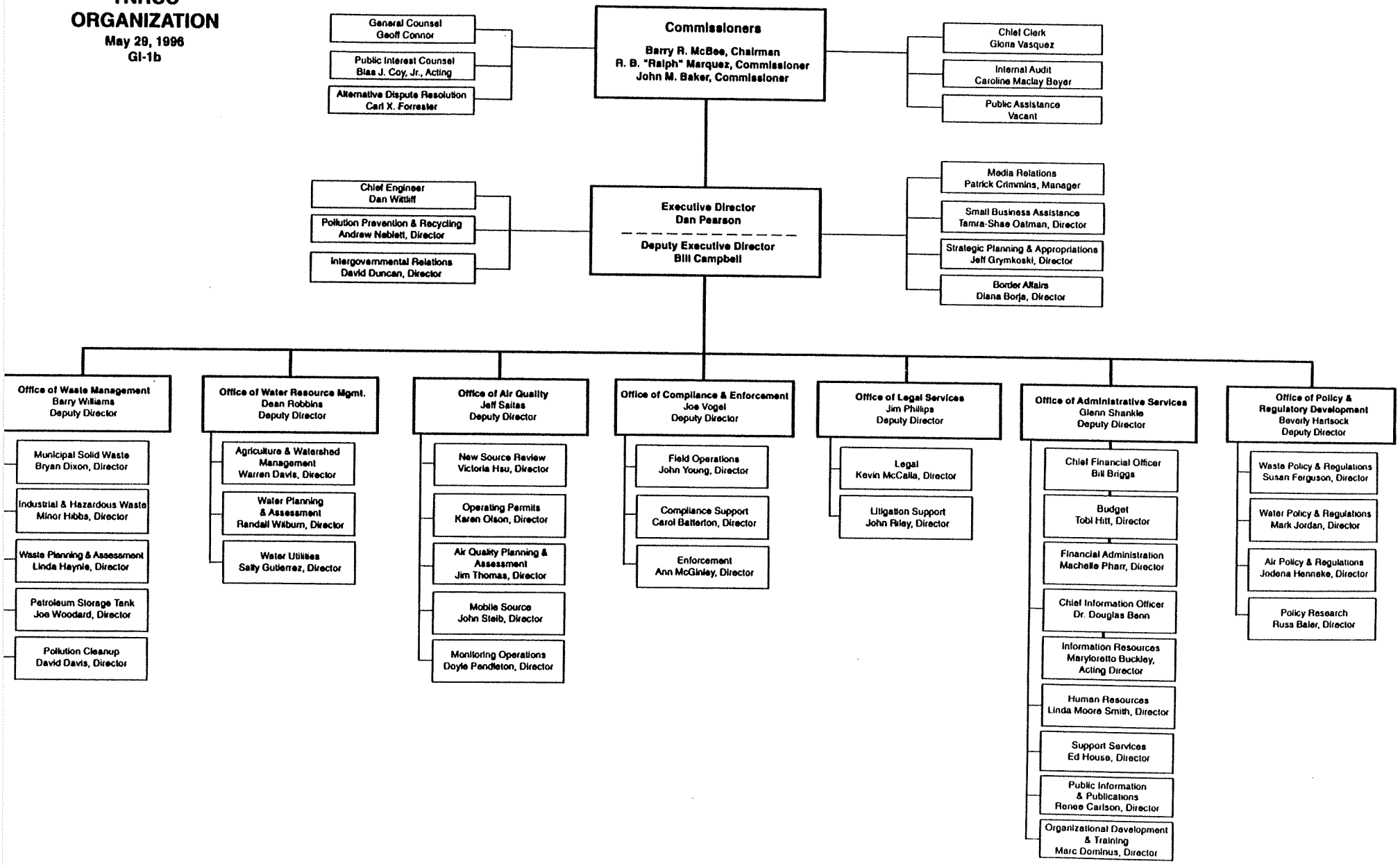
An efficient way to submit your written request is by fax, at (512) 239-0888.

For additional information, please call (512) 239-DATA (239-3282) during the office hours of 7:00 a.m. to 4:30 p.m. Monday through Friday. This number will connect you with a customer service representative who will answer your question or connect you with someone more familiar with your type of request.

for more info call: 239-DATA

TNRCC ORGANIZATION

May 29, 1996
GI-1b



Air Quality

"Gone With The Wind"

Jeff Saitas

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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.

NOTES

Air Quality

"Gone With The Wind"

Groten Goes to the Movies
A Viewer's Guide to New "Air Releases"

Eric Groten

"Airheads"

Eric Groten has focused on air quality issues since graduating from the University of Texas School of Law in 1985. After four years with a Phoenix firm, he moved back to Austin in 1989, where he is now a partner in the Environmental, Utility & Technology Section of Brown McCarroll & Oaks Hartline, L.L.P.

Eric is very active in Clean Air Act-based regulatory development. He currently serves the Texas Title V Planning Committee as a member of its Steering Committee and Chair of its Enforcement, Monitoring & Compliance Certification Subcommittee, and is an invited stakeholder in EPA/industry dialogue on the compliance assurance monitoring and credible evidence rules. His other activities include compliance counseling, permit application development and advocacy, enforcement defense, and toxic tort litigation.

Eric received his undergraduate degree in chemistry and environmental studies from Baylor University. He has published numerous articles and presented numerous papers on Clean Air Act issues, and has been honored as a Director of the Texas Lyceum Association.

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GROTEN GOES TO THE MOVIES

A Viewer's Guide to New "Air Releases"

as of

July 25, 1996

As Presented at
Eighth Annual Texas Environmental Superconference
Four Seasons Hotel
Austin, Texas

August 1, 1996

By
Eric Groten

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The following are capsule summaries of recent and forthcoming developments in air quality regulations of general interest. The goal is to allow the reader to determine possible interest and find the theatre, not to give the plot away. We also do not review any limited engagements of interest to only one specific audience, such as standards affecting only one industry or one part of the State.

NOW PLAYING

The following have been out for up to 6 months or more, but are still worth a look:

"The Changeling"

Rules/Guidance Implementing S.B. 1126: Regulation VI changes to accommodate S.B. 1126 have been out since February, and so should be familiar to most audiences [*see* 21 Tex. Reg. 1569 (Feb. 27, 1996)]. Generally speaking, facility changes that do not cause emissions to exceed previously permitted levels are no longer considered "modifications" requiring pre-construction authorization, provided that the facility has been subject to a best available control technology ("BACT") analysis within the past 10 years or otherwise applies a level of control equivalent to BACT. The plot actually is a little more complicated, so interested viewers are encouraged to review the Guidance Document for more details on such issues as (1) equivalent BACT for a wide range of facility types, (2) the level of notice (annual, post-project or even pre-project), (3) "trading" among compounds for categorical pollutants, and (4) determining "allowable emissions" [TNRCC New Source Review Division, *Modification of Existing Facilities Under Senate Bill 1126* (Mar. 14, 1996)]. ☺☺☺

"Play It Again, Sam"

Rules Implementing S.B. 1125: Senate Bill 1126 (from the 1995 session) imposed important restrictions on (1) the circumstances under which an air permit renewal may be contested, and (2) the conditions for permit renewal. Rules implementing S.B. 1125 also have been "playing" for many months [*see* 20 Tex. Reg. 7284 (Sept. 15, 1995) (amending procedural rules to limit grounds for granting hearing requests on air permit renewals); 20 Tex. Reg. 10191 (Dec. 1, 1995) (amending Chapter 116 to limit the conditions that may be imposed on renewal of air quality permits)]. Applicants for permit renewals are encouraged to review available guidance before submitting an application.[1] However, viewers are further advised that the boilerplate public notice still requested for renewals does not do justice to the new regime, because it does not fully convey to the interested public the very limited circumstances under which a hearing request on a permit renewal may be granted. In this reviewer's experience, the TNRCC Legal Division will approve alternative public notice language that is more faithful to the statute, and which has less potential to create false expectations. ☺☺☺

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[1] TNRCC has published both a *Technical Guidance Package for Permit Renewals* (Nov. 1995), as well as detailed instructions for the application form itself.

DOUBLE FEATURE:
"Circle of Friends"
"Houseguest"

"Section 101.2" Petitions: Although a favorite among critics, almost no member of the regulated public has bought a ticket. Late last year, TNRCC adopted amendments to 30 T.A.C. § 101.2(b), such that two or more sources located anywhere in the State may petition the Commission to have their co-located "properties" treated as one "property" for effects evaluation purposes [20 Tex. Reg. 11019 (Dec. 22, 1995)].[2] Given the widespread and increasing use of "guest facilities" and partial sales of units within integrated plants, particularly along the Gulf Coast, and given the critical importance of "receptor" location to the results of any modeling analysis, this petition process ought to be getting a lot of use. To this reviewer's knowledge, however, TNRCC has only one such petition in house. If you work for or represent a company that "shares space" with another, this rule is a "must-see." ☺☺☺☺

"A Tale of Two Cities"

NO_x-Based Nonattainment New Source Review ("NNSR"): Due to preliminary information suggesting that ozone formation is not NO_x-limited in the Houston/Galveston and Beaumont/Port Arthur ozone nonattainment areas, TNRCC has deferred the consideration of nitrogen oxides ("NO_x") emissions as a basis for triggering NNSR in those areas [20 Tex. Reg. 8620 (Oct. 20, 1995)]. Because of the submittal of either an attainment demonstration or a § 818 demonstration for the Dallas-Fort Worth and El Paso ozone nonattainment areas, respectively, the same rulemaking also deleted NO_x-based NNSR for these areas entirely. If permitted after April 1995, NO_x-emitting sources in Houston/Galveston and Beaumont/Port Arthur are subject to recapturing offsets if future modeling fails to confirm TNRCC's initial "§ 182(f)" findings, and, of course, NO_x emissions still can trigger prevention of significant deterioration ("PSD") review in any area of the State. The § 182(f) petition is scheduled to expire on December 31, 1997. ☺☺☺

"A Time to Kill"

"NO_x RACT" Compliance Date Extension: For the same reason that TNRCC deferred NO_x-based NNSR in Houston/Galveston and Beaumont/Port Arthur, it also deferred the deadline for compliance with the "NO_x RACT" rules (Chapter 117 limits on NO_x emissions from power plants, large commercial boilers, heaters, turbines and engines, and adipic and nitric acid plants in the Houston/Galveston and Beaumont/Port Arthur areas) [21 Tex. Reg. 516 (Jan. 19, 1996)]. If

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[2] Before this amendment to the long-standing (1979) rule, the opportunity to petition had been limited to sources located in a county with a population below 50,000. The absence of a petition process for most sites had led to ad hoc determinations when TNRCC actually considered specific cases, or -- more commonly -- the issue has been left unresolved and unspoken.

TNRCC fails by May 31, 1997, to demonstrate that NO_x controls are not needed to achieve ozone attainment (i.e., renew its "§ 182(f)" petition), then the rules -- on their face and without further action by TNRCC -- must be met by May 31, 1999. In appropriate cases, extensions of this deadline ("phased RACT") may be granted by petition [21 Tex. Reg. 4213 (May 14, 1996) (proposed rule); adopted by Commission on July 24, 1996, but not yet published in *Texas Register*]. ☺

"First Blood"

"15 Percent SIP" Disapproval: EPA has proposed to partially disapprove TNRCC's first major ozone SIP submittals under the 1990 Amendments [61 Fed. Reg. 2751 (Jan. 29, 1996)]. EPA based its disapproval largely on the 1995 Legislature's abolition of the vehicle inspection and maintenance ("I&M") program that was supposed to achieve a significant part of the statutorily compelled percentage reductions in volatile organic compound ("VOC") emissions. Final action on this EPA proposal, however, is expected to be avoided by the adoption of the "motorist's choice" I&M program [21 Tex. Reg. 5275 (June 11, 1996)] and a new demonstration that Texas will achieve the emission reduction targets (see "Eraser," reviewed below as a new release). ☹

"Cold Comfort Farm"

Reaffirmation of SO_2 NAAQS: EPA recently reaffirmed the current suite of SO_2 NAAQS (which have been established for the 3-hour, 24-hour, and annual averaging periods) [61 Fed. Reg. 25566 (May 22, 1996)]. Although the earlier proposal had requested comment on the need for a short-term (five-minute) NAAQS or other national program to prevent short-term exposures to protect exercising asthmatics, the recent NAAQS decision did not adopt any of the three proposed options. Just when you thought it was safe to go back in the water, though, EPA is considering the release of "Sudden Impact," reviewed under the "Coming Soon to Theatres Everywhere" section of this *Guide*. ☺☺

NEW RELEASES

This section reviews the summer's blockbuster releases, which have hit the big screen only in the last month or two.

"The Neverending Story"

Title V Interim Approval: This is the one *everyone* is talking about. On June 13, EPA Regional Administrator Jane Saginaw signed the notice granting interim approval to Texas' Title V program [61 Fed. Reg. 32693 (June 25, 1996)].[3] As a result of this action, owners of sources

[3] In a parallel action, EPA Headquarters adopted revisions to the Part 70 rules to allow itself to approve Texas' interim program notwithstanding that program's failure to establish minor new source review ("mNSR") as an applicable

subject to the interim program under TNRCC Regulation XII [30 T.A.C. Ch. 122], which includes electric utilities and upstream oil and gas operations, have until January 25, 1997, to submit applications for at least 10 percent of their sources. The remainder of the interim program source applications are due by July 25, 1997.[4] This "final interim" approval also triggers an eighteen-month clock for Texas to submit its final program, meaning that (if today's expectations are correct, which should not be assumed whenever the Title V program is involved) everyone else will have to file applications by around July 1999.

Although some of the forms and guidance documents needed for the interim program already are available on TNRCC's electronic bulletin board, others still are being developed. Among the works in progress, which also are among the more controversial, are (1) guidance documents on potential-to-emit and "periodic monitoring," and (2) the compliance certification and compliance schedule forms. Another major pending issue is the extent to which applicants must cross-reference all "pre-construction authorizations."

Normally, the story of EPA approval of a State program that enjoyed general support among all segments of the Texas viewing public would be no story at all. What turns this one from a sleeper into a blockbuster are EPA's conditions for approval of Texas' final program. Although the *Federal Register* notice announces numerous conditions, the condition of overwhelming importance relates to the definition of "applicable requirement": According to EPA, the State's minor new source review ("mNSR") program is an "applicable requirement." If so, then all State mNSR decisions must be handled in accordance with the Part 70 rules, including (1) EPA review of each mNSR decision, (2) possible veto of same, (3) citizen petitions, (4) submittals only by "responsible officials," (5) mNSR permits to include compliance certification requirements, EPA-driven monitoring requirements, and all other Part 70 whistles and bells, (6) EPA-directed limitations on permit revisions, and (7) such other impediments as may result from having two sovereigns involved in authorizing almost every new business activity.

TNRCC has one of the most comprehensive mNSR programs in the United States. As a result, it cannot afford to superimpose another bureaucracy on top of the current program. In this critic's views, shared by others, Texas likely will scale back its mNSR program -- perhaps to federal minima -- if forced to handle mNSR through its Title V program.

To help avoid this outcome, the TNRCC Commissioners voted on July 24, 1996, to ask the Attorney General to develop a petition for judicial review of the EPA notice, as well as of related amendments to Part 70 that affect this issue. Industry petitions also are expected to be filed with the U.S. Court of Appeals before the August 19 and 23 deadlines. ☹

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requirement [61 Fed. Reg. 31443 (June 20, 1996) (so-called "small rule")]. This notice is the first actual regulatory action by EPA that depends on this interpretation of the current (1992) Part 70 rules.

[4] Please refer to Appendix 1 for a brief, TNRCC-generated description of the interim program.

"The Carpetbaggers"

Part 71 Rules: As promised (threatened?), EPA did approve Texas' interim program barely in advance of its adoption of the Part 71 rules [61 Fed. Reg. 34202 (July 1, 1996)]. Part 71 establishes the requirements for a federally administered Title V program in any state that lacks approval, or whose interim approval lapses, after July 31, 1996. Because Texas has been granted interim approval, sources within its jurisdiction are not immediately, and may never be, affected by Part 71. However, because this rule also addresses the "applicable requirement" issue, and because Texas may yet again be threatened with Part 71, TNRCC and Texas business interests are considering a petition for review of this final EPA action, as well. ☹

"How to Succeed in Business Without Really Trying"

General Operating Permits ("GOPs") Proposal: TNRCC recently proposed GOPs for two source categories governed by the interim program, (1) upstream oil and gas facilities and (2) bulk terminals [21 Tex. Reg. 4955 (June 4, 1996)].[5] Comments were due by July 19, and adoption is expected sometime this Fall. The GOPs will help avoid repetitive information-gathering and review for these numerous and generally similar sources.

An interesting feature of the proposal was its request for comment on 32 different regulatory interpretations ("preliminary determinations") affecting a wide range of both TNRCC rules and EPA-adopted new source performance standards ("NSPS"). TNRCC believes that this action is necessary to resolve ambiguities in the applicable requirements that are being codified in these GOPs. Because the Agency undoubtedly will apply these interpretations (once published in the final rulemaking package) to all entities governed by the rules being interpreted, the final GOPs package should be reviewed in detail by just about every regulated entity, not just the comparative few that may use the four GOPs. ☺☺

"Jurassic Park"

Grandfathered Emission Rate Determinations: One of the more controversial issues debated during the 1993 formulation of Chapter 122 (TNRCC's operating permit program rules) was the requirement to document grandfathered emission rates as a "State-only" requirement. On July 10, 1996, the Commission authorized a proposal that would, in effect, repeal that requirement from Chapter 122, , so not even the interim program sources will have to satisfy these requirements [21 Tex. Reg. 6872 (July 23, 1996)]. ☺☺☺

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[5] Because the "applicable requirements" vary considerably with geographic location, TNRCC actually proposed three GOPs for upstream oil and gas operations, the applicability of which depends on the site's geographic location, for a total of four GOPs in the proposal.

"On Dangerous Ground"

Risk Management Program ("RMP") Rules: EPA recently adopted rules under § 112(r)(7) of the federal Clean Air Act, which mandate the creation of RMPs for a wide variety of sources [61 Fed. Reg. 31688 (June 20, 1996); *see also* 61 Fed. Reg. 31733 (June 20, 1996) (announcing availability of related guidance documents)]. Compliance must be achieved by June 20, 1999. ☹

"Eraser"

"The SuperSIP": Look, up in the air, it's a bird, it's a plane, . . ., it's adopted on July 24, 1996. The so-called SuperSIP consists of a variety of changes to documentation previously submitted to EPA to show that Texas' rules will achieve the mandated percentage reductions in VOC emissions from 1990 levels despite subsequent changes to the vehicle I&M program and the repeal of the employee trip reduction ("ETR") program. The SIP corrections also reinforce TNRCC's prior demonstration that its current VOC rules require reasonably available control technology ("RACT").[6]

☮ ☮ ☮ COMING SOON TO A THEATRE NEAR YOU ☮ ☮ ☮

In this section of our *Guide*, we review air quality initiatives by or uniquely affecting Texas. For previews of coming EPA attractions, see "Coming Soon to Theatres Everywhere."

DOUBLE FEATURE:
"You Only Live Twice"
"The Odd Couple"

One-Stop Permit Rules : *Perhaps* by October, TNRCC will propose rule changes to accommodate the repeal of the so-called "one-stop permit" statute, which repeal was effective in 1993. Since then, there has been some confusion about the permitting of facilities that are subject to permitting under both the Solid Waste Disposal Act and the Texas Clean Air Act. These rules reportedly will acknowledge that appropriate permits must be obtained under each Act, but create options for simultaneous processing of two or more applications by the Agency. ☺☺

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[6] This package of revisions to the State implementation plan ("SIP") is intended to address the grounds on which EPA proposed to disapprove portions of TNRCC's 1993 and 1994 ozone SIP submittals. It is hoped, but not yet certain, that this revised submittal will preclude final disapproval.

"The Cowboy Way"

Chapter 122 Revisions: On July 10, 1996, the Commission directed Staff to revise Chapter 122 (Texas' operating permit program rules) to reflect the general concepts described in the table provided in Appendix 2. The resultant proposal is expected to be authorized for publication by the Commission at the end of November. This proposal will provide EPA with an opportunity to comment on Texas' plans for its final Title V program. We hope but do not necessarily expect that all interested parties will support this new version of Chapter 122, such that it can be adopted in the Spring of 1997 and be submitted to EPA for approval well before the January 1998 deadline for submitting a final program. Perhaps by next year, EPA guidance will have evolved to allow a permit process as simple as that suggested by the last page of Appendix 2. ☺☺☺☺

"Green Card"

Standard Permits: Absent an available standard permit, emission control projects that have the effect of causing incidental increases in non-target pollutants would require conventional permitting, even if the new controls were required to be installed. To resolve concerns over this awkward outcome, TNRCC adopted a general (Chapter 116) and two specific standard permits (Chapters 115 and 117) in 1993-94. To simplify the rules, TNRCC is about to issue a proposal to consolidate them, such that all emission control projects will be authorized (if at all) under the Chapter 116 standard permit for such projects. TNRCC expects to conclude this rulemaking by the end of this year. ☺☺

"A League of Their Own"

Standard Exemption Recodification: TNRCC recently proposed a new Chapter 106 into which all standard exemptions will be codified [21 Tex. Reg. 6409 (July 12, 1996)]. This rulemaking is intended to allow TNRCC more flexibility in future changes to the standard exemption list. The *Texas Register's* rules prevent TNRCC from overlapping rulemakings affecting the same section of the *Texas Administrative Code*. Because all standard exemptions currently are adopted by reference in just one section (30 T.A.C. § 116.211), TNRCC cannot propose any changes to one exemption if it has pending any proposal changing or adding another specific exemption. By giving each exemption its own section in the new Chapter 106, it can make changes in overlapping rulemakings.

The July 12 proposal would create the "general provisions" governing the use of any standard exemption, and add the first standard exemption to Chapter 106 (by transferring Standard Exemption 3 for "comfort heating and cooling" to new § 106.102, with some amendment). In the preamble, TNRCC announced its intention to transfer the majority of the exemptions from the current standard exemptions list to Chapter 106 unchanged from their current form in future rulemaking actions. This mass transfer is likely to await the conclusion of TNRCC's ongoing substantive review of over 40 standard exemptions, discussed next. **(N.R.)**

"Necessary Roughness"

Standard Exemption Substantive Review: In part because of controversy over the use of the standard exemptions for concrete batch plants, the Commissioners have at least questioned whether the current standard exemptions continue to reflect BACT and provide sufficient protection of public health. Consequently, on May 13, 1996, it directed Staff to review all exemptions to evaluate their sufficiency, and to expect to repeat this exercise on 10-year cycles. The first wave of review, affecting about 40 exemptions,[7] is supposed to be concluded in September. Depending on Staff findings, amendment or even repeal of some exemptions is possible. Although this review could jeopardize some exemptions, this review probably is a necessary step to maintain the viability of the standard exemption concept. ☺☺

"The Quick and the Dead"

Upset/Maintenance Reporting Rules: In response to an initiative by a group of regulated companies, TNRCC issued in January 1996 a concept paper announcing its intention to revisit its long-standing rules on upset/maintenance reporting. A paper outlining various regulatory options is expected in a month or two. The industry group has asked TNRCC to consider use of CERCLA/EPCRA-based reportable quantities as thresholds for reporting, but other options (including no action) are expected to be floated for discussion. **(N.R.)**

☮ ☮ ☮ COMING SOON TO THEATRES EVERYWHERE ☮ ☮ ☮

DOUBLE FEATURE:
"The Fog"
"Smoke"

Particulate Matter ("PM")/Ozone NAAQS Revisions: EPA has elected to delay until November 29, 1996, the proposal of a revised national ambient air quality standard ("NAAQS") for ozone. A cynic would believe that this delay in what was supposed to have been a July proposal resulted from EPA concerns about proposing before the elections a new standard that would worsen the overall nonattainment status of the U.S. However, in a recent advanced notice of proposed rulemaking, EPA explained this decision as an effort to parallel-track the ozone NAAQS proposal with the PM NAAQS proposal, the latter of which already had been scheduled (by court order) for November 29 [61 Fed. Reg. 29719 (June 12, 1996)]. The ANPR also suggests that EPA will take comment on a variety of formulations of the ozone NAAQS to allow for nonattainment status to be determined on a more airshed-wide basis, as had been recommended in a position paper advanced by TNRCC Commissioner Marquez this past Spring.

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[7] Among the exemptions up for review are Nos. 7 (for boilers and heaters), 51, 53 and 86 (for storage tanks), 66 (oil & gas production), 80 (flares), and 106 and 118 (catch-alls).

The PM NAAQS decision also moved a step closer to November proposal when EPA issued its final Staff Paper on July 15. The Staff Paper recommends that the Administrator consider $PM_{2.5}$ NAAQS of 20-65 ug/m^3 (24-hour average) and 12.5-20 ug/m^3 (annual average).[8] Retention of the current PM_{10} NAAQS of 150 ug/m^3 (24-hour average) is included as an "option" for the Administrator to consider. EPA Staff has resisted efforts to expand the upper boundary of the recommended range, despite substantial criticism that this range is based on inaccurate assumptions about the $PM_{2.5}/PM_{10}$ equivalency ratio. Speculation is that EPA Staff wants to propose a tighter-than-necessary $PM_{2.5}$ NAAQS to overcome political difficulties associated with an ozone NAAQS tight enough to compel controls on utility emissions of NO_x and sulfates, which EPA Staff very definitely wants to control.

Final action on both standards remains scheduled for June 1997. Regardless of the options adopted by EPA, it seems extremely unlikely that the State's major urban areas will shake their current ozone nonattainment designations, and probable that several "new" areas will be pushed over the edge. Although considerable uncertainties in both the level of the standard and current ambient levels of $PM_{2.5}$ in Texas mean that nonattainment status cannot now be forecasted, the most likely $PM_{2.5}$ nonattainment areas are Houston and El Paso.

EPA is looking to parallel-track implementation as well as adoption of the revised ozone and PM NAAQS. This is because it believes that both pollutants have common precursors, and are affected by long-range transport. Thus, implementation of the revised standards will require a change in the 25-year-old NAAQS/SIP paradigm, whereby primary pollutants are controlled by State rules at local sources to reach attainment of the NAAQS in the localized nonattainment area. This, in turn, almost certainly will mean an expanded federal role in control strategy development, and quite possibly means that the federal Clean Air Act itself must be changed. An EPA-initiated "Federal Advisory Committee" is considering all of these, and other, issues. ☹

"Sudden Impact"

Short-Term SO_2 Release Control Program: As noted above ("Cold Comfort Farm"), EPA recently declined to adopt any of the previously proposed options for preventing short-term (5-minute) ambient peaks of SO_2, but a fourth option (one heavily dependent on State action) may be proposed this September. The recent filing of petitions for judicial review of EPA's May 22 decision, however, may cause EPA to hold off on this supplemental proposal. ☹

"A Funny Thing Happened on the Way to the Forum"

Compliance Assurance Monitoring ("CAM") Rules: EPA's efforts to define the level of monitoring required for an approvable Title V permit have been plagued with controversy since

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[8] $PM_{2.5}$ is particulate matter consisting of particles with an aerodynamic diameter of 2.5 microns or less, whereas PM_{10} (the indicator for the current NAAQS) is comprised of 10-micron particles.

production began in 1993. For a summary of how CAM arose from "enhanced monitoring" (the original working title) and "periodic monitoring," and for a brief synopsis of what these rules are likely to require, please refer to Appendix 3. The most important rumor from the set, however, is that we may never see CAM as a *Federal Register* proposal; rather, it may be adopted next year in final form as an allegedly "logical outgrowth" of the original (1993) EM proposal. EPA is negotiating with environmental group plaintiffs to secure a one-year extension of the current July 1996 deadline for final action, and may offer to "save time" by cutting out the proposal step. The other concession would be to adopt "any credible evidence" rules by sometime this Fall. ☹

"The Gods Must Be Crazy"

"Any Credible Evidence" ("ACE") Rules: The background on this companion to CAM is provided in Appendix 4. Adoption by this Fall seems likely. As discussed in the Appendix, these rules would cast a shadow of uncertainty over every Clean Air Act-based compliance obligation. ☹

"Judge Dredd"

Field Citations: EPA has a long-standing proposal to establish a field citation program under § 113(d)(3) of the Clean Air Act [59 Fed. Reg. 22776 (May 3, 1994)]. Rumor has it that these rules will be finalized this Fall. ☹

"Only the Lonely"

Section 112(g) Rules: EPA is expected to adopt by December of this year its final rules implementing § 112(g) of the Act. This section mandates case-by-case development of maximum achievable control technology ("MACT") standards for any new or modified source, if constructed or modified after the deadline for EPA adoption of MACT standards for the affected source category, if EPA fails to adopt those MACT standards by the applicable deadline. According to a recent supplemental proposal [61 Fed. Reg. 13125 (Mar. 26, 1996)], the final rules likely will apply the § 112(g) process only to major new "green-field" sites, or to major new units within a site. If so, this will avoid the extremely complex applicability determinations contemplated by the original proposal [59 Fed. Reg. 15504 (Apr. 1, 1994)]. ☹

"The Pagemaster"

EPA recently published a massive rules package (95 *Federal Register* pages) to "simplify" its requirements for approvable new source review programs (PSD and NNSR) [61 Fed. Reg. 38250 (July 23, 1996)]. TNRCC is beginning to evaluate how these rule changes would affect Texas' NSR program, and what comments to file. (N.R.)

Appendices

1 - Overview of Interim Title V Program
2 - Redirection of Texas Program
3 - Overview of CAM Rules
4 - Overview of ACE Rules

APPENDIX 1

Texas Natural Resource Conservation Commission

INTEROFFICE MEMORANDUM

To: All Interested Parties Date: June 28, 1996

From: Karen N.T. Olson, P.E., Director
Operating Permits Division

Subject: Status of the Title V Operating Permits Program In Texas

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On June 25, 1996, the U.S. Environmental Protection Agency (EPA) published in the Federal Register notice of approval (delegation) of Texas' Interim Federal Operating Permits Program (Interim Program) as defined in Title 30, Texas Administrative Code, Chapter 122 (Regulation XII). This letter describes who must apply for Federal Operating Permits in Texas and the time line established for application submittal.

Applicability

Affected sources subject to the Acid Rain rules (Title 40 Code of Federal Regulations, Part 72 [40 CFR 72]) and major sources whose primary Standard Industrial Classification (SIC) codes which are listed below shall apply for a Federal Operating Permit under the Interim Program. These classifcation codes are described in the Standard Industrial Classification Manual, 1987.

- 1311 - Petroleum and Natural Gas
- 1321 - Natural Gas Liquids
- 4911 - Electric Services
- 4922 - Natural Gas Transmission
- 4923 - Natural Gas Transmission and Distribution
- 5171 - Petroleum Bulk Stations and Terminals

Any solid waste incineration unit subject to Section (§)129(e) of Title I and all remaining major sources meeting the criteria of §122.120 will be subject to Texas' Full Federal Operating Permits Program (Full Program). The expected delegation of the Full Program from the EPA is two years after interim delegation.

A major source is any source which emits or has the potential to emit one of the following:

- 10 tons per year (tpy) of any hazardous air pollutant (HAP);
- 25 tpy of any aggregate of HAPs;
- 100 tpy of any air pollutant,
- 25 tpy of volatile organic compound (VOC) or NO_x if in a severe nonattainment area;

- 50 tpy of VOC or NO_x if in a serious nonattainment area, or
- 100 tpy of VOC or NO_x if in a moderate nonattainment area.

An understanding of the Texas Natural Resource Conservation Commission's (TNRCC's) definitions for site and potential to emit will help an owner or operator determine whether a site should be classified as a major source. A site, as defined in §122.010, is the total of all stationary sources located on one or more contiguous or adjacent properties, which are under common control of the same person (or persons under common control) and excluding research and development facilities. (Information will be available through the TNRCC's Definition of Site guidance document which is expected to be placed on the TNRCC Online Bulletin Board System [BBS] in mid-August, 1996.) After the boundaries of the site are determined, the owner or operator should calculate the site's potential to emit. Some major sources may limit their potential to emit to avoid the major source classification and therefore will not be subject to the Federal Operating Permits Program. Owners or operators may limit a source's potential to emit by establishing federally enforceable emission rates and registering these rates through an appropriate TNRCC mechanism. (More information will be available through the TNRCC's Potential to Emit guidance document which is expected to be placed on the TNRCC Online BBS in mid-August, 1996.)

Application Submittal

To preserve the ability to operate until such time as a Federal Operating Permit is issued, owners and operators of major sources must submit timely and complete applications pursuant to §§122.133 and 122.134. The following list identifies the dates in which Federal Operating Permit applications are due to the TNRCC:

July 25, 1996

Effective date of Texas' Interim Program: The TNRCC will begin to accept applications from owners or operators of interim sites. Application forms may be obtained from the TNRCC Online BBS or TNRCC's Central Office (Directions for accessing the TNRCC Online BBS are enclosed and contact information for the Central Office is provided in the following section of this letter). Applications should be submitted to the address provided in the following section of this letter. (More information will be available through the TNRCC's application guidance document which is expected to be placed on the TNRCC Online BBS in mid-August, 1996.)

January 25, 1997

Six month application deadline for interim sites, pursuant to §122.130(c)(1)-(2): The owner or operator of one site shall submit a permit application no later than January 25, 1997. Owners or operators of multiple sites shall submit applications for no less than 10% of the sites on or before January 25, 1997. Therefore, owners or operators of multiple sites may delay submitting applications for 90% of the sites for six months.

July 25, 1997

Final application deadline for interim sites, pursuant to §122.130(c)(3): The owner or operator of multiple sites shall submit the remaining 90% of the permit applications for those sites subject to the Interim Program.

Application Form Availability

Copies of the application forms are expected to be available mid-July, 1996 on the TNRCC Online BBS (see enclosure) or by contacting the TNRCC's Operating Permits Division at (512) 239-1334.

All Federal Operating Permit Applications should be submitted to:

Technical Operating Permits Support
Operating Permits Division
Office of Air Quality
Mail Code 163
P.O. Box 13087
Austin, Texas 78711-3087

Background on the Texas Federal Operating Permits Program

The role of the Federal Operating Permit is to improve air quality through increased compliance and awareness by the codification of existing applicable regulatory requirements for major or affected sources. In Texas, the Federal Operating Permits Program requirements are separate from the New Source Review (NSR) Program requirements because the two programs serve different purposes. The NSR permits implement other substantive requirements, such as best available control technology (BACT) and ground level impacts analyses, and applies to both major and minor sources which are new or modified. (See TNRCC Regulation VI, 30 TAC 116.116). The two air programs have separate but complimentary goals; therefore, an application for, or issuance of, a Federal Operating Permit does not remove the owner or operator's responsibility for obtaining and maintaining appropriate NSR preconstruction authorization in accordance with TNRCC Regulation VI.

History

The following is the sequence of events that led to the implementation of the Texas Federal Operating Permits Program:

November 11, 1990

Amendments to the Federal Clean Air Act (FCAA), signed by President Bush instituted a new program requiring major sources in the United States to apply for a Federal Operating Permit.

July 21, 1992

Pursuant to §502(d) of Title V of the FCAA, the EPA promulgated 40 CFR 70 directing each state to develop an Federal Operating Permits Program that meets specific requirements.

August 23, 1993

After a series of roundtables involving the public, environmental groups, and regulated community, staff developed a proposed plan for implementation of the Federal Operating Permits Program in Texas, adopted Regulation XII to implement the Texas Federal Operating Permits Program pursuant to 40 CFR 70, and requested the EPA to approve (delegate) the program.

June 7, 1995

The EPA proposed approval of the Texas Federal Operating Permits Program.

June 25, 1996

The EPA published final interim approval of the Texas Federal Operating Permits Program giving the TNRCC authority to implement the Interim Program.

If you have any questions concerning this letter or the Federal Operating Permit application review process please call the Operating Permits Division at (512) 239-1334.

Full Program Approval Issues - Staff Options (Dated 6/24/96)

This table summarizes the Operating Permits and Field Operations staff's options for the issues EPA has identified for full program approval.

Issue	Staff Option	Pros	Cons
New Source Review Related Issues			
Is Minor NSR an applicable requirement?	No. Make no further changes to program except as identified in the interim approval notice.	Minimizes staff resources. Maintain existing two-permit system. Minimizes burden on NSR program. Minimize delays in preconstruction approval process.	High probability of disapproval. Significant conflict with EPA. Only state with this issue.
	* No. Make changes consistent with staff proposal for full program (program substitution) and allow EPA to approve as described in the attached table.	Maintain existing two-permit system. Minimizes burden on NSR program. Minimize delays in preconstruction approval process. Adds process to operating permit only. Reduces probability of disapproval.	Moderate probability of disapproval. Significant conflict with EPA. Only state with this issue. NSR treated differently than other applicable requirements.
	Yes. Concede to EPA after Part 70 mini rule is final. Make changes for full program that includes minor NSR as an applicable requirement.	Eliminates conflict with EPA. Approach is consistent with other states.	Staff resources required to develop new permit system. Delays in preconstruction process. Additional requirements on NSR. Uncertainty (EPA veto). Risk to minor NSR program and contested case hearings.

* - TNRCC STAFF RECOMMENDATION

TITLE V PLANNING COMMITTEE AGREES WITH STAFF RECOMMENDATION EXCEPT AS NOTED BY "PC"

APPENDIX 2

Full Program Approval Issues - Staff Options (continued) (Dated 6/24/96)

Issue	Staff Option	Pros	Cons
General Title V Issues			
Compliance certification basis (*)	Utilize existing compliance method data while EPA establishes new methods for each rule.	Provides clarity to determine compliance. Federal rules implemented consistently. Cost effective (no case by case review).	Time consuming national effort. Some probability of EPA disapproval, sanctions, Part 71.
	Require sources to certify based only on required compliance method data, or if none exists, based on other data at the permittee's discretion.	Provides clarity to demonstrate compliance. Provides maximum flexibility to companies.	Does not permit the agency to adopt new methods of determining compliance where existing regulations are weak or nonexistent.
	Require source to certify based on 'any credible evidence' (ACE).	Significantly expands set of criteria for establishing compliance status. Avoids possible EPA disapproval, sanctions, Part 71.	Uncertainty in determining compliance. Requires each state to determine ACE on a case-by-case basis increasing workload, inconsistent interpretations, and resulting enforcement throughout nation.
Compliance certification form (PC) Agreed to leave ~~unaddressed~~ undirected Allow meeting on 7/30 w/ Field ops.	<u>Application certification</u>, require broad statement of compliance; rely on previously submitted reports or concurrently submitted plans to identify all non-complying units.	Significantly minimizes the volume of required documents to be submitted to the agency.	Possibly requires a Part 70 change. Difficult for agency or public to identify potential noncompliance. Incomplete documentation of non-compliance.
	<u>Application certification</u>, require broad statement of compliance; require all non-compliant units to be listed in the compliance certification. (*)	Reduces paperwork, especially for large sites. Permit details all applicable req's; compliance certification lists units out of compliance.	Possibly requires a Part 70 change. Some probability of EPA disapproval, sanctions, Part 71.
	<u>Annual certifications</u>, require broad statement of compliance; rely on previously submitted reports or concurrently submitted plans to identify all non-complying units; no requirement to categorize as 'continuous' or 'intermittent'. (PC)	Eliminates confusion over 'intermittent.' Allows state to determine what constitutes a violation.	Possibly requires a Part 70 change.
	<u>Annual certification</u>, require broad statement of compliance; require 'intermittent' compliant units listed in compliance certification with reference to report detailing non-compliant events. (*)	Allow permittee to demonstrate extent of compliance. Eliminates ambiguity of 'intermittent'.	Possibly requires a Part 70 change. Some probability of EPA disapproval, sanctions, Part 71.
	Follow Part 70 exactly.	Consistent with Part 70. Full documentation of compliance status. Public/EPA easily identify compliance status. Public/EPA more easily pursue enforcement. Avoids possible EPA disapproval.	Significant and duplicative reporting burden. Lack of clarity on intermittent and continuous.

Full Program Approval Issues - St. Options (continued) (Dated 6/24/96)

Issue	Staff Option	Pros	Cons
General Title V Issues			
Modular vs. Conventional	High level determinations in application; detailed citations put in permit by the agency after investigation.	Provides flexibility for sources to use existing processes. Does not require permittee to provide specific citations for each unit (e.g., Subpart Kb as opposed to 40 CFR 60.112b(a)(3)(i)). Allows permittee to minimize redundant information submitted to agency.	High probability of disapproval. Possibly requires a Part 70 change to allow the level of detail in the modular application. Process not proposed by any other state. Process requires the agency to do work traditionally conducted by permittee. Substantial increase in manpower required. Requires the agency to develop duplicate processes.
	X Conventional permit application coupled with compliance and applicability confirmation inspection. PC CONDITIONAL ACCEPTANCE BY PLANNING COMMITTEE AS SPECIFIED ON ATTACHED PAGE	Provides inspector assistance with permit development. Enables many elements of IPG to be eliminated. More accurate permits due to combined agency effort reviewing application. Minimize duplication of info submitted. Minimize additional FTE requirements. Facilitates dissemination of application information. Consistent with Part 70.	Requires permittee to submit details on applicable requirements. Requires permittee to submit information using standardized forms.
	Requires modular permit applications to include all Part 70 requirements, including detailed citations of applicable requirements made by the permittee.	Consistent with Part 70.	Requires significant modification to existing processes; therefore benefits minimized.
Phased-in detail	X Phase in detail over 7-years. In the initial permits, only portion of units will have detailed citations. Remaining detail phased-in annually according to schedule in permit.	Provide flexibility for sources with complicated and many applicability determinations. Provides permittee and agency with more time to ensure accurate determinations are made.	Possibly requires a Part 70 change. Some probability of EPA disapproval, sanctions, Part 71. Some risk that EPA will object to permits not having sufficient detail.
	Require initial permits to include detail to determine all obligations.	Consistent with Part 70. Avoid possible EPA disapproval, sanctions, Part 71.	Minimizes flexibility to distribute workload.

Full Program Approval Issues - Staff Options (continued) (Dated 6/24/96)

Issue	Staff Option	Pros	Cons
General Title V Issues			
Responsible official/Duly authorized rep.	DAR could be any person responsible for preparing material in all cases.	Provides flexibility for low-level sign off. Minimizes paperwork for high-level management.	Clear conflict with Part 70. High probability of EPA disapproval, sanctions, Part 71.
	* DAR could be any person responsible for preparing material in certain cases.	Provides flexibility for low-level sign off for high-volume reports. Minimizes paperwork for high-level management.	Possibly requires a Part 70 change. Some probability of EPA disapproval, sanctions, Part 71.
	Require DAR be responsible for one or more facilities and approved in advance or notified.	Consistent with Part 70. Avoid possible EPA disapproval, sanctions, Part 71.	Less flexibility for low-level sign off for high-volume reports. Increased paperwork for upper management.
Permit revisions	* Annual revision process, certain changes require prior approval, otherwise monthly notice.	Eliminates delay to permittee when making revisions while still providing full information	Some probability of EPA disapproval, sanctions, Part 71.
	Follow Part 70 exactly.	Eliminates conflict with EPA.	Minimizes flexibility to make revisions. Potentially adds delays in operating an NSR approved change.
State only applicable req. Agreed PC	Separate out state rules into 'state-only' and 'federal only' categories.	Eliminates requirements for rules that are not a federal applicable requirement.	Time and resource intensive to work out with EPA. Treated differently than other applicable reqs.
	* Do not separate out state rules into 'state-only' and 'federal only' categories. Would help federal only	Simple approach. Eliminates resource requirement. Minimizes conflict with EPA.	Subjects requirements to full Part 70 requirements (compliance cert., CAM).
Other Significant Regulation XII Changes			
Application Shield	Agency has to take specific action to remove.	Ensures that appropriate discretion is used when removing an application shield.	Possibly requires a Part 70 change.
General Permit	Require sources to submit simplified renewal application every 5 years.	Eliminate conflict with EPA.	Requires some additional resources to apply and grant permit every 5 years.
Public notice left open	Require one sign-posting, one newspaper notice to satisfy public notice.	Minimizes cost of notice.	Inconsistent with NSR PN requirements. Perceived weakening of PN requirements.
	Leave public notice requirements unchanged.	Consistent with NSR PN requirements.	More strict than Part 70 requires.

1990 CLEAN AIR ACT AMMENDMENT TITLE V
EPA GUIDANCE DOCUMENT III

Attached is EPA Title V Guidance Document III. This document has been issued substantially ahead of schedule. If we expect others to bust their butts all the time, we need to demonstate the ability to do so once in a great while as well. You will be pleased to note that we have streamlined the process significantly, and are now recommending the submittal of a standardized one page application. You may not be so pleased to learn that most of the work you have done to this point in time was totally unnecessary.

Regards,
Your Friendly Administrator

TITLE V APPLICATION FORM

Source name _____

Location: (Check here if in western hemisphere____; otherwise attach globe).

Emission Units (check all that apply):
____ Thingies with smokestacks;
____ Thingies without smokestacks;
____ Assorted doo-dads not listed above.

Emission Inventory (for each listed pollutant, check quantity):
Chunky stuff - ___ it'll cover you up; ___ fair to middling; ___ not so's you'd notice;
Stinky stuff - ___ gag a maggot; ___ hold your breath; ___ you'll get used to it;
Other stuff - ___ don't see a thing; ___ only at night; ___ off plant property.

Applicable Regulations:
____ None (grandfathered source)
____ None (grandmothered source)
____ None (permitted source) (If it's permitted, that means I can do it, right?)

Compliance Monitoring Plan:
____ Absolute Monitoring (attach check, made out to "To Whom It May Concern")
____ Relative Monitoring - Scheme A (I can blame it on someone else.)
____ Relative Monitoring - Scheme B (Attach results from brother-in-law's lab.)
____ Biological Monitoring (e.g. count dead birds)

Small Business Qualification
____ Qualifies as small business;
____ Doesn't qualify as small business yet, but downsizing;
____ Big business, and proud of it!

Certification:
____ I swear I didn't just make this up.

Signature_____

Do not write below this line:

TITLE V PERMIT

The above named owner can do all the stuff listed above; other stuff may require another ~~check~~ permit.

If you do anything else, don't blame us if you get in trouble.

In the event you fail to do any of the things you ought to have done (you know what they are), you have to tell us within 90 days of the time you didn't do them.

In the event you do any of the things you ought not to have done (you know what they are, too), you have to tell us before you do them again.

PERMIT FEES

Your permit fee is $_____.___.

Permit fee is to be paid in cash, every other Saturday night, by enclosing it in a sealed jar and placing it under the third bush to the right of your visitor parking lot.

Signed_____
Permit Guy

APPENDIX 3

BASIC SUMMARY OF COMPLIANCE ASSURANCE MONITORING ("CAM") RULES

HISTORICAL BACKGROUND

- 1990 Clean Air Act Amendments
  - § 114(a)(3): "The [EPA] Administrator shall. . . require enhanced monitoring and submission of compliance certifications. Compliance certifications shall include (A) identification of the applicable requirement that is the basis of the certification, (B) the method used for determining the compliance status of the source, (C) the compliance status, (D) whether compliance is continuous or intermittent, (E) such other facts as the Administrator may require. . .The Administrator shall promulgate rules to provide guidance and to implement this paragraph within 2 years after the enactment of the Clean Air Act Amendments of 1990."
  - § 113(e)(1): CAA penalty amounts shall take into account (among other factors) "the duration of the violation as established by any credible evidence (including evidence other than the applicable test method). . . ."
  - § 504
    - (a) [Title V permits to include] such other conditions as are necessary to assure compliance with applicable requirements. . .
    - (b) The Administrator may by rule prescribe procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated under this Act. . .
    - (c) Each permit issued under this title shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions. Such monitoring and reporting requirements shall conform to any applicable regulation under subsection (b).
- Part 64 "Enhanced Monitoring" Proposal [58 Fed. Reg. 54648 (Oct. 22, 1993)]
  - CEM requirements or demonstrated compliance parameter limits ("DCPLs") on all sources > 30% of major source thresholds
  - Implementation through Title V *and* SIPs, NSR permits, etc.
  - "Credible evidence" mandate included as part of EM proposal

- EPA began issuing "SIP calls" to compel states to adopt "credible evidence" provisions even before federal rules adopted

▶ Post-Proposal Stakeholder Dialogue (January - November 1994)

- Extensive TNRCC involvement
- November 8, 1994 elections

▶ Supplemental request for comment on EPA-issued protocol concept (to address "burden" issue) [59 Fed. Reg. 66844 (Dec. 28, 1994)]

▶ April 1995: The birth of "CAM"

- April 4, 1995: EPA announcement (Appendix 3A)
- Court-ordered deadline extended to July 1996
- Stakeholder meetings on May through September 22, 1995
- Pre-proposal draft issued September 13, 1995, with written comments through mid-October

▶ February 1996: The re-emergence of "credible evidence" delays CAM

- OECA reasserts itself
- April 2, 1996 position paper
- Extensive dialogue with EPA Staff, including June 20, 1996, revelation that EPA may forego formal proposal of CAM rules

SCHEDULE FOR FURTHER RULE DEVELOPMENT

▶ EPA considering further changes in response to comments on September 1995 draft

▶ Current court-ordered deadline for CAM adoption is July 1996, but rules have not yet even been formally proposed. EPA is negotiating for extension to July 1997, possibly including agreement to go "direct final" by July 1997 on theory that CAM is logical outgrowth of EM proposal

OVERVIEW OF SEPTEMBER 13, 1995, PRE-PROPOSAL DRAFT

▶ Many changes are possible prior to formal proposal/adoption, especially regarding

- Use of CAM data (credible evidence issue)
- Applicability

Any specific areas for which likely changes have been reported since October 1995 are highlighted in italicized type.

- Rules to be codified in new Part 64, but **would establish the monitoring, reporting and recordkeeping ("MRR") criteria for approvable Title V (Part 70) permits, all in addition to whatever MRR is specified in existing applicable requirements**
- Would govern all Title V permits issued starting 6 months after final promulgation. *EPA reportedly has acknowledged that the linkage to Part 70 needs work.*
- **Announced intention is to require "closer attention to control device performance"**
- Applicant must, **for each emission unit/applicable requirement/pollutant combination** (Appendix 3B, Figure 1):

  (1) Determine applicability (Appendix 3B, Figure 1a)

  - Define emission units
  - Determine pollutant-specific emission rates
  - Identify pollutant-specific applicable requirements
  - Determine appropriate "Tier" (Appendix 3B, Figure 1b);

  (2) Develop CAM plan;

  (3) Obtain permitting authority approval of plan (Appendix 3B, Figure 1c);

  (4) Upon permit issuance, comply with CAM plan.

- Permit authority (e.g., TNRCC) to review each CAM plan for adequacy prior to issuing Title V permit, and to incorporate elements of plan into permit.

APPLICABILITY

The pre-proposal draft rule establishes three tiers of applicability; however, the only difference between Tiers 1 and 2 is that, in some cases, Tier 2 units may be eligible for a reduced monitoring frequency. The first two tiers are so broad that it is not clear that any unit would be in Tier 3 (which imposes "only" recordkeeping requirements for those not in Tiers 1 or 2).

Tier 1

(1) Any "emission unit" covered by NSPS or Part 61 (old) NESHAP, if NSPS or NESHAP itself already has some required monitoring

(2) Any major emission unit, as determined by any one of the multiple "major source" thresholds under the Act, if some monitoring is required by the underlying applicable requirements.

(3) Units in a source category that would be covered by NSPS or Part 61 NESHAP but for date of construction/modification

Tier 2

(1) Major emission units not subject to any existing monitoring requirement

(2) Any emission unit subject to an applicable requirement for which any monitoring is required

(3) Any emission unit that uses a control technology

Reports suggest that EPA will scrap this complex, tiered applicability approach; instead, the rules would apply only to emission units that have add-on controls. Size limitations (e.g., units emitting 25 percent of major source thresholds, assuming no controls) also are possible.

CAM PLANS

Applicants must submit with Part 70 permit application a plan or plans to address each emission unit/applicable requirement/pollutant combination, except if the applicable requirement is NSPS or NESHAP adopted after 11/15/90. Under current EPA view, each NSR permit condition (and representation) would be an applicable requirement (in addition to all applicable requirements created by rules). **For each combination, the CAM plan must include the following basic elements (at least seven elements in all):**

- **Monitor one or more indicators of control device performance** (with "control device" defined to include raw material limits, process design, etc.) as "necessary to ensure the detection of potential adverse changes in control device performance"
  - Operate and maintain parameter monitors per manufacturer specifications
  - Develop QA procedures for parameter monitors
  - Establish a parameter monitoring frequency "commensurate with time period for a potential adverse change in control performance that would affect compliance status"

- Create data availability specifications considering downtime expected with proper O&M of monitor

► **Establish operating ranges for the parameter(s) being monitored:**

- Levels such that emission unit meeting them "will remain in compliance with applicable emission limitations or standards"

- Parameter levels to be independently enforceable, either immediately and directly or to trigger corrective action. If applicant elects corrective action option, then operating ranges shall provide margin of compliance with emission limitation(s).

► **Corrective action plans** for all unit/applicable requirement/pollutant combinations for which applicant does not want directly enforceable parameter limits. Plans to include:

- Specific time for initial response and maximum time for returning parameter to allowable operating ranges;

- Maximum number of allowable "discrepancies" (exceedances of parameter levels), considering type of unit and control technology and margin of compliance associated with parameter range(s) selected; and

- Exceeding maximum number of discrepancies is either directly enforceable, or -- if fewer than two discrepancies above limit -- permittee must institute "quality improvement program."

► **Justification of plan**, in writing, to cover all elements:

- Data from site-specific testing generally needed to establish operating ranges (akin to DCPL);

- For Tier 1 units, justification must address in detail why site-specific compliance testing data is not being used; and

- Agencies can request testing to evaluate approvability of plan.

► Each element of plan is separate applicable requirement

► Semiannual reporting of deviations from CAM plan requirements and number of deviations from operating range parameters

CAM PLAN REVIEW/APPROVAL/REVISION PROCESS

- ▶ Permitting authority to at least review CAM plan for completeness
- ▶ Substantive adequacy can be judged or rejudged at any time by either agency

MAJOR COMMENTS ON PROPOSAL

- ▶ Industry groups varied in degree of opposition
- ▶ Texas Title V Planning Committee/Texas Chemical Council Issues (Appendix 3C)

(1) Implementation via Title V would overwhelm the permit process:

- 3,000+ sites in Texas
- Thousands of source/pollutant/requirement combinations at each site
- 7-8 new applicable requirements for each existing one
- Applicability determinations alone a major burden (Appendix 3B)
- Substantive decisions almost certain to be contentious: CAM creates multiple new work practice standards akin to leak detection and repair programs

(2) There is no need to impose any new monitoring requirements via Title V

- Current rules have been developed with appropriate monitoring
- CAA programs evolve as necessary to resolve monitoring deficiencies (EPA examples)
- Other non-regulatory incentives not considered by EPA

(3) If EPA decides to compel a review of the adequacy of current monitoring requirements, at least it should allow each State the option of doing so by rule, not in each permit.

- Proposed/endorsed by TNRCC
- Allow "State CAM Plan": Programmatic demonstration
- Texas rules already compel appropriate attention to control device performance (especially upset reporting program)

- Rule fixes far more efficient than permit-by-permit, with improved public participation and faster implementation

- Rule effectiveness improvements becomes quantifiable for SIP credit

(4) CAM data should not be used for enforcement

- Major issue for all industry representatives

- Concern is creation of massive amounts of data, effectively increasing originally intended stringency of rule

(5) Annual compliance certifications should simply require each permittee to reaffirm that it has reported all "deviations" throughout the year

- Prompt reporting of all "deviations" (possible violations) to be required by Title V

- Annual certification can simply reaffirm compliance with duty to report deviations

- FCAA does not compel detailed annual certification

(6) EPA should not retain any "periodic monitoring" requirements

April 4, 1995

Status of Clean Air Enhanced Monitoring Rule
OAR & OECA

Earlier this month President Clinton proposed a series of significant reforms to reinvent environmental regulations and to spearhead a new cleaner, cheaper and smarter direction for environmental protection. The goal of the reinvention effort is to design performance-based environmental programs in a manner that provides industry with the flexibility to comply in cost-effective ways, while requiring accountability for achieving results.

Using these principles as a basis for regulatory decision-making, the Environmental Protection Agency (EPA) has decided to withdraw the enhanced monitoring rulemaking now under review at OMB in order to take a fresh look at its proposed enhanced monitoring approach under the Clean Air Act. EPA intends to build on the regulatory work that has been accomplished to date and to design a simpler, more flexible approach. One approach which we are currently developing would revise the proposed rule so as to focus on improving current operation and maintenance (O & M) requirements. An enhanced O & M protocol would require that a source owner provide documentation that it has operated and maintained a control device or process operation in accordance with established, reliable operating and maintenance practices and that any necessary corrective actions have been implemented to ensure that emissions have been reduced. EPA will also consider other approaches as part of this review.

One of the first steps the Agency will take is to hold a stakeholders' meeting within the next three weeks. At this meeting EPA will continue to work with representatives from industry, states, and environmental groups to obtain their assistance in developing an enhanced monitoring rule that meets the objectives of the President's Environmental Regulation Reinvention effort including minimizing reporting and recordkeeping requirements.

Such a program would be designed in a way that provides greater assurance that pollution control equipment is operating in accordance with underlying standards. The emphasis will be on compliance and accountability, with state and federal enforcement remaining a tool for those who fail to meet the requirements.

We hope to develop an approach that will allow EPA to quickly issue enhanced monitoring requirements that build on the requirements of existing rules and ensure that the environmental results expected from those rules are being achieved. In addition, through its industry-specific regulations, such as its standards for toxic air pollutants, EPA will continue to advance the development of monitoring methodologies, and where appropriate, to require the use of monitoring methods that can directly demonstrate continuous compliance with emission limits. EPA will also seek to provide voluntary incentives to use more accurate monitoring

methods as part of the open market emission trading rules it intends to propose in June.

The other benefits of this approach would include the following:

* Facilitates integration by State and local governments of the enhanced monitoring provisions into their operating permit programs, including the application of enhanced monitoring requirements into specific operating permits with minimum delay;

* Provides a cost-effective option for industry in meeting the requirements of the Act; and

* Can be quickly implemented by industry, ensuring prompt return on environmental benefits.

In order to foster integration of the program with the operating permits and air toxics programs, the Emissions Monitoring and Analysis Division in EPA's Office of Air Quality Planning and Standards will take the lead in developing the O & M and alternative concepts. EPA will seek an extension in the court-ordered deadline for issuing the final enhanced monitoring rule to allow time for stakeholder involvement in the development of the rule.

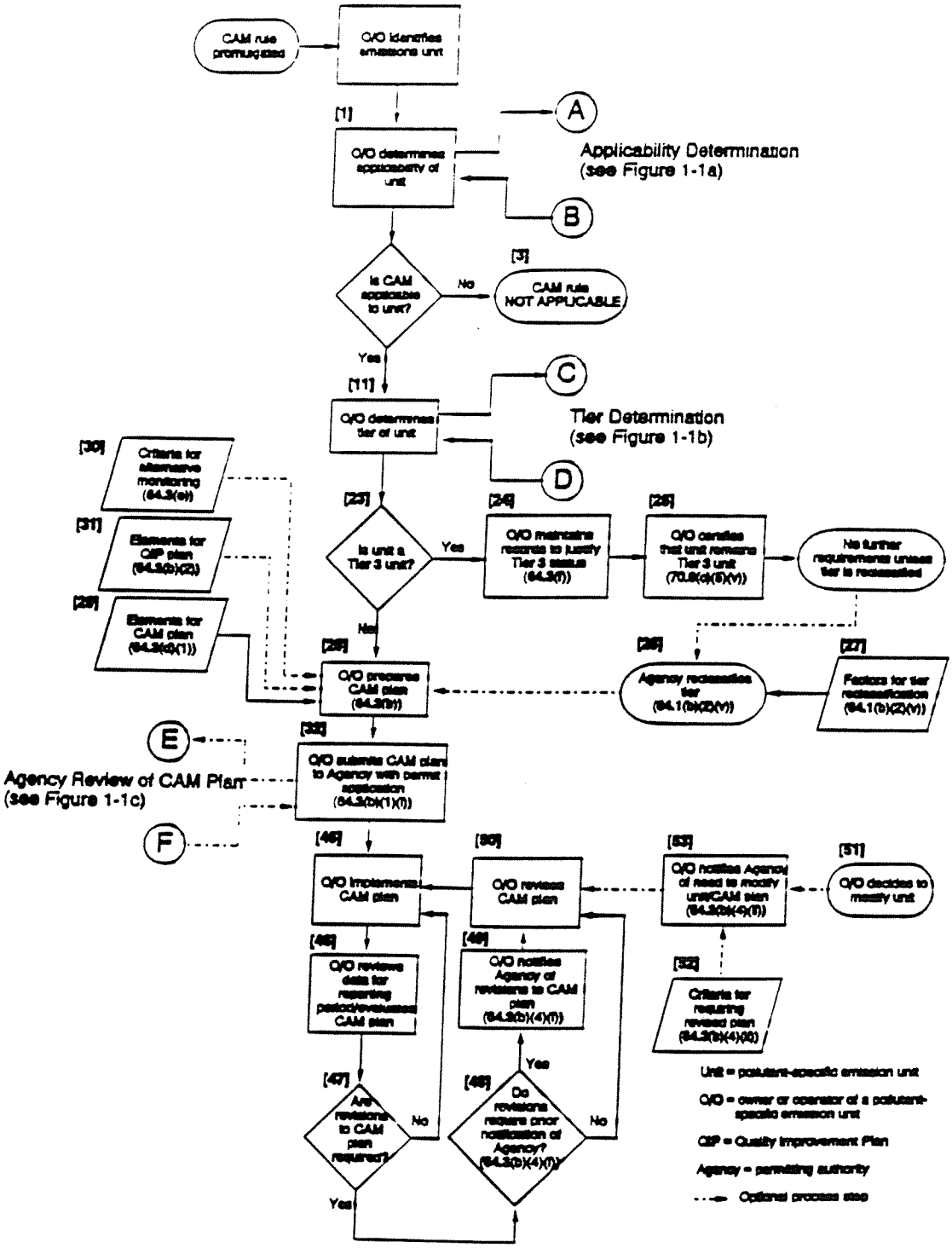
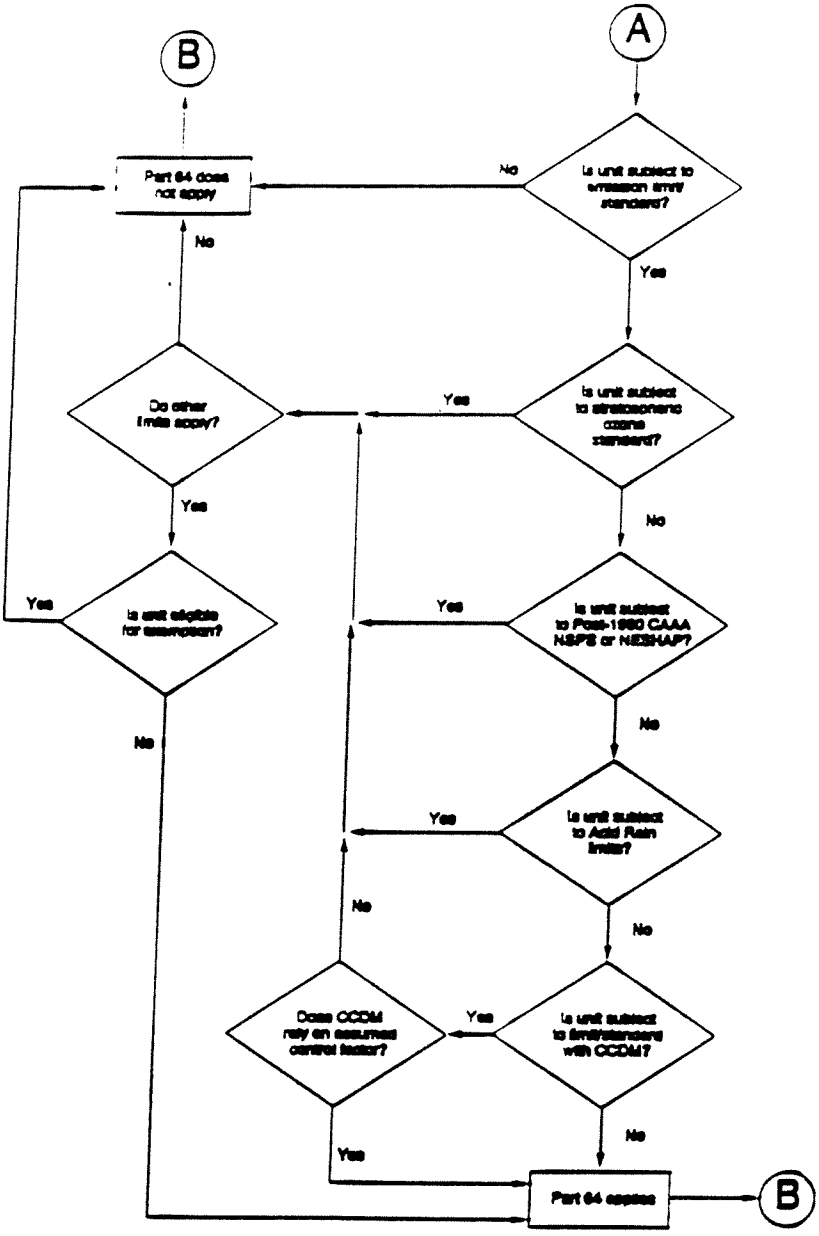


Figure 1. Flow diagram for CAM process.



Note: Process to be followed on a pollutant-by-pollutant basis

CCDM = continuous compliance determination monitoring
Unit = pollutant-specific emission unit

Figure 1a. CAM applicability flow diagram.
(§ 64.1(a) and (b)(1))

PREDECISIONAL DRAFT
DO NOT QUOTE OR CITE--09/15/95

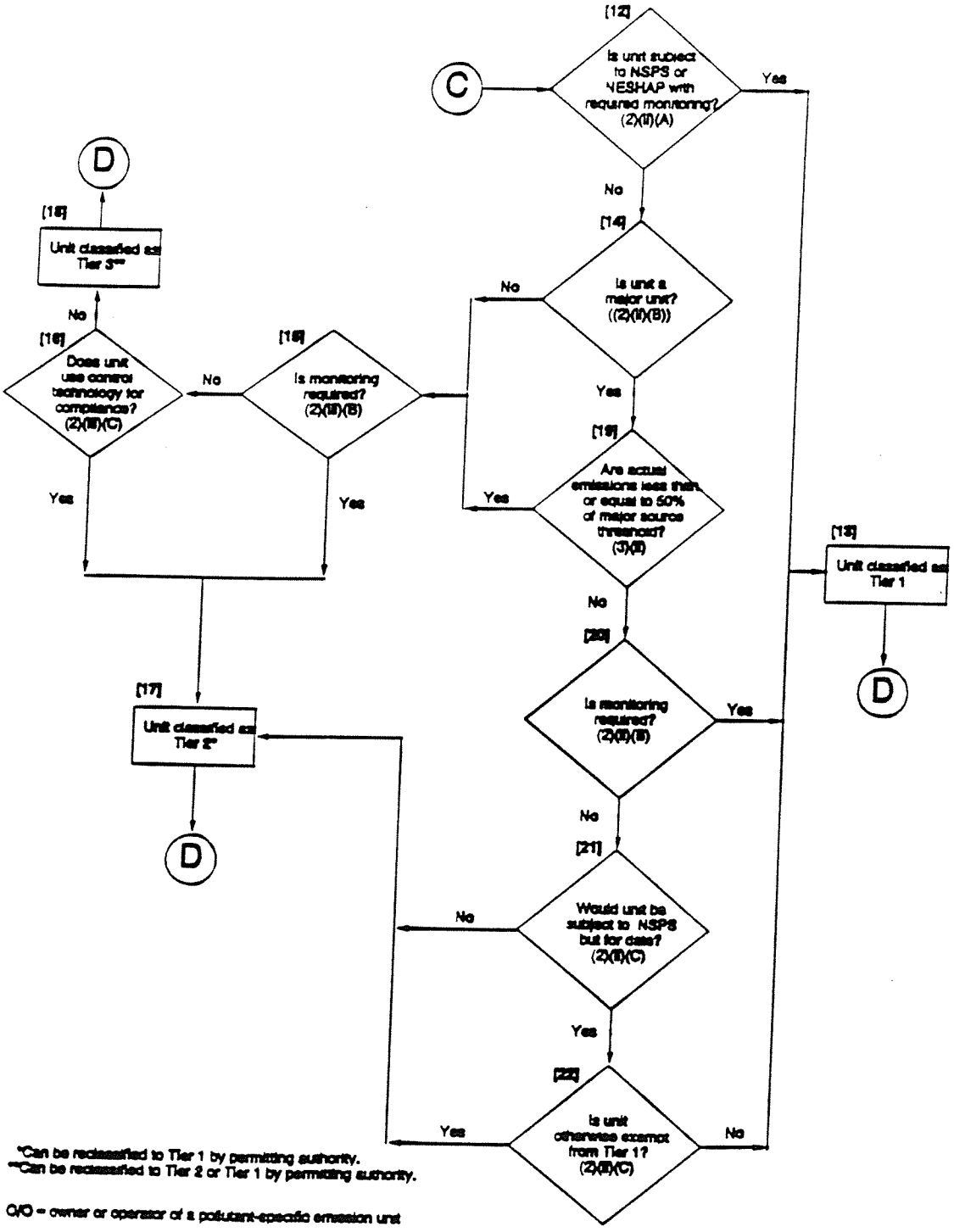


Figure 1b. Flow diagram for CAM tier determination. (§ 64.1(b)(2) and (3))

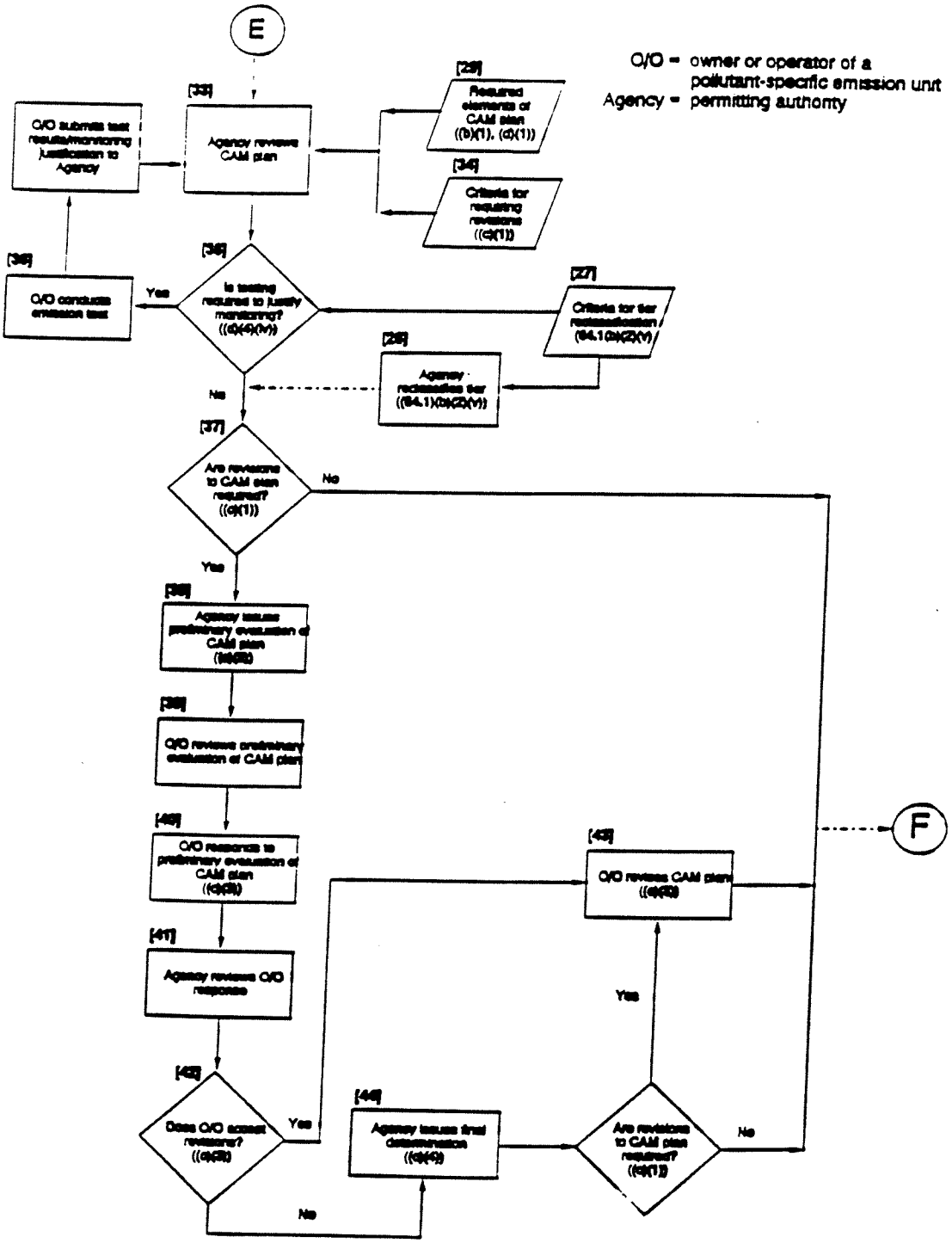


Figure 1c. Flow diagram for CAM plan submission/revision. (§ 64.3)

TEXAS TITLE V PLANNING COMMITTE

Steering Committee
Larry Feldcamp (Chair) · Baker & Botts, L.L.P
Richard Bausell · Natural Gas Pipeline Co.
Bonnie Blam · IBM Corporation
Steven Cook · Lyondell Petrochemical Company
Jim Cuthirth · Champion International
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Jim Myers · RMT/Jones & Neuse
Marc Phillips · Enron
Lynn Reed · Warren Petroleum Company
Mary Studlick · Exxon Company, U.S.A.
George Talbert · Mobil Oil Company

October 17, 1995

VIA OVERNIGHT
Mr. Peter Westlin
U.S. Environmental Protection Agency
Office of Air Quality Planning
and Standards
I-40 and Old Page Road
Research Triangle Park, N.C. 27711

Re: Detailed Comments on September 13, 1995, Pre-Proposal Draft of Compliance Assurance Monitoring Rules

Dear Mr. Westlin:

On October 6, 1995, I transmitted to you a summary of the Texas Title V Planning Committee's most basic concerns with the above-referenced draft rules, and a statement of our interest in resolving those concerns. Due to the short time for review and evaluation of the draft rules, we were unable to provide you with more detailed support for our concerns at that time. The enclosed, more detailed comments are to more fully explain our previously identified concerns, and to elaborate on additional issues. We hope you will consider both our original comment letter and these more detailed comments as you develop the formal proposal.

We thank you again for the open process you have used for rule development, and for your consideration of our views. Please contact me at (512) 479-9749 for any further information. We would welcome the opportunity to meet with you at your earliest convenience to discuss our concerns and suggestions for resolving them.

Sincerely,

TITLE V PLANNING COMMITTEE

By: _____
Eric Groten
Co-Chair

cc: U.S. EPA Air Docket (LE-131)
Room M-1500
401 "M" Street, S.W.
Washington, D.C. 20460
Attention: Docket No. A-91-52

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COMMENTS ON SEPTEMBER 13, 1995, PRE-PROPOSAL DRAFT OF COMPLIANCE ASSURANCE MONITORING RULES

Submitted to:

U.S. ENVIRONMENTAL PROTECTION AGENCY

By:

TEXAS TITLE V STEERING COMMITTEE

October 17, 1995

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COMMENTS ON DRAFT CAM RULE

I. THE PROPOSAL WOULD OVERWHELM THE TITLE V PERMIT PROCESS.

The compliance assurance monitoring ("CAM") process outlined in the September 13, 1995, draft rule would compel the wholesale creation of work practice standards via the Title V permit process. The required monitoring of one or more parameters and the prescribed response to monitored "discrepancies" is not different in principle (but may be far more complex in practice) than, for example, the leak detection and repair ("LDAR") requirements compelled by rule for the control of fugitive emissions of volatile organic compound emissions from petrochemical industry and other potential VOC sources. These complex work practice standards have taken considerable cost and time to develop and implement, and they are as substantive as any other applicable requirement established under the federal Clean Air Act ("FCAA" or "Act").

A proposal to develop new monitoring and work practice requirements permit-by-permit, pollutant-by-pollutant, and source-by-source is inconsistent with the well-understood purpose of Title V:

> In general, [the Title V] program was not intended by Congress to be the source of new substantive requirements. Rather, operating permits required by Title V are meant to accomplish the largely procedural task of identifying and recording existing substantive requirements applicable to regulated sources and to assure compliance with these existing requirements. Accordingly, *operating permits and their accompanying applications should be vehicles for defining existing compliance obligations rather than for imposing new requirements or accomplishing other objectives* [U.S. EPA, Title V White Paper, July 1, 1995 (emphasis added)].

The draft CAM rule, contrary to the above EPA pronouncements, would, in fact, impose a bewildering array of new applicable requirements via Title V permit: Because each of the seven or eight requirements of a CAM plan are to be enforced as separate applicable requirements, each existing applicable requirement (e.g., emission limitation) will breed seven or eight new ones.[1]

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[1]The draft *Guidance Document* summarizes in Table 1-4 the eight elements of an approvable CAM plan, one of which (the "Quality Improvement Plan") is deemed optional. According to the draft rules, each of these seven (or eight) elements is to become a separate "applicable requirement."

Texas is in the process of developing a streamlined approach to its Title V permit program.[2] This approach relies on a rigorous and continually improving site investigation process, by which (1) the Texas Natural Resource Conservation Commission ("TNRCC") requests considerable data in advance of an inspection, (2) the site owner compiles that data in accordance with published guidelines, and (3) the TNRCC inspector evaluates that information and investigates the site, and (4) issues a report on all applicable requirements (not just federal ones) and on compliance with those requirements, again in accordance with published source investigation guidelines. Where this approach is used, a Title V permit itself need only provide the most basic summary of applicable requirements: The requisite mutual understandings of Clean Air Act obligations instead are achieved in detail through the site investigation process. The end result of this streamlined process is the dedication of Title V resources to the development of correct mutual expectations between the regulated community and the inspector, and to a thorough check on compliance with those expectations by the entity charged with enforcing them. This program provides not just a "reasonable," but a rigorous "assurance of compliance."

This rigorous yet streamlined approach would be derailed by the draft CAM rule. Instead of using Title V to create a mutual understanding of existing applicable requirements, Title V would be used for very substantive and almost certainly contentious determinations and to create innumerable, entirely new (work practice-type) applicable requirements for almost every air contaminant-emitting activity. Furthermore, the regulatory system by which those requirements are to be established is unnecessarily complex.

A. THE DRAFT RULE IMPOSES AN OVERWHELMING BURDEN ON EACH TITLE V PERMIT APPLICANT.

In the draft rule preamble, EPA recognizes that the CAM plan process will impose a considerable paperwork burden on reviewing authorities. The burden on the author, which is not even mentioned in the draft rule, even though it is likely to be much greater than the burden on the reviewing authority. Furthermore, the burden on applicants arises not only from the CAM requirements themselves, but just from the initial exercise of simply determining their applicability.

1. The Applicability Determination Alone Could Overwhelm the Permit Applicant.

The applicant's first obligation under the draft rule is to disaggregate its site into its various "emission units." This term is defined as "any part or activity of a stationary

[2]Starting in June of this year, a great many Texas businesses organized the Title V Planning Committee to develop recommendations for streamlining Texas' Title V program. Those recommendations were endorsed by the Texas Natural Resource Conservation Commission on September 27, 1995, at which time the Commission directed its Staff to revise the Texas program consistent with those recommendations. A copy of those recommendations were transmitted to you by the Planning Committee on October 6, 1995.

source that emits or has the potential to emit any regulated air pollutant" [40 C.F.R. § 70.2]. Because this definition is extremely vague, yet critical to determining CAM applicability, we can reasonably foresee this becoming a difficult and contentious issue for years to come. One need only look at our collective experience with "source" definition issues over the past twenty-plus years, several of which are still unresolved.[3] Adding further potential confusion is the prospect that the boundaries of each emission unit might be different depending on which applicable requirement or regulated pollutant is being evaluated. The complexity and thus the difficulty of the applicability determination process is evidenced by the applicability determination flow sheets (Figures 1a and 1b) in the *Guidance Document* accompanying the draft rule.

Once "emission units" are delineated, the applicant must then overlay the applicable requirements for that unit. This, too, must be done pollutant-by-pollutant. The number of potential combinations thus becomes extraordinary. For but one example, The Dow Chemical Company has evaluated just one of its sites and determined, as best as possible, that there are 14,000 unit/requirement/pollutant combinations to consider.[4]

Note that this evaluation for just one Texas site does not include the great many requirements imposed by minor new source review ("MNSR") permits. If these are deemed "applicable requirements" that must be "CAMed," the burden would grow exponentially. Therefore, we urge EPA to clarify that CAM would not apply to permit-based requirements.

Once the site is broken down into the vast array of combinations, each must be analyzed to determine the appropriate applicability tier. The tier depends at least in some cases on "potential to emit," so additional investigations may be required to determine this figure. The Agency is well aware that this concept has engendered 20 years of ongoing debate. We foresee additional potential for disputes over the Tier 1 category for units that would be covered by a new source performance standard ("NSPS") but for their date of construction.

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[3]One stakeholder at the September 22, 1995, meeting provided but one example of the ambiguities inherent in the term "emission unit": What is the "emissions unit" for purposes of potential fugitive emission sources at a petrochemical site? In response, EPA Staff appeared to acknowledge the vagueness of the definition and the potential difficulties in applying it.

[4]This figure is intended to be conservative. The Dow Chemical Company Freeport site has 2400 separate "facilities" as defined in Texas, which are assumed to be equivalent to "emission units." There are an estimated 30 major air rules applicable to equipment at that site (not counting MACT standards), which usually are specific to a single pollutant and a single type of equipment. This yields an estimated 2800 rule/unit combinations. Each rule, in turn, is conservatively assumed to impose five applicable requirements on each equipment item. The result of these conservative assumptions is the estimate of 14,000 possible unit/requirement/pollutant combinations. If each combination requires a CAM plan with a minimum of seven elements, then the site would need to develop about 100,000 individually negotiated new applicable requirements.

In sum, history tells us that applicability issues will drain considerable resources from everyone involved in the process. Even if our worst-case expectations are not fully realized, however, EPA must recognize that applicability arguments will direct at least some resources away from other, more productive pursuits. This waste -- however large or small -- is the inevitable outcome of any permit-based regulatory program with arbitrary applicability provisions.

2. **The Development of Parameter Monitoring and Associated CAM Plans Will Overwhelm Title V Permit Applicants.**

If and when each applicant ultimately is able to reach its own conclusions about which "emission units" are subject to which "tier," it must then develop a CAM plan as required for each tier.[5] While the draft rules outline each required component and the objectives that each component must achieve, virtually no guidance is provided for most of the potential unit/requirement/pollutant combinations that will be subject to the rules. Most significantly, the burden is on the permit applicant to justify -- in writing -- that its proposed CAM plan will achieve each objective of each required component. The preamble also contemplates the creation of site-specific test data to support the justification for each of the seven or eight basic CAM plan requirements, or a detailed justification for not generating and using such data. Thus, depending (but only in part) on permitting authority expectations, each CAM plan -- and there may be many, perhaps thousands for each site -- could become a document of a magnitude comparable to a graduate thesis, with voluminous appendices ("the supporting documentation"). The draft rules also do not foreclose the possibility of having to repeat this entire exercise upon permit renewal; in fact, the preamble raises the possibility of an *annual* review.

The draft rules require each of the following specific components of a CAM plan, each of which is at least somewhat problematic:

a. **Establishment and justification of one or more indicator parameters for each "control device":** The selected indicator(s) must be those "necessary to ensure the detection of potential adverse changes in control device performance," with "control device" defined to include raw material limits, process design, etc. As noted by EPA, many situations would require two or more indicator parameters to accomplish this goal. If a situation calls for multiple parameters, then the remaining CAM plan components would be multiplied, as well.

The draft CAM concept should not be applied to either (1) applicable requirements that are not numeric emission limitations, or (2) units without add-on control devices. The

[5]As set out in the draft rule, we see comparatively little difference between the requirements imposed on Tier 1 and Tier 2 units (only an undefined ability for Tier 2 units to propose slightly less frequent monitoring). We also see almost no source as being eligible for Tier 3. Therefore, we expect almost every "unit" to require a full-blown or near-full blown CAM plan for each applicable requirement/pollutant combination.

paradigm assumed by EPA is a process unit with a single end-of-pipe control device that vents to a single stack (emission point) that is subject to a numeric emission limitation. Outside of that paradigm, the scheme described by EPA makes no sense.

In the case, for example, of a work practice standard such as LDAR for fugitive emissions, how is the permit applicant to define parameters other than those already described in the rule (i.e., leak level and repair time)? EPA essentially would be requiring each permit applicant to rejustify the underlying applicable requirement (e.g., 40 C.F.R. Part 60, Subpart VV). The only sensible answer is to exempt such requirements altogether, because LDAR and other work practice programs already are "CAM" programs.

b. **Installation, maintenance and operation of monitor(s) for the selected parameter(s):** One Texas company (Texas Utilities) has estimated that the CAM rule would impose on it a capital cost of $50 million and annual operating costs of $10 million, even though it already has continuous emission monitors on the emission points that account for 99% of the emissions from the company's operations. Given that Texas Utilities accounts for less than 1 percent of the estimated 3000 sites in Texas, we may extrapolate State-wide monitor installation and operation costs to exceed $1 billion.

c. **Development and justification of quality assurance procedures and downtime parameters for each indicator monitor:** The draft rule would require documentation and use of manufacturer-recommended QA procedures. This approach, however, creates the incentive for manufacturers to develop potentially excessive "repair or replace" guidelines, which would drive up monitor operation and maintenance ("O&M") costs and spare part inventories and costs.

d. **Determination and justification of monitoring downtime:** Here, the only criteria is the level of data availability expected with "proper operation and maintenance" of each monitor. The applicant thus is expected to determine either (1) for existing monitoring systems, the level of downtime experienced historically, and justify that it historically has undertaken "proper" (a very vague term) O&M of that monitor, a resource-intensive archival exercise, or (2) for new monitoring systems, speculate concerning future performance and justify that speculation.

e. **Identification and justification of monitoring frequency:** The goal of this CAM plan requirement is to specify a frequency "commensurate with the time period for a potential adverse change in control device performance that would affect compliance status." This raises a host of difficult issues: What "adverse changes" are possible? Over what time period might they occur? How, if at all, would these adverse changes affect compliance status? This inevitably will drive the regulated community to continuous monitoring methods, and to greater costs.

f. **Establishment and justification of acceptable ranges for each parameter:** In many cases, the draft rules would require source testing to show that compliance with the

parameter will yield compliance with the underlying emission limitation(s). Although the demonstration requirements are somewhat less detailed than envisioned under the previously proposed Part 64 (enhanced monitoring) rules, the demonstration requirements in the draft rule are no different in principle than the demonstrated compliance parameter limit ("DCPL") approach in the former rule. As such, it is almost equally of concern, and for the same two basic reasons. First, the demonstration itself will be extremely resource-intensive (compelling stack testing, etc.). Second, and as fully discussed in the prior rulemaking, DCPLs would unlawfully increase the stringency of existing requirements.

g. Establishment and justification of an acceptable maximum number of "discrepancies" (exceedances of specified control device parameter level): The only guidance on this critical aspect of each CAM plan is that it must consider the type of unit and control technology and margin of compliance associated with the parameter range(s) selected. Given the open-ended nature of this requirement, agreement among all involved parties almost certainly will be difficult. It also implies that discrepancies are foreseeable and, therefore, predictable. Even so, each applicant will be forced to know the unknowable, and could be penalized for guessing wrong.[6]

Most applicable requirements (including all NSPS, NESHAPs, and every rule in Texas) carry with them a general duty to use "good air pollution control practices," a duty satisfied by proper O&M of control devices. These general duty rules have worked well without establishing a fixed number indicator events ("discrepancies"), with enforcement discretion instead used to determine whether a source owner has satisfied the general duty. Therefore, the specification of a fixed number of discrepancies is not essential to the functioning of this general duty. However, if the CAM process (however it is implemented) compels the establishment of a fixed number of discrepancies, that number should not be an enforceable limit. If it were enforceable, each applicant would have considerable incentive to maximize the number of discrepancies. Instead, if the concept is retained at all, it should define a number of discrepancies, compliance with which would foreclose any allegations of failure to comply with the general duty. Exceedances of the "maximum" number should not be directly enforceable; rather, they would simply compel a closer examination of whether the general duty had been satisfied.

The CAM rules suggest that EPA is taking the opposite approach: "[The CAM rule] does not mean that compliance with monitoring that is included in the CAM plan is equivalent to compliance with an emission limitation or standard, or a general duty to properly operate and maintain a facility." However, if CAM is to be used solely as sword

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[6]EPA acknowledges that "establishing a maximum number of discrepancies from established operating ranges may be difficult, especially initially." Its proposed solution is to allow implementation of a quality improvement program ("QIP") after experiencing excess discrepancies. However, more than two excess discrepancies would subject the source to enforcement. On what basis has EPA selected this number? It provides little comfort, and creates an incentive to overestimate the number of discrepancies up front and thereby *reduce* attention to control device performance.

and not also a shield, it would create no incentive to establish a lower number of discrepancies and closer evaluations of control device performance.

h. Implement corrective action in time period specified in CAM plan: This CAM plan requirement, too, implies an ability to forecast all possible indicators of control device deterioration and thus the time period for corrective action appropriate to each eventuality. If failure to take "timely" corrective action (as specifically predetermined in the CAM plan) becomes a violation of this new applicable requirement, then the rule simply creates an incentive to stretch out the response times provided in a CAM plan.

B. IF THE PERMITTING AUTHORITY UNDERTAKES ANY MEANINGFUL REVIEW OF PROPOSED CAM PLANS, IT WILL BE OVERWHELMED.

Although the draft rule preamble says nothing about the above burdens on permit applicants to develop and implement CAM plans, it does acknowledge the burden on permitting authorities to review them. EPA's apparent solution -- to delay substantive review at least until after permit issuance if not in perpetuity -- confirms the existence of the burden problem, minimizes any arguable benefit from the CAM program, and casts uncertainty over the whole process.[7] Each permittee would be subject to two or even three masters (the State, EPA, and citizen groups), each of whom could at any time call into question -- even after permit issuance -- the adequacy of any CAM plan. This prevents the certainty of expectations that Title V was supposed to achieve.

As an alternative approach to resolving concerns with process burden, EPA suggests that it will develop guidance concerning each CAM plan component. Such "guidance," however, inevitably assumes the power of a rule, yet is adopted without benefit of rulemaking. The resources dedicated to guidance development instead should be used to fix any rules that EPA believes to fall short of providing a "reasonable assurance of compliance."

C. THE NEED FOR CAM PLAN REVISIONS WOULD IMPEDE PROCESS CHANGES.

The draft rule contemplates the submittal of a new or revised CAM plan sixty days before undertaking a project that would (1) affect the validity of the current CAM plan for an existing unit, or (2) create a new unit/applicable requirement/pollutant combination not already subject to a CAM plan. In either case, this presupposes that the permittee can develop all of the elements of a CAM plan without operational experience, which is not a valid assumption. More important, this pre-submittal requirement would add yet another

[7] By creating a regulatory process and then not "enforcing" its expectations, EPA would create a system that competitively penalizes those who try hardest to comply: Those who submit aggressive plans will pay more than those who do not.

delay to the permit revision process, as well as create uncertainty concerning the requirements under which a proposed unit ultimately will be expected to operate

II. THERE IS NO DEMONSTRATED NEED TO IMPOSE ANY NEW BURDENS ON THE TITLE V PERMIT PROCESS.

The draft rule assumes that current regulatory programs are inadequate to assure that each owner or operator pays appropriate attention to control device performance. It further assumes that sources need regulatory compulsion before they will pay attention to emission controls. Therefore, the draft rule would compel each permit applicant to either re-prove the adequacy of these existing regulatory or voluntarily programs, or to propose improvements to them.[8] Contrary to the intent expressed in the preamble, the draft proposal simply does *not* "focus on situations where existing requirements fail to assure ongoing compliance with emission limitations or standards under the Act." Environmentally necessary improvements in compliance assurance need no new programs, just the full implementation of existing ones.

A. EXISTING PROGRAMS SHOULD BE CONSIDERED BEFORE CREATING NEW ONES.

1. Existing Regulatory Programs Should be Fully Implemented Before Determining Whether a New One is Needed.

Each major Clean Air Act program requires EPA (in its promulgation of federal rules or in its review and approval of state rules) to ensure that adequate monitoring is provided. We see no basis to conclude that EPA has failed to do its job, so that this job must now be shifted to each permit applicant and to the states.

Existing federal programs already require a great deal of monitoring and of data gathering and submittal. The problem, if any, may not be in these requirements, but in what EPA does or does not do with the data it already receives. Most telling is an EPA study reported in the CAM docket that apparently is being used to justify the CAM rules:[9]

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[8] As stated in the preamble, "[a]ny such existing monitoring would serve as a starting point for determining what monitoring methods will be needed to comply with Part 64. In many instances, the required monitoring method may be adequate for data collection; however, subsequent requirements. . .related to performance and operating requirements, use of monitoring data, *and justifying monitor adequacy* all would still apply and could require additional actions by the owner or operator to come into compliance with Part 64 [emphasis added]."

[9] The reference is to an undated EPA white paper simply titled, "Anecdotal Examples of Where 'Paying Attention' to Good Operations and Maintenance Reduce Emissions."

> In the 1980s, enforcement personnel in [EPA] Region V *undertook an aggressive program to actually use the excess emission reports* as notices of violation for enforcement purposes. *By paying attention to these reports*, Region V clearly relayed the word to sources and local agencies that they needed to pay more attention to excess emission occurrences.

The excess emission reports described in this report already were required to be submitted to EPA. Thus, what this anecdote indicates is not that current programs themselves are inadequate, but that they may be inadequately implemented by EPA.

2. Existing Voluntary Programs Should be Credited in Any Evaluation of the Need for New Regulatory Programs.

Every company already has numerous built-in incentives to properly operate and maintain every part of its operation, *including* emission control devices, without governmental compulsion. Just because these voluntary efforts may not yield precisely the same outcome as the draft CAM rules does not mean that they do not accomplish the same objectives as the draft CAM rules. The existence of the following inherent incentives and non-federal programs, calls into question the need for a prescriptive new federal mandate.

First, proper O&M increases the life of any capital good, and thus reduces replacement cost. "Paying attention" to control device performance also can yield direct cost reductions, as illustrated by one EPA-generated example:

> The EPA publication, Alternative Control Techniques Document -- Industrial Cleaning Solvents published February 1994 documented a number of case studies whereby good administrative tracking procedures significantly reduce solvent use and thus reduced emissions. The general finding of the study is that tracking solvent use causes operators to pay attention and this results in reduced solvent losses. "The general consensus by the plants is that overall benefits and cost savings of the changes outweigh the costs to implement and maintain the accounting system." In some cases plants reported reductions in State-imposed emission fees. "One facility reduced its usage of one cleaning solvent by 76%. Another changed production schedules so that fewer cleanings were needed. They reduced the amount of waste disposal by 35,000 gallons in one year with a direct savings of $100,000."

Proper O&M also reduces upsets and the public or regulatory scrutiny that results from them, which has been greatly magnified by numerous state and federal release reporting requirements over the past decade. We expect this is why EPA found the following example of a voluntary "CAM" program:

> OAQPS conducted a CEM Pilot Project Study between 1982 and 1986 during which a number of utilities in Missouri and Iowa were studied to learn how

the CEM data could be used as an O&M tool to reduce excess emissions. In the course of the study, it was learned that every company used CEM data as feedback to monitor control performance. In addition, one company took increasingly stringent corrective measures (i.e. load changes, coal blending procedures) as the opacity readings increased. In this way they had virtually eliminated all malfunctions of its particulate controls during the study period.

Before EPA acts on its belief that we need a new program to ensure that operators "pay the same attention to their pollution control operations with the same care they do their product operations," we also urge the Agency to consider the effect of the demands of customers and standard-setting organizations such as the ISO. For example, the Chemical Manufacturers Association Responsible Care® program requires annual reporting of emissions to local emergency planning committee, which creates substantial incentive to minimize emissions, including via careful attention to control device performance.

B. ANY GAPS IN REGULATORY REQUIREMENTS GOVERNING CONTROL DEVICE PERFORMANCE WILL BE FILLED AS NECESSARY AND APPROPRIATE VIA THE NORMAL EVOLUTION OF EXISTING CLEAN AIR ACT PROGRAMS.

EPA proposes to exempt from the CAM rules any applicable requirement resulting from an NSPS or NESHAP adopted after 1990. This is because the Agency intends -- quite properly -- to incorporate any necessary monitoring provisions into those rules as they are adopted or revised. By stating this intention, however, EPA is acknowledging (1) that it is more efficient and cost-effective to adopt monitoring requirements in this manner,[10] (2) that it has the authority to do so, and (3) that the entire focus of the CAM bureaucracy will be on *old* rules. Given the evolutionary nature of each Clean Air Act program, there is no reason to require each permit applicant and permitting authority to revisit the adequacy of all of the Agency's old rules.

[10]If it is more cost-effective to *prevent* gaps by rule, why is it not more cost-effective to fix them the same way, particularly since all "old" rules ultimately must be revisited anyway, as directed by environmental needs?

1. New Source Performance Standards Will Be Upgraded by Rule.

Perhaps the leading category of applicable requirements to be "CAMed" under the draft rule is the NSPS.[11] The Clean Air Act, however, already requires each NSPS to be revised at least once every eight years [CAA § 111(b)(1)(B)], so any concerns about the adequacy of those standards can be addressed at the time they are re-examined. Given that post-1990 standards are presumed adequate to satisfy EPA's compliance assurance expectations, those that may not (i.e., those adopted before 1990) should be re-examined no later than by 1998. As discussed below, this is sooner than EPA can reasonably expect the CAM process to be completed under Title V. In addition to complying with clear statutory requirements, this process has the added advantage of ensuring national consistency for what should be national standards.[12] It also is far more efficient to undertake the process once for all sources subject to the standard than as many times as there are sources. Finally, all relevant factors -- including costs and benefits -- can be considered during that one-time standard-setting process.

If EPA nonetheless decides to "CAM" NSPS affected facilities via the Title V process, we urge the Agency to limit this process to units that indeed are "affected facilities." We see no basis to include facilities are not "affected" because they were constructed or modified before the effective date of a particular NSPS. The NSPS, including their monitoring requirements, are statutorily limited to new or modified facilities because the decision to construct or modify can be made with full consideration of the relevant NSPS requirements in both the project feasibility assessment and in project design. Furthermore, there is no necessary connection between the potential environmental significance of a unit and its coverage in an NSPS source category. Environmentally significant units will be covered (according to the tier system in the draft rule) by the category for "major" units, whether or not the unit would have been covered by an NSPS but for date of construction or modification. Therefore, we urge EPA to exclude from CAM coverage any units covered by NSPS but for date of construction or modification.

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[11]Most examples used by EPA Staff during the stakeholder process involved NSPS sources, and EPA has placed in Tier 1 not only NSPS affected facilities but also facilities that would be affected but for date of construction or modification. This emphasis seems misplaced for several reason. First, many NSPS standards already require control device parameter monitoring and excess emission reports. In addition, each affected facility is subject to a general duty provision [40 C.F.R. § 60.11(d)]. Finally, in states with rigorous NSR programs (such as Texas), NSPS assume minimal regulatory importance: Almost any activity subject to NSPS also is subject to NSR permitting and a BACT demonstration in which any applicable NSPS is considered to establish the *minimum* level of controls and associated monitoring.

[12]Proceeding case-by-case inevitably will result in inconsistencies between determinations. Permit engineers within individual states and EPA regions, much less among states and regions, simply will not reach the same conclusions about what requirements are directed by Part 64. If past is prologue, EPA headquarters staff will then wind up issuing guidance memoranda in an effort to get all of the regulatory army marching in the same step, which will lead to litigation, which will lead to more rulemaking, which will further bureaucratize the entire process and delay its effective implementation.

2. National Emission Standards for Hazardous Air Pollutants under Part 61 Need No Re-Examination.

There are several reasons why Part 61 NESHAPs do not need to be "CAMed." First, the Part 61 standards are being superceded in practical effect by maximum achievable control technology ("MACT") standards adopted pursuant to Title III of the 1990 Amendments. Second, all Part 61 sources are subject to monitoring appropriate to the needs of the respective standards. Third, they are subject -- like NSPS affected facilities -- to a general duty provision [40 C.F.R. § 61.12(c)]. Therefore, no resources should be dedicated to re-evaluating the adequacy of the Part 61 standards (including their associated monitoring requirements) via the CAM process.[13]

3. State Implementation Plan Rules are Self-Correcting.

The last major category of applicable requirements to be "CAMed" is the huge variety of rules adopted by each State and approved by EPA as necessary to attain the national ambient air quality standards ("NAAQS"). Because of the structure and operation of the Act, however, there is absolutely no reason to "CAM" each of these thousands or tens of thousands of state implementation plan ("SIP") provisions via Title V.

The sole purpose of any SIP provision is to further the goal of attaining the NAAQS. If an area is not attaining the standards and part of the reason is the inadequacy of monitoring or of the operation and maintenance of control equipment, then a further tightening of monitoring or O&M-related requirements inevitably will be part of the solution. By way of one small but representative example, TNRCC recently amended its rules governing external floating roof VOC storage tanks. While this rule established a maximum seal gap, it did not specify a repair period. The amendment to specify a repair period (the "corrective action") improved the effectiveness of that rule in a way that allowed for SIP credit.[14]

A more global illustration is provided in the EPA-drafted summary of anecdotal evidence on the value of "paying attention to good O&M":

> The local pollution control agency in San Francisco reduced ozone violations from 67 days in 1969 to one day in 1994 and they attributed this success to a CAM-type emission monitoring program. One essential part of their monitoring program is that sources are required to do their own performance monitoring. Another is that the agency itself performs

[13]At the very least, and as it proposed in the 1993 version of Part 64, EPA should exclude the asbestos NESHAP [40 C.F.R. Part 61, Subpart M] from coverage under the CAM rules.

[14]Other Texas programs to promote attention to control device O&M and corrective action are described in Section III.B of these comments.

unannounced "monitoring audits" from time to time. Frequency of monitoring is reduced as margin of compliance gets larger. Likewise, penalties escalate as the number of violations increase.

Neither the Bay Area Quality Management District nor any other agency responsible for attaining the NAAQS needed or needs a CAM rule to continually improve monitoring and compliance assurance programs: They already are doing so if and as needed to attain the standards.

The same EPA summary paper includes several other examples. In Ohio:

> The Ohio EPA is in the process of working with four refineries to develop comprehensive facility-wide O&M plans after excess emission reports indicated process/malfunction problems. One refinery now has a plant-wide emission limit for which compliance is based on a spreadsheet computation. A key aspect of the compliance program at this facility is a detailed O&M plan with preventive maintenance and targeted CEMs requirements with QA/QC requirements. State representatives indicated that the O&M efforts, as well as the additional control equipment, have reduced excess emission problems at this facility.

In Georgia:

> A Georgia State agency representative indicated that the Georgia agency has documented improvements in excess emissions from pulp mills after paying more attention and giving more detailed oversight to the TRS and opacity monitoring reports from these facilities.

In Florida:

> The Florida State agency has seen significant reductions in SO_2 emissions from sulfuric acid plants at fertilizer facilities after developing stringent O&M requirements for the start-up conditions. The agency worked with the industry to develop the appropriate O&M conditions and then updated the applicable operating permits to include the O&M conditions. CEMS data are now used to document compliance with the startup O&M requirements.

In Indiana:

> Ann McIver of the Indiana State agency relayed a case study of a recycled paperboard manufacturing facility with three small boilers (50, 107, 107 mmBtu/hr) which reduced excess opacity emissions from 9.2% between

1994-1996. These improvements were due to improved O&M and better procedures for ash pulling.

. . .

Paul Krakaewicz who works in a local agency in Indiana provided an example of a large steel plant with a significant problem with coke oven door leaks. Prior to 1994, inspections revealed that as many as 30 door leaks occurred per year. The company rebuilt the coke oven battery and instituted extensive O&M work practices including employee training, internal inspection procedures, and corrective work practices. Afterwards, door leaks were reduced approximately by over 95% to once per year.

In Wisconsin:

Patrick McCoy of EPA Region V cited an example of a lime kiln at a pulp and paper facility in Wisconsin that reduced excess emissions of TRS due to better O&M. Following enforcement actions, the facility instituted improved O&M by focusing on better chemical engineering procedures and attention to "rings". These measures increased efficiency, reduced downtime and had a significant impact on reducing exceedances. In 1988 and 1989 the excess emissions ranged from 25% to 48% yet dropped to under 2% by early 1990.

And in Oregon:

The Oregon agency initiated an improved source O&M program in the Medford, Oregon region which involved opacity, CO, control device, and process parameter monitoring. According to a State agency representative, this initiative improved compliance rates for the area which has subsequently achieved attainment with the particulate standard. (Note that source O&M alone cannot take full credit for this achievement since other control strategies were operating simultaneously.)[15]

In none of these states was a federal CAM rule needed, and none is needed now. The Act places primary responsibility for air pollution control on the States [FCAA § 101(a)(3)], and, with exceptions not relevant here, grants them complete discretion to develop the programs needed to achieve air quality objectives.[16]

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[15]Texas' "CAM" programs are discussed in Section III.B. of these comments.

[16]Early on, the U.S. Supreme Court established that, while EPA must set ambient standards, it is up to the states to determine -- through SIPs -- how to meet them:

If a State fails in that objective, the Act compels the submittal of additional measures and the approval of those measures by EPA. At that time, as it always has, EPA has the ability to reject the SIP submittal if it is inadequate for its intended purpose. Until this occurs, EPA has no basis -- in law or in fact -- to require a wholesale revisitation of long-standing State-initiated compliance assurance measures.

If EPA still concludes that SIPs must be "CAMed," at least the above analysis should lead EPA to the following changes in Part 64's applicability to SIP provisions. First, units (or at least SIP-based requirements on units) in attainment areas should be excluded: If an area is in attainment, then the State's regulatory programs obviously are sufficient to achieve their goals, and need no embellishment. Second, for the same reason that EPA proposes to exclude post-1990 NSPS and NESHAPs, it also should exclude SIP provisions adopted after that date: Presumably, the Agency is not approving any SIP submittal that does not satisfy its current expectations for monitoring, etc.

> [EPA] is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it set are to be met. Under § 110(a)(2), the Agency is required to approve a state plan which provides for timely attainment and subsequent maintenance of the ambient air standards, and which also satisfies [Section 110's] other general requirements. [*Train v. Natural Resources Defense Council*, 95 S.Ct. 1470, 1481-82 (1975)].

Although § 110(a)(2)'s general requirements have gotten somewhat more prescriptive over time, such as the 1990 revisions to § 110(a)(2)(F) (concerning the monitoring required for an approvable SIP), absolutely nothing has changed this basic relationship.

The immediate corollary of the principles announced in *Train* is that SIPs are a creature of state law; thus, once EPA has approved a plan as meeting the requirements of § 110 (or whatever form § 110 was in effect at the time of approval), EPA cannot alter the SIP's requirements or even its interpretation without issuing a SIP call, allowing the state to correct the alleged new deficiency by revising its state rules, and resubmitting them as SIP revisions [*see, e.g., Bethlehem Steel Corp v. Gorsuch*, 742 F.2d 1028, 1035-36 (7th Cir. 1984) (EPA cannot make SIP more stringent than intended by the state without following the procedures set forth in the Clean Air Act); *U.S. v. Riverside Laboratories*, 678 F. Supp. 1352, 1356-57 (N.D. Ill. 1988) (EPA cannot enforce a SIP against an alleged violator if a state court interprets the SIP to not apply to defendant)].

It is inescapable that the draft CAM rules would violate these long-held restrictions on EPA's ability to short-cut the SIP process. In its current draft form, Part 64 calls for each applicable requirement (i.e., each SIP provision) to be evaluated in a CAM plan to accompany each permit application, and to include in that plan innumerable additions to each existing applicable requirement (i.e., the one dictated in the SIP) as dictated by EPA's CAM rules and ultimately even guidance documents. What components of a CAM plan are there that would not alter the state's intent? Even the most trivial change is a change in the SIP, and that is prohibited unless EPA proceeds via § 110(b)(5).

III. EPA COULD MINIMIZE ADMINISTRATIVE BURDENS BY ALLOWING STATES THE OPTION OF A PROGRAMMATIC, RATHER THAN PERMIT-BASED, APPROACH.

The Planning Committee recognizes that, despite longstanding and continually evolving regulatory programs, and despite substantial non-regulatory incentives, there is always room to improve upon the attention paid to control device performance and thereby "promote ongoing compliance." We are equally convinced, however, that the case-by-case re-examination of every source's O&M practices via the complex procedures and criteria established in the draft rules is not the way -- at least in Texas -- to secure those improvements. Thus, while we do not believe any new program is needed at all, a "programmatic" option would do much to alleviate the burden associated with the permit-by-permit approach.

A. GENERAL DESCRIPTION OF THE PROGRAMMATIC OPTION

Prominent among EPA's principles for any CAM rule is to "build on current monitoring requirements" and to "incorporate flexibility." One way for it to fulfill both principles is to allow any state to demonstrate that its regulatory programs already "promote ongoing compliance," or can and will be made to do so. This "programmatic" approach, as EPA acknowledged in its brief invitation to comment on it, indeed would (not "could") reduce "the burdens associated with source-specific CAM plan development."[17] It also would recognize and "build on" all of the compliance assurance programs -- both voluntary and regulatory -- that have developed without any "CAM" program.

In brief, the "programmatic option" would allow a state to demonstrate that its overall air quality control programs "promote ongoing compliance" by requiring sources within its jurisdiction to "pay attention to control device performance." It would not necessarily require a State to show that everyone of its specific rules would yield precisely the same outcome at each emission point as would the case-by-case Part 70/64 approach; rather, the State would have to demonstrate to EPA's satisfaction -- in a "*State* CAM plan" -- that its overall programs achieve Part 64's general objectives. The programmatic option would attain equivalency of environmental results, not necessarily equivalency of bureaucratic results.

The best way to illustrate the possible components of a State CAM plan is by example. As noted in the numerous EPA identified examples, restated in Section II.B.3. of these comments, many states (and perhaps all of them) have long been in the CAM

[17]It seems inarguable that a one-time review of a regulatory program would be far more administratively efficient than repeating the exercise thousands of times over on a case-by-case basis. Once the program is corrected, it is then fairly readily codified in each subject source's Title V permit. EPA's acceptance of this view is expressed in the draft rule preamble, and is implied in EPA's choice to develop "pre-CAMed" rules after 1990 (rather than adopting "unCAMed" rules and then "CAMing" them via each Title V permit).

business, requiring or fostering increased attention to control device O&M where necessary to achieve air quality objectives. Each such State-level initiative can be a component of a State CAM plan that eliminates the need for case-by-case re-reviews under Title V. Texas already has combined many of those initiatives.

B. THE TEXAS EXAMPLE

Texas has long encouraged and continues to look for new ways to promote ongoing compliance by paying attention to control device performance. Taken together, its programs already strongly encourage proper control device O&M, and -- as important -- include self-correcting mechanisms to ensure that the programs themselves are improved when necessary. These programs serve as examples of what an approvable State CAM plan might contain.

1. TNRCC Already Implements a CAM Process.

A longstanding TNRCC rule applicable to all sources specifically compels proper operation and maintenance of control devices: "All pollution emission capture equipment and abatement equipment shall be maintained in good working order and operated properly during normal facility operations" [30 T.A.C. § 101.7(a)]. Therefore, the State can and has pursued enforcement against those who do not properly maintain their control equipment.

A separate obligation, but one which improves the value of the "general duty" rule, is to report all upset, maintenance, start-up and shut-down events:

> "The owner or operator of a facility shall notify the Executive Director and the appropriate local air pollution control agencies as soon as possible of any major upset condition which causes or may cause an excessive emission that contravenes the intent of the Texas Clean Air Act or the regulations of the [TNRCC]" [30 T.A.C. § 101.6(a); *see also* § 101.7(b) (analogous obligation for "maintenance, start-up or shutdown which will or may cause an excessive emission...")].

Thus, TNRCC must be informed of any event -- certainly including control device failure or deterioration -- that *might* cause an exceedance of an emission limitation. That report "shall identify the cause of the upset and the processes and equipment involved, and shall include the date and time of the upset, the duration of the upset, and the compound-specific types and quantities of emissions released during the upset" [§ 101.6(a); *see also* § 101.7(b) (analogous requirements for malfunction, start-up and shut-down reports)].

The State's rules also provide a positive incentive to aggressively report "upset" and similar events: Such events, if properly reported, *may* be excused from potential allegations of noncompliance if the TNRCC Executive Director determines that the event did not result from neglect by the source owner/operator, that prompt corrective action was taken, and

that no nuisance conditions results from the event [30 T.A.C. § 101.11(a), (b) and (f)]. Even if the Executive Director is satisfied that each of these conditions has been met, he may request a more detailed explanation and a corrective action plan:

> "[U]pon request by the Executive Director [the owner or operator shall perform] a technical evaluation of the upset event. The evaluation shall include at least an analysis of the probable causes of the upset and any necessary actions to prevent or minimize recurrence. The evaluation shall be submitted in writing to the Executive Director within 60 days from the date of request" [§ 101.6(b); *see also* § 101.7(c) (analogous provision for maintenance activities)].

Of course, TNRCC may instead or in addition request source testing [§ 101.8].

The TNRCC rules thus already include a CAM process:

- Source owners are required to properly maintain their control devices;
- They are required to report in detail any control device failure or deterioration ("discrepancies") that might result in exceedances,
- There is also a positive incentive to report all possible "discrepancies"; and
- Excessive discrepancies can lead either to enforcement (for violation of the general duty), and/or to the requirement to implement a "quality improvement program," and/or to conduct compliance (performance) testing.

As a result of this longstanding program (as well as the disciplined on-site investigation process discussed below), TNRCC identifies and corrects most, if not all, potential "bad actors" -- those who do not recognize their self-interest in proper control device O&M. And Texas, apparently, is not alone: According to EPA,

> [t]he CAM plan concept is consistent with other similar types of regulations. For instance, the general provisions to the NESHAP requirements in Part 63 provide for startup, shutdown and malfunction plans that are similar in nature to the CAM plan concept. *Many States also have similar malfunction abatement plan requirements.* In addition, the risk management plan requirements in proposed 40 CFR Part 68 for hazardous air pollutant sources under Section 112(r) of the Act would establish comparable plan requirements.

2. **TNRCC's Applicable Requirements Include the Monitoring Necessary and Appropriate to Identify Discrepancies.**

A source's and the State's awareness of possible discrepancies may depend at least to some extent on monitoring systems in place to identify them. For the reasons identified in Section II.B.3. of these comments, however, we believe that each TNRCC rule require the level of monitoring necessary and appropriate to achieving the rule's substantive objectives. The rule's enforceability is a key consideration in its development by TNRCC and, presumably, in its review and approval by EPA.

Also, nothing prevents a State from reviewing and revising the monitoring-related provisions of its rules. For example, based on comments filed in this docket, TNRCC apparently is willing to undertake such a review as part of its "CAM plan." Given that EPA has the authority to call for a rule revision if it finds the rule inadequate to achieve its purpose,[18] we do not believe that such a review should be compelled as a condition of the programmatic option. If such a demonstration nonetheless is required, it should exclude: (1) rules applicable to sources in attainment areas, because such rules obviously are adequate to achieve their purpose, (2) rules submitted and approved after 1990, because presumably those rules satisfy current EPA "CAM" expectations, and (3) NSPS and NESHAPs, for the reasons provided in Section II.B.1. and 2. of these comments.

3. **Continual Improvements in Compliance Assurance Result from Texas' Disciplined On-Site Investigation Process.**

As more fully described in the outline of the proposed streamlining of Texas' Title V program (provided with the Planning Committee comments submitted on October 6, 1995), TNRCC has a regimented and continually improving site investigation program conducted by TNRCC's 15 regional offices. Further development of this investigation process is planned in connection with the Title V program, such that Title V resources ultimately will be directed towards rigorous annual, on-site compliance evaluations assisted by the investigated source.

As a result of this hands-on process, the Agency is able to determine compliance with existing obligations, including the obligations to properly maintain emission control devices, to report upsets, etc., and -- of course -- to comply with the specific requirements of each pollutant-specific rule. As important for the success of the programmatic option, it also allows the State to identify situations in which rule changes are needed to promote enforceability and ongoing compliance. For example, the external floating roof tank rule change discussed in Section II.B.3. was the result of feedback from TNRCC's Houston

[18]EPA has shown that it can and will exercise that authority. For example, in 1990, EPA issued a "SIP call" for revisions to Texas' Regulation I (PM control) and Regulation II (SO_2 control) because of its view that the rules did not specify sufficient monitoring. It took less than a year from SIP call to submittal of rule revisions to satisfy EPA objections.

regional office. Thus, the rigorous site investigation program helps to ensure that specific rules become "CAMed" as necessary.

C. THE PROGRAMMATIC OPTION SATISFIES AT LEAST AS MANY IMPLEMENTATION PRINCIPLES AS WOULD A PERMIT-BY-PERMIT APPROACH.

Administrative Efficiency, Cost-Effectiveness, Etc.: In the states in which it is selected, the programmatic option will require substantially fewer resources -- public and private -- than the case-by-case approach.

Build on Current Monitoring Requirements and Avoid Case-by-Case Review: A corollary of the above advantage is that the permitting authority *can* build on existing programs, not -- in essence -- assume they do not exist.

Public Participation: Every aspect of a State CAM plan would be open for public participation. In fact, the ability of interested citizens (as well as the regulated community) to participate would be enhanced by the rulemaking or State CAM plan approach, rather than by attempting to oversee every individual CAM plan in a permit-by-permit approach. Also, of course, the accuracy with which the resulting regulatory obligations (including those developed under a State CAM plan) are reflected in an individual permit is subject to all conventional Title V permit procedures. The permit, however, is left to its intended role of codification, not creation.

Implementation Within A Reasonable Time: The programmatic option is likely to yield results at least as fast as the permit-by-permit approach. The Part 70 approach will take more time, and the programmatic option less, than EPA expects.

Part 64 will not be a self-executing new rule that can become effective within 180 days. The Part 64 rules, as proposed in draft form, serve simply as an adjunct to Part 70; that is, they describe the requirements of an approvable State Title V program. Once Part 64 is adopted, States will have to be given sufficient time to amend their Part 70 programs, and -- before EPA can expect the CAM requirements of "Part 70" to be effective in any State -- approved as program revisions by EPA. Assuming the CAM rules are finalized on schedule, they will be adopted in July of 1996. States should reasonably be allowed 18 months (i.e., until the end of 1997) to revise their Part 70 programs and gear up for CAM, and EPA will need at least a year to approve the revised program submittals (i.e., end of 1998). Therefore, we are at least 3 years away from even starting to actually implement CAM in any state. At that point, the submittal of CAM plans will become a requirement to obtain or renew a Title V permit, but EPA expects at least a five-year cycle to be completed before CAM plans are in place at all subject sources.

A State CAM plan, in contrast, would need no where near eight years to develop and implement. Furthermore, upon adoption of any program changes called for in the CAM

plan, they become effective for all sources. We will not need to await the revisitation of a particular source's permit.

Flexibility to Accommodate SIP Rules: This is the fundamental tenet of the programmatic option.

Also, as one potential benefit of the CAM rule, EPA claims that "increased compliance rates with existing rules will lower the long-term overall cost of air pollution control by decreasing the need for additional regulations to obtain necessary emission reductions, especially for nonattainment areas." EPA may be right, but only if those reductions can be quantified and assigned to a particular rule. Therefore, by allowing any necessary improvements to occur by rule, EPA would be improving the SIP process itself: The SIP credit achieved by additional compliance assurance measures is far more easily quantified if accomplished by rule than by each individual permit, thus greatly enhancing air quality planning.

Provide States With Flexibility to Achieve CAM Objectives: The programmatic approach is just an *option*. States have the flexibility to choose it or the permit-by-permit approach.

The programmatic approach may appear less prescriptive, but this is an illusion. While the CAM *process* outlined in the draft rules appears prescriptive and certain, it will rely on thousands of case-by-case determinations, which neither EPA nor interested citizens nor even the permitting authority can be expected to rigorously and consistently review. Because of the opportunity for involvement by all parties in a unified rulemaking under the programmatic option, that option is more likely to achieve the desired results.

The mechanistic, seemingly detailed, and frankly micromanaging permit-by-permit approach perhaps reflects EPA concerns with "letting go." It must be remembered, however, that the Clean Air Act properly grants to the States the primary responsibility for air quality control, particularly for stationary sources. EPA has an oversight function and, if States fail, EPA can take appropriate measures. EPA is willing to trust the States with implementation of the detailed yet discretion-laden Part 64 rules. Why not trust the states with a less prescriptive route to the same result?

> Law should articulate goals, award subsidies, allocate presumptions, and provide mechanisms for resolving disagreements, but law should also never provide the final answer. Life is too complex. Our public goals are too complex. *Hard rules make sense only when protocol -- as with the rules of a game or with speed limits -- is more important than getting something done.* When accomplishment or understanding is important, we have no choice: Law can't think, and so law must be entrusted to humans and they must take responsibility for their interpretation of it [P. Howard, *The Death of Common Sense* (1994)].

IV. THE CAM RULE MUST NOT LEAD TO CHANGES IN COMPLIANCE METHODOLOGIES, UNLESS SUCH CHANGES ARE ACCOMPLISHED BY AMENDING UNDERLYING RULES.

The above comments address concerns with how new data-gathering and corrective action obligations are imposed. The Planning Committee is equally concerned with how any such CAM data will be used.

Until fairly recently, EPA has presented CAM as a program to gather data on control device performance, such that a source owner is able to respond to monitored deteriorations, thus "promoting ongoing compliance." Recently, however, EPA representatives have suggested that CAM data will not be used solely for this propose; rather, every "discrepancy" identified with CAM data may be used as evidence of a violation of underlying emission limitations. Our concern is reinforced by various statements in the draft rule itself.

If the Agency's goal is as it previously stated -- to require corrective action in response to deteriorating control device performance -- then proper monitoring and corrective action must insulate a source from any allegations of noncompliance. (Using the VOC leak detection and repair analogy, the monitoring of leak is not a violation, but merely a trigger for corrective action.) If instead the CAM data is to be used as a basis for enforcement action despite sufficiently prompt corrective action and despite the absence of any compliance method data showing noncompliance, then EPA's actual purpose would instead seem to be the creation of new enforcement triggers. If so, then EPA will defeat its own stated purpose of encouraging close attention to control device performance: What sensible source owner would establish vigorous monitoring and low corrective action trigger thresholds if each monitored trigger may be used as evidence of a violation? In short, EPA must decide -- preferably before formal rule proposal -- which of these two competing purposes it intends to achieve.

V. THE CLEAN AIR ACT NEITHER COMPELS NOR ALLOWS ANY NEW "CAM" PROGRAM UNDER TITLE V.

According to EPA, the draft CAM rule is intended to "respond to the statutory mandate in the Clean Air Act Amendments of 1990." EPA's response, however, cannot be justified based on legal mandates.

A. ANY RELIANCE ON § 114(a)(3) IS MISPLACED.

EPA refers at length to § 114(a)(3) of the Act as authority or even a mandate for the CAM rules. The CAM rules, however, are proposed as requirements for an approvable Title V permit program. Thus, EPA has incorrectly assumed that § 114(a)(3) directs the formulation of Title V programs.

1. **Section 114(a)(3) in No Way Affects the Requirements for an Approvable Title V Permit Program.**

Whatever § 114(a)(3) may require or allow, it is not the draft CAM rules. It is in the wrong place to be deemed a Title V requirement, and by its own terms is not a directive to the States of any kind.

a. **Section 114(a)(3) is not in Title V:** Section 114(a)(3) is codified in a section of the statute that describes EPA's general information-gathering authorities, not in the entirely separate title dedicated to describing an approvable Title V program. Why would Congress have put this Title V requirement in a sub-section of a completely unrelated part of the statute if it had intended it to be a Title V requirement?

b. **The Language of § 114 Confirms that it Creates No New Title V Requirements:** Any doubt about Congress' intent is removed by the language of § 114 itself. On its face, § 114(a) is specifically directed to EPA, not the states, whereas Title V is a state-level mandate. Further proof is found in § 114(b), which *allows -- but does not require* -- a state to develop investigate powers and programs analogous to those which Congress authorized EPA to develop in § 114(a). Title V programs, in contrast, clearly are mandated in each state.

The attempted implementation of § 114(a)(3) via Title V permit also is at odds with that section's express requirement to be implemented *by rule*, not by permit. There also is a disconnect in timing: Rules implementing Title V were due in 1 year, whereas a 2-year deadline applied to the rulemaking under § 114(a)(3). Finally, one cannot reconcile the coverage of Title V with the coverage of § 114(a)(3). Each is meant to apply to a different universe of sources. Although there may be some overlap, the differences confirm that § 114(a)(3) was not just accidentally left off the list of Title V program requirements in § 502(b). Section 502(b) describes all the monitoring that must be included in a Title V permit, which need not and cannot be any different from the monitoring requirements of the underlying applicable requirements.

2. **Section 114(a)(3) Simply Provides EPA with the Authority to Request Discrete Compliance Certifications, and Authorizes No New Compliance Methodologies.**

Section 114(a)(3), like the rest of § 114, simply authorizes EPA to conduct investigations of regulated sources, generally by discrete reference method testing or whatever the prescribed *compliance method* may be. Section 114(a)(3)'s admittedly limited legislative history[19] simply "clarifies and confirms that EPA has the authority to require

[19]This limited legislative history is further proof that § 114(a)(3) compels no new major program on the scale of the draft CAM rule. If Congress has intended such a program, almost assuredly it would have provided far more than a few sentences of recorded discussion prior to adoption.

enhanced monitoring and to require such monitoring in compliance certifications" [H.R. Rep. No. 101-490 (May 17, 1990), at 354].[20]

Section 114 on its face and in longstanding practice is simply the authority by which EPA can compel performance testing of a regulated source, either for purposes of standard-setting or for determining compliance with those standards once established in accordance with §§ 110-112 and according to the compliance methods delineated in the standards themselves. To now use § 114(a)(3) as a source of authority to redefine compliance methods and to require entirely new monitoring methods would hardly just "clarify and confirm" § 114's long-established meaning.[21] It also would be at odds with long-established precedents concerning the inextricable relationship between standards and their associated compliance methods [*see Portland Cement Assoc. v. Ruckelshaus*, 486 F.2d 375, 397 (D.C. Cir. 1973].[22]

The only substantive addition to § 114(a) was the authority to request detailed compliance certifications. As with the rest of § 114(a), however, it does not compel an annual or even any sort of periodic action by all sources. Instead, it is directed to a target company's response to any specific § 114 request it receives; that is, when EPA wants to specifically request discrete source testing (and has basis for requesting the testing, according to the rules EPA is to adopt), EPA may now also ask the respondent to certify compliance with the underlying applicable requirements based on the results of the source testing.[23] Alternatively, in lieu of any mandate to conduct a specific test at all, EPA arguably can now (via § 114 request) also simply ask a suspected violator to certify compliance according to the specifics of § 114(a)(3).

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[20]The directive to enhance its use of existing powers to compel stack testing is fairly easily understood in light of reports -- such as that quoted in Section II.A above--concerning EPA's failure to review and react to excess emissions reports it already is receiving.

[21]That Congress intended no changes to monitoring methods under § 114(a)(3) is confirmed by the fact that it did undertake in 1990 to refine the monitoring methodologies necessary for an approvable SIP, as codified in § 110(a)(2)(F). If § 114(a)(3) opened the door for wholesale redefinition of compliance methods, why would Congress have bothered with surgical revisions to § 110(a)(2)(F)?

[22]If such a relationship does not exist, why does EPA require so much internal review and process in order to accept proposed alternatives to regulatorily prescribed monitoring methods?

[23]In fact, the accompanying certification of test results would itself "enhance" the monitoring; thus, it can be defensibly argued that the need to submit the § 114(a)(3) compliance certification with the monitoring results is itself the "enhancement" contemplated in § 114(a)(3).

B. TITLE V DOES NOT COMPEL THE CREATION OF ANY NEW MONITORING OR CORRECTIVE ACTION REQUIREMENTS.

As noted earlier, Title V is an exercise in codification, not creation. Each applicable requirement defines the means for assuring compliance with itself, and it is those means that must be reflected in a Title V permit. As further noted above, any deficiencies in those methods can and will be corrected by rule. The specific, continuing need to develop monitoring requirements by rule and not by permit is reaffirmed by the clear language of § 504(b).

VI. THE COMPLIANCE CERTIFICATION IN THE DRAFT RULE IS OVERBROAD.

In the draft rule, EPA has interpreted the annual compliance certification requirement of § 503(b)(2) to require a great deal of information for each permit condition, including the means used to determine compliance with it and the consideration of a large and poorly defined mass of data. This detailed certification is the result of grafting onto the annual § 503(b)(2) certification the specific details of the discrete § 114(a)(3) certification. As discussed in the previous section of these comments, however, § 114(a)(3) has no bearing on the simple annual certification described in § 503(b)(2). The level of detail listed in § 114(a)(3) is significantly absent from § 503(b)(2).

In that same section [§ 503(b)(2)], Congress also has required the prompt reporting of deviations. Given that the permitting authority is being kept apprised of all deviations throughout the year, it serves no useful purpose to have all of that same information re-submitted at the end of the year. The annual compliance certification instead should be used simply to require each permittee to inform the permitting authority that it has complied with its obligation to report deviations as they occur throughout the year.

The Planning Committee also is very concerned with the draft proposal's description of the information that is to form the basis for the annual certification: "A compliance certification should include all available compliance-related information so that the description of a source's compliance status considers all relevant information." How can a responsible official ever have the confidence to sign so ill-defined a certification?

A responsible official should be able to sign a certification of compliance if the owner/operator has done everything that the law requires. That means that it has done all of the compliance method monitoring required, and that none of that required monitoring shows a violation.

In light of the above analysis, the following should suffice as a compliance certification in all cases:

> To the best of my knowledge after reasonable inquiry, based on any compliance method data required by the terms of Permit

No. ____, I hereby certify that [Company/Site] is in compliance with the requirements of that permit, except as otherwise previously reported to [Permitting Authority].

VII. EPA SHOULD NOT RETAIN ANY "PERIODIC MONITORING" PROVISION IN THE PART 70 RULES.

In various briefings on the draft rule, EPA has indicated its intention to merge the previously proposed "enhanced monitoring" and "periodic monitoring" components of its model Title V program into a single CAM program. The draft rule, however, retains unaltered the periodic monitoring provisions of Part 70, except to exempt "Tier 3" sources.

The Agency has referred to § 503(b) as though it compels a "periodic monitoring" requirement to be developed in Title V, but we see no such requirement in that or any other section of the Act. If the permitting authority or EPA wants a particular source to conduct periodic monitoring, it has ample authority to request such testing. "Periodic monitoring" is another unnecessary burden on Title V.

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APPENDIX 4

SYNOPSIS OF THE "ACE" RULES

What is ACE? "Any credible evidence" ("ACE") is a short-hand reference to revisions to Parts 51, 52, 60, and 61 that EPA proposed along with the voluminous "enhanced monitoring" rules (Part 64) in October 1993 [58 Fed. Reg. 54648, 54682-84 (Oct. 22, 1993)]. Under these ACE rules, EPA would authorize itself to prove violations of virtually any Clean Air Act rule or permit by "any credible evidence," not just the compliance method specified in the rule or permit. EPA also would require each state to grant itself similar powers.

Although the ACE provisions were proposed in the same package as enhanced monitoring ("EM") in 1993 and continue to be tied by EPA to the compliance assurance monitoring ("CAM") rules, they are not directly related: ACE redefines the compliance methods for all rules (by essentially eliminating any specific method), whereas the EM (now CAM) rules would define the added physical monitoring requirements to be developed in each Title V permit. Of course, the more data required, the more that can be used in any enforcement action under ACE.

Where Does ACE Now Stand? As of April 1995, the EM part of the October 1993 proposal has been withdrawn in favor of CAM. The ACE part of the October 1993 proposal, however, reportedly will be sent to OMB by mid-August and adopted in December as a final action separate from CAM. There is some chance that the adopted rules will include some linkages to CAM, such that only CAM data would be considered "credible evidence," and that EPA will delete various presumptions in the original proposal. In the meantime, several states (not including Texas) have succumbed to a long-standing SIP call to include ACE-type language in their own rules.

How Did We Get Here? All parts of the October 1993 proposal -- EM and ACE -- were met with substantial adverse comments.[1] To help itself address this widespread opposition to the 1993 proposal, EPA convened a number of stakeholder meetings in the summer and fall of 1994. Although ACE lurked in the background of those discussions, the main focus was on the rules (EM) establishing monitoring requirements to be developed through the Title V permit process. Generally speaking, the states shared many of industry's concerns, and had a few of their own. EPA's response to all of this dialogue was a December 1994 reproposal of a variety of cosmetic changes to Part 64 as originally described in October 1993 [59 Fed. Reg. 66844 (Dec. 28, 1994)]. At about the same time, however, the 1994 elections changed EPA's perspective on its ability to proceed with any form of EM and so, in April 1995, EPA announced that it would withdraw EM and repropose CAM.

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[1] At roughly the same time, EPA began pressuring states (through "SIP calls") to adopt ACE-type rules, even though Part 51 still has not been revised to require such rules. To date, many states have resisted these SIP calls, including Texas, but about nine have not.

Following a series of stakeholder meetings through the summer, a preproposal draft of the CAM rules was issued and publicly discussed in September 1995. Although there were (and are) a variety of views on the merits of CAM itself, all industry participants were (and are) united in their concerns about the use of CAM data (and other "credible evidence") for enforcement purposes: Where is the incentive to develop protocols for carefully monitoring control device performance if all such "parametric" monitoring data could be used to prove a violation of the underlying emission limit? While OAQPS understands and respects these concerns, OGC and OECA evidently do not. Accordingly, CAM's formal proposal was delayed (at least in part) by efforts within EPA to resolve this issue.

In February 1996, the appropriate Assistant Administrators met with Deputy Administrator Fred Hansen to resolve this internal tension. Reportedly, Deputy Administrator Hansen turned ACE over to OGC and OECA, and left CAM with OAQPS. This divergence could well mean the worst of both worlds -- a comprehensive new set of data-gathering requirements (CAM) pushed by OAQPS, and the ACE rules by OGC/OECA.

To fulfill an earlier promise to the stakeholders group (that it would not adopt ACE without further dialogue), EPA next released its ACE position paper (Appendix 4A) and convened a public meeting on April 2, 1996, to discuss it. However, the meeting was more like oral argument before a Court of Appeals, with the appellate panel consisting of opposing counsel. Many of the issues raised by industry witnesses are presented in Appendix 4B.

Since then, representatives of ad hoc industry coalitions have met several times with senior EPA officials to negotiate revisions to the hard-edged ACE rules as originally proposed. This dialogue is likely to lead to some limitations on what may be considered "credible evidence," but it seems unlikely that the adopted rule will be acceptable to most members of the regulated community.

The Use of Information Other Than Reference Test Results for Determining Compliance With The Clean Air Act

I. INTRODUCTION

In an October 1993 Federal Register notice (58 Fed. Reg. 54648, 10/22/93), EPA solicited public comment on a proposal to amend 40 C.F.R. Parts 51, 52, 60 and 61 to eliminate language that has been read to provide for exclusive reliance on reference test methods as the means of demonstrating compliance with emission limits under the Clean Air Act ("CAA"), and to clarify that credible evidence can be used for compliance determinations. In the same notice, EPA proposed an "enhanced monitoring" rule providing for direct continuous emissions monitoring for a number of sources. EPA has suspended development of the enhanced monitoring rule while it attempts to develop a compliance assurance monitoring (CAM) approach to serve the purpose of the enhanced monitoring proposal, and intends to issue a CAM proposal soon. In a September 1995 draft of the CAM proposal EPA stated that it would hold a public meeting prior to finalizing the credible evidence revisions. That meeting has been scheduled for April 2, 1996. This memorandum is intended to provide a focus for that public meeting.

II. BACKGROUND

Over the past twenty years the Agency has published a number of "reference test methods" and, in order to assure uniformity in the application of emission standards, has required sources to establish compliance with emission standards by use of those reference test methods. In theory a source would conduct testing on a periodic basis utilizing these methods and would rely on the comprehensive nature of this testing to assure compliance on a day to day basis.

In the interim more accurate emission monitoring devices have been developed. In addition, the EPA, the states and the regulated community have gained a better understanding of the specific facility and pollution control device operating parameters that control emissions. Today, as a practical matter many sources determine compliance with permitted limits either through the use of continuous emission monitors or by monitoring key parameters of their production processes and pollution control devices.

Section 113(a) of the Act provides that the Agency may bring an enforcement action "on the basis of any information available." However, in United States v. Kaiser Steel Corp, the District Court ruled that, because of what it perceived to be limitations in EPA's regulations, only reference method stack testing could be used to establish violations of permit limits,

notwithstanding irrefutable scientific evidence that otherwise demonstrated thousands of violations. In the 1990 amendments to the Clean Air Act Congress overrode the Kaiser decision, providing that the duration of the violation could be established by "any credible evidence (including evidence other than the applicable test method)." [1]

EPA is now considering proceeding to final promulgation of previously proposed revisions to 40 C.F.R. Parts 51, 52, 60 and 61 to revise regulatory provisions that have been read as requiring exclusive reliance on reference test methods as the means of determining compliance with emissions limits. EPA believes that these revisions are consistent with the CAA as well as the language and intent of the 1990 CAA amendments. The revisions would provide sources with cheaper and more flexible means for certifying compliance in permit compliance certifications, and for asserting compliance in enforcement actions. For similar reasons, the revisions would benefit state environmental agencies, EPA and the public. EPA and states would use credible evidence to more easily and effectively assess a source's compliance status and respond to noncompliance, thus more effectively protecting our nation's health and environment.

This balanced proposal reflects the Agency's basic approach to "common sense" environmental protection, which encourages smarter, cheaper and more flexible means of achieving environmental goals without compromising the fundamental health and environmental protections provided by federal environmental laws. The credible evidence proposal removes cost barriers to regular determinations of compliance by the regulated community and regulatory authorities alike. Allowing the use of emission data other than reference test results is critical to other EPA proposals to streamline CAA regulations, including EPA's draft proposed CAM rule and Open Market Trading rule ("OMTR"). Under the draft proposed CAM rule sources would be allowed to certify compliance with applicable permit limits based on monitoring key operating parameters. Similarly, in order to provide sufficient flexibility for a broad pollutant trading scheme to function, at least some sources would have to be allowed under the OMTR to use means other than reference test methods to quantify the emission reductions being traded.

Members of the regulated community have expressed concerns regarding the proposal, particularly regarding its effects on emission standards and enforcement. Some regulated sources have argued that allowing the use of credible evidence to determine whether or not a source is in compliance with an emissions standard increases the stringency of the standard; others have argued that states, EPA and citizens will use credible evidence to bring enforcement actions for minor violations. As explained

below, EPA does not intend to affect the stringency of the underlying standards. However, the Agency recognizes, and indeed intends, that the use of "credible evidence" will require some sources to take steps to improve the degree to which they comply with the Act. The Agency intends to publish an enforcement policy at the time of any final Agency action on credible evidence revisions to assist EPA Regional Offices and the states in distinguishing between minor and insignificant violations that need not be pursued in the first instance by judicial action and significant violations for which prompt and aggressive enforcement is appropriate.

III. PROPOSAL DESCRIPTION

If promulgated, these credible evidence revisions would enable state and Federal enforcement agencies and citizens to use credible evidence as defined by the appropriate state or Federal rules of evidence to prove violations of the CAA. It would also allow sources to use such evidence as a basis to dispute a state, EPA or citizen allegation of noncompliance in an enforcement action or to show that the noncompliance has been remedied. EPA also plans to propose in the upcoming CAM rulemaking related changes to 40 C.F.R. Parts 64 and 70, which would provide for the use of data other than reference test methods for certifying compliance with the requirements of Title V of the CAA.

By clearly providing that the reference test methods are not exclusive methods, EPA does not intend to alter the underlying standards. Rather, the Agency would still use the reference methods for exactly what they are: test methods of reference against which other data will be measured. That is, the reference methods will be used as the standard for determining the credibility and precision of other emissions data and measurements [2]. For example, EPA Reference Method 9 provides for opacity measurements to be taken over a period of 6 minutes. A continuous opacity monitor may record opacity as often as once every 15 seconds. The Agency does not propose to provide that a single opacity reading, spanning only 15 seconds, is sufficient evidence to establish a violation. In this example a violation could only be established by the continuous monitor data where a series of such measurements over a six minute period demonstrated a noncompliance.

IV. BENEFITS TO THE PUBLIC AND THE REGULATED COMMUNITY

1. Reduces Industry Burdens in Compliance Certifications

Incorporating credible evidence into compliance certifications and compliance determinations in general is fully consistent with the language and intent of the CAA and the 1990

CAA amendments, and with EPA's goals regarding burden reduction, the use of common sense, and effective environmental law enforcement. Unlike the 1993 enhanced monitoring proposal, the credible evidence revisions would require no additional information gathering or recordkeeping by sources. Instead, the revisions would allow sources to rely on accurate information, much of which is already available and utilized, in order to assert compliance with emission standards. The proposal also allows EPA and states to use this same credible information for compliance and enforcement purposes.

Both EPA and industry now routinely rely on many types of information, including engineering calculations, indirect estimates of emissions, and direct measurement of emissions by a variety of means, in order to assess compliance with CAA requirements.

Where available, CEM data and parametric monitoring data (such as the operating temperature and air flow rate of a regenerative thermal oxidizer) generally provide reasonably accurate data regarding a source's compliance with emission limits and standards. These data also generally cover a greater percentage of a source's time in operation and are more representative of a source's ongoing compliance status than sporadic performance testing. Under EPA's credible evidence proposal, sources would generally be able to use this accurate, already existing monitoring data to certify compliance with their operating permits. This flexible, common sense approach compares favorably to the "exclusivity" approach, which limits compliance data to infrequent performance tests conducted under conditions that may not reflect the source's actual in-operation emissions. The exclusivity approach can also be expensive and burdensome: reference method tests can cost up to $100,000 for a series of tests and can take a week or more to set up and complete.

2. Reduces Potential Industry Burdens in Enforcement Actions

By providing industry with flexible, cheap and accurate means of determining compliance, this proposal significantly aids sources in certifying compliance with emission limits. Moreover, the proposal assists industry in more general compliance and enforcement contexts. For example, the 1990 CAA amendments provided in certain circumstances that if a source is notified of a violation of an emission limit or other standard, the violation can be presumed to continue until the source demonstrates its return to compliance. CAA § 113(e)(2). Under an exclusivity approach, a source might be deemed to remain in violation after a non-complying reference test until it could conduct (and pay for) a second set of reference tests, even if it identified and fixed

the problem immediately. Today's proposal would eliminate this inflexible, expensive result by allowing sources to demonstrate a return to compliance through other credible evidence.

3. Reduces Burdens on EPA and States

Not only is this proposal less burdensome for industry; it also allows EPA and states to perform essential functions with fewer resources. Periodic development, review and observation of reference method tests are resource intensive. EPA and state compliance assessment activities frequently involve an inspection where direct emissions data may not be readily available, an information request, a performance test, and an assessment of the test. In contrast, the use of credible information in permit compliance certifications, and in compliance activities generally, allows states, EPA and sources to more readily and rapidly assess whether a source is in compliance with its emissions limits. This will enable states and EPA to take appropriate compliance and enforcement action to protect public health and the environment.

V. INDUSTRY'S CONCERNS, EPA'S RESPONSES

1. EPA's Enforcement Approach

Some industry representatives have expressed concern that the use of credible evidence in compliance determinations will reveal multiple minor violations for which EPA, the states or citizens will bring lawsuits. This is not EPA's intent, and EPA does not expect that it would occur. EPA focuses its compliance and enforcement resources on violations that (1) may threaten or result in harm to public health or the environment, (2) are of significant duration or magnitude, (3) represent a pattern of noncompliance, (4) involve a refusal to provide specifically requested compliance information, (5) involve criminal conduct, or (6) allow a source to reap an unfair and illegal economic windfall. As discussed, EPA's experience is that citizen enforcers generally focus on similar violations.

An examination of EPA's judicial enforcement cases over the past few years reveals that EPA has focussed its judicial enforcement resources on large, significant cases rather than a large number of relatively minor matters. Two recent cases illustrate the point. The first is EPA's nationwide enforcement action to address a wood product company's failure to obtain preconstruction permits and install required pollution controls at numerous wood panel manufacturing plants. Each of the plants involved in the action had emitted or had the potential to emit hundreds of tons of ozone-forming organic chemicals, which cause smog. In addition, these illegally constructed plants allowed

the company to obtain an unfair economic advantage over its competitors. The violations persisted for as long as 10 years. EPA and the Department of Justice (DOJ) negotiated a judicial settlement under which the company would install state of the art pollution control systems at 14 plants, at an estimated cost of $70 million, that would reduce emissions from these facilities by more than 90%. The company also agreed to pay a civil penalty of over $11 million.

In the second example, EPA and DOJ brought a judicial action against a hazardous waste incinerator that modified its facility to substantially increase its air emissions without obtaining required preconstruction permits or installing required pollution control devices. At trial, evidence was presented that the company had exceeded its limits for authorized emissions by as much as a factor of 100, and emitted substantial amounts of noxious and toxic chemicals (including toxic metals as lead, cadmium and chromium) where no emissions were authorized. The evidence established that the source had violated its permitted limits and operated unpermitted sources each and every day for over eight years and had ignored state administrative orders and even a judgment from the state supreme court. The Federal District Court entered an injunction (which is currently stayed pending an appeal) that halted further operation without a permit and imposed a multimillion dollar fine on the operator.

In contrast, EPA's approach to minor unexcused violations generally has been to exercise prosecutorial discretion and use compliance mechanisms such as notices of violation and administrative compliance and penalty orders to ensure a return to compliance. Where appropriate, EPA has also exercised its discretion to take no enforcement action at all. EPA does not intend to use credible evidence to change this general approach.

EPA considers enforcement against minor CAA violations to be a very low enforcement priority and believes that it has sufficient enforcement and compliance assistance tools to respond to such violations without the need to file an action in Federal District Court. EPA has a balanced enforcement program that seeks to assure compliance using the mix of the compliance and enforcement tools available to it. Accordingly, absent extraordinary circumstances, such as where a company's negligence occasioned a significant risk to the public, EPA does not favor filing judicial enforcement actions against sources that have had exceedances of short duration that were caused by a problem that the source quickly fixed. Although such exceedances would technically be violations (unless they fell within a compliance exclusion), they generally would not be treated as an Agency enforcement concern because they did not have a significant environmental impact and were not a continuing problem.

Likewise, if a source had occasional exceedances of the emission standard that were slightly in excess of the standard and solved the problem, EPA would not generally recommend filing a civil enforcement action because the environmental impact was minimal and the source returned to continuous compliance.

Also, if a source was installing a new unit subject to the New Source Performance Standards (NSPS) and had difficulties getting the control equipment to operate properly after the "shakedown" period permitted before the initial performance test (40 C.F.R. §60.8(a)), but solved the problems promptly after the performance test, this would also be a low enforcement priority -- particularly where innovative control equipment was being employed for the first time.

Finally, we note that the NSPS already generally excuse sources from compliance with some emissions limits during periods of startup, shutdown or malfunction. See 40 C.F.R. §60.11(c). Some NSPS additionally excuse sources from compliance during certain specified periods. Emissions exceedances monitored during any of these periods are not considered violations (although sources are under a separate duty to minimize emissions at these times). Moreover, some NSPS specify averaging periods for determining compliance and noncompliance. As a result, many minor emissions values above the standard, when averaged with other values in the relevant averaging period, do not emerge as violations. The credible evidence proposal does not change these averaging periods or their results.

2. Federal and Citizen Enforcement Experience

In February, 1996, EPA reviewed citizen enforcement actions under the Clean Water Act (CWA). We chose CWA citizen actions because they have been far more numerous than CAA actions, and because the CWA utilizes discharge monitoring reports directly for enforcement purposes, which in some circumstances would be similar to using credible evidence to prove CAA violations. To determine whether these citizen actions involved long-term, significant noncompliance, we examined the penalties and injunctive relief resulting from the suits. These figures, taken together, are reasonable indicators of the seriousness of the underlying violations.

Our evaluation confirmed that CWA citizen suits generally do not involve sporadic, inconsequential violations. The National Environmental Law Center (NELC) in Massachusetts provided information showing that their concluded cases involved an average penalty of $714,134, and a median penalty of $250,000. Each case also included injunctive relief. For those cases where duration of violation information was available, the average was

almost 575 days of violation per case. The New Jersey Public Interest Research Group (NJ PIRG) reported similar results, with an average per case penalty of $702,800.

To date, there have far fewer CAA citizen suits than CWA suits. However, among the few CAA suits filed to date, there have been at least two notable cases involving serious violations. In NWF v. Copper Range Co., a citizen suit filed by the National Wildlife Federation in which the United States and the states of Wisconsin and Michigan intervened, the facility at issue was one of the largest sources of particulate matter in the Upper Peninsula of Michigan, emitting particulate at a rate of 230 lbs/hour -- over five times its permitted limit. The emissions contained many toxic air pollutants, including mercury, arsenic, cadmium and lead. The suit was settled in 1995 for civil penalties of $4.8 million and injunctive relief valued at over $200 million. In Sierra Club v. Public Service Company, 894 F.Supp. 1455 (D.C. Col. 1995), the district court held that a power company generating station had committed over 19,000 violations of opacity emission standards over a period of five years; the court has not yet ruled on an appropriate penalty. In January 1996 EPA issued a notice of violation to this facility for thousands of subsequent violations.

In addition, EPA examined its docket of concluded federal judicial actions that involved NSPS violations, to illustrate its own approach towards these cases. Not all of these NSPS cases involved emissions violations. Nonetheless, the results support EPA's general argument that federal cases are typically brought to address substantial environmental problems. Over the last five years, the Department of Justice reports that the average NSPS case was concluded for a penalty of $181,249 (median penalty, $89,600). No compilation of the value of injunctive relief was readily available.

3. Stringency

Some industry representatives have argued that the credible evidence proposal increases the stringency of emissions standards or limitations. In their view, a source must comply with NSPS and other emission standards only during periods of reference testing; during all other operating periods, sources need only ensure that pollution control equipment is running properly. They argue that the credible evidence proposal would effectively increase emission standard stringency because it would result in compliance being measured during many other operating periods.

EPA does not believe that the credible evidence proposal will increase the stringency of the standards. As detailed in the October 1993 Federal Register notice, EPA's position is that

emission standards generally must be complied with at all times, except for periods where noncompliance is specifically excused. As discussed above, both the general NSPS provisions and various specific NSPS subparts excuse noncompliance during certain specified periods. Apart from these periods, sources are required to continually comply with their emission limits. Accordingly, increased compliance monitoring does not increase emission standard stringency. In Sierra Club v. Public Service Co., the only federal judicial decision to address this issue since the passage of the 1990 CAA amendments, the court rejected the defendant's argument that a citizen group's use of CEM data and reports as evidence of violations effectively changed the underlying standard.

EPA agrees that one effect of the proposed rule would be to increase the probability that a noncomplying facility will be detected. This increased detection of noncompliers benefits the majority of sources that do routinely comply by ensuring a level playing field so that others do not obtain a competitive advantage through noncompliance. To use a simple analogy, the Agency is not proposing to change the speed limit for vehicles on Federal highways; rather, it is proposing to allow the use of radar guns to more readily detect speeders.

4. Recordkeeping Considerations

Some industry commenters have suggested that the adoption of the credible evidence proposal would force sources to increase the amount of records that must be kept. As discussed above, the proposal does not require the maintenance of any additional records or reports. In many circumstances, the information that a source already keeps regarding their emissions and control device performance could be used to assert its compliance status in an enforcement context.

In the context of compliance certifications, some commentators have argued that to require the use of credible evidence would be to require a source to scour all records throughout the plant -- "go through every file cabinet" -- and create an enormous recordkeeping burden. The CAM rule as presently envisioned would address this concern by providing a mechanism, the CAM Plan, where the permitting authority and the source would negotiate and agree on a limited amount of data that would have to be reviewed in order to certify compliance. To prevent fraud, a source could not ignore other information that it became aware of that showed noncompliance, but would be under no affirmative obligation to generate or search out such information.

ENDNOTES

[1] The legislative history of this provision states that it "clarifies that courts may consider any evidence of violation or compliance admissible under the Federal Rules of Evidence and that they are not limited to consideration of evidence that is based solely on the applicable test method in the State implementation [plan] or regulation." S. Rep. No. 101-228, Dec. 20, 1989, at 366.

[2] The National Bureau of Standards maintains a number of standards against which other measuring devices, used in scientific or commercial applications, are calibrated. Similarly, where a New Source Performance Standard or permit requirement specifies EPA Method 25A, for example, for determining the amount of volatile organic compounds ("VOCs") that are emitted, the "other evidence" tnat could establish compliance would have to relate to the likely measurement of VOCs that would have been obtained by a Method 25A measurement at that point in time. This could include consideration of key operating parameters for the facility as correlated with emissions during a Method 25A test.

TEXAS TITLE V PLANNING COMMITTEE

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April 17, 1996

Mr. Steve Viggiani
Air Enforcement Division
M.C. 2242A
U.S. Environmental Protection Agency
401 M Street, S.W.
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Re: Testimony on "Any Credible Evidence" Rules

Dear Mr. Viggiani:

On behalf of the Texas Title V Planning Committee, I am writing to submit the enclosed outline of concerns with the so-called "any credible evidence" ("ACE") portions of the October 1993 "enhanced monitoring" proposal. As you may recall, time limitations (albeit necessary, given the number of speakers) and questioning from the EPA panel (albeit quite educational) did prevent me from testifying on all of these issues at the April 2 hearing, so I encourage you and others involved in this decision at the Agency to review the outline in more detail.

In particular, several of the concerns received little direct attention from other opponents of the ACE concept, but are emphasized here:

1. **Effect on Past *and Future* EPA and State Rules and Permits:** The inseparable relationship between any emission limit and the method of determining compliance with it has been known to EPA[1] and the courts[2] for years. Throwing out this much Clean Air Act history

[1] The presentation by Bob Ajax on behalf of the Coalition for Clean Air Implementation clearly and carefully explained how all technology-based limits are established with consideration given to the method of compliance. As I noted at the April 2 hearing, one need look no further than the prescriptiveness of EPA reference

should hardly be characterized as mere "housekeeping": Once the method of compliance is divorced from the emission limit, every rule that EPA and the states have adopted, and every permit issued, will have to be reexamined to determine if the limits they impose remain consistent with the data used to support them, and with statutory criteria for establishing the emission limit/compliance method.

EPA also should very carefully consider ACE's effect on the ability to promulgate and defend all *future* rules and permit-based limits, federal and State. Whether RACT, BACT, LAER, GACT, MACT, or other statutory formulation, each Clean Air Act emission limit must be *achievable*. How will EPA demonstrate that standards are achievable when -- due to ACE -- it cannot articulate what the standard requires? Given that ACE's shadow will be cast over every rule and permit, State and federal authorities will have no choice but to show that the standards are *continuously* achievable. As you are aware, the levels of research and resources to develop the necessary database for such standards are much higher than State or federal rule and permit writers typically have or need. Is EPA willing to burden itself and its State partners with this heavy load for every future rule and permit? Has EPA considered the associated costs to governments at all levels in any regulatory impact analysis of these ACE rules?

2. **The ACE Rules Disrupt the State-Federal Partnership Established by the Act:** This is an issue I only briefly mentioned at the April 2 hearing, but it bears more careful thought by EPA. The issue here results from two provisions of the Act, § 113 and § 110.

First, even if § 113(e) did authorize EPA to adopt the ACE rules as to federally promulgated standards (e.g., NSPS or NESHAPs),[3] that section says nothing to the States. Section 113 defines *EPA's* enforcement authorities. The States' obligations are set forth in § 110, which says nothing about the need for SIPs to allow enforcement to be based on "any credible evidence." Undoubtedly, this is due in part to the questionable constitutionality of any effort by Congress to dictate the rules of evidence in State courts. Had Congress intended EPA to attempt intrusions into State rules of evidence, it must provide a "plain statement" of that intent [*E.g., Gregory v. Ashcroft*, 111 S.Ct. 2395 (1991)]. We find no such statement anywhere in the Act;

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methods (for discrete sampling or continuous monitoring), and the zealousness with which EPA has protected those methods, for proof of the Agency's understanding of the relationship between compliance methods and emission limits.

[2] The D.C. Circuit's opinion in *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), has guided EPA's standard-setting for over 20 years.

[3] Of course, § 113 quite clearly speaks only to ACE as a means of proving duration of a violation, not its onset, thereby reaffirming that the occurrence of a violation must be proven by the compliance method specified in the rule.

on the contrary, the specific language of § 113(e), as well as that section's focus solely on EPA enforcement, provides no evidence at all that Congress wanted EPA to set rules of evidence (including presumptions) for State courts or agencies.

Any effort to impose ACE on State rules also exceeds EPA's role in its partnership with States, as defined by § 110(i). State rules, like EPA's, are a combination of numeric limit and compliance method. EPA cannot, in one overarching rule, throw out each State's many decisions concerning the appropriate compliance method: EPA's role under § 110 is to approve the SIP as presented by the State, not to selectively change it after or in the process of approving it [*e.g.*, *Bethlehem Steel v. Gorsuch*, 742 F.2d 1028, 1035-1036 (7th Cir. 1984) (EPA cannot make SIP more stringent than intended by the State, except under § 110 procedures); *U.S. Riverside Laboratories*, 678 F. Supp. 1352, 1356-57 (N.D. Ill. 1988) (EPA cannot enforce a SIP against an alleged violator where the State court concludes that the SIP does not apply to the defendant)].

In short, ACE is a rather crude tool to do a job whose need has not yet been -- and probably cannot be -- proven. We urge you to reconsider the adoption of ACE, or at least to engage in a true dialogue involving all interested parties in and outside of the Agency before going any further. We remain ready, willing and able to continue the dialogue. Please contact me at (512) 479-9749 for any further information.

Sincerely,

Eric Groten
Co-Chair
Enforcement, Monitoring & Compliance
Certification Workgroup

cc: (w/encl.)
Fred Hansen - EPA Deputy Administrator
Barry McBee - TNRCC Chairman
Ralph Marquez - TNRCC Commissioner
John Baker - TNRCC Commissioner
Beverly Hartsock - Deputy Director, TNRCC-OPRD
Jeff Saitas - Deputy Director, TNRCC-OAQ
Karen Olson - TNRCC-OPD
Mitch Baer - API
Larry Feldcamp - Chair, Title V Planning Committee

Steering Committee
Larry Feldcamp (Chair) - Baker & Botts, L.L.P.
Bonnie Blam - IBM Corporation
Susan Boenker - Trinity Consultants
Steven Cook - Lyondell Petrochemical Company
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Scott Fetter - Lockheed-Martin
Ed Flesinger - Monsanto Company
Eric Groten - Brown McCarroll & Oaks Hartline, L.L.P.
Jim Kennedy - E.I. Du Pont de Nemours & Company
Steve Knis - Dow Chemical Company
John Mabry - Exxon Company, U.S.A.
Mary Miksa - Texas Association of Business and Chamber of Commerce
Don Mustard - Amoco Corporation
Jim Myers - RMT/Jones & Neuse
Marc Phillips - Enron
Lynn Reed - Warren Petroleum Company
Mary Studlick - Exxon Company, U.S.A.
George Talbert - Mobil Oil Company

OUTLINE OF STATEMENT OF ERIC GROTEN ON BEHALF OF TEXAS TITLE V PLANNING COMMITTEE AT EPA FORUM ON "ANY CREDIBLE EVIDENCE" POSITION PAPER APRIL 2-3, 1996 WASHINGTON, D.C.

1. Statement of Texas Title V Planning Committee interest: Coalition of major industries doing business in Texas, including petrochemical; petroleum and gas extraction, refining, and distribution; cement; electronics manufacturing; electric utilities; pulp and paper; and many others. Formed in 1995 to help guide State implementation of Title V and related rules, including CAM.

2. ACE IS UNNECESSARY

   a. Allegedly needed by industry to provide additional bases to certify compliance. Flawed premise:

      ➢ Certify compliance if owner/operator has done what current rules require (as codified in Title V permit), including any monitoring, reporting or record-keeping ("MRR").

      ➢ If no data collection is compelled, EPA's problem is with its own rules or rules it approved, and this problem is self-correcting:

         • States and EPA have made judgments over the years as to what level of MRR is appropriate to level of emissions, emissions variability, MRR cost, data to support emission limitation ("EL"), etc.

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1.807

- If balance needs to be restruck, States can do it any time. If EPA finds particular SIP provision inadequate, can call for changes (as it did with SO2 and PM limits in Texas in 1989-90 *before* 1990 CAAA). EPA is mandated to re-examine NSPS and is redoing NESHAPs with MRR appropriate to MACT standards.

b. States/EPA don't need ACE to "more readily and rapidly assess compliance."

➢ Where are examples of how EPA/States are unable to enforce under current laws?

- If EPA or States suspect compliance problems based on "any credible evidence" of *possible* violation, they can and do request testing. In fact, this is how the entire indicator monitoring approach works in many NSPS.

- It's no burden on State or EPA to request reference method ("RM") test.

3. ACE FRUSTRATES, NOT ADVANCES, COMPLIANCE

a. Many companies conduct RM and non-RM testing or other process monitoring to be sure they're meeting limits, provide more accurate emissions invcntory data, etc. These companies would have strong incentive to cease any uncompelled diagnostic testing or process monitoring if that data becomes the rope with which to hang them. Result of ACE will be elimination of any voluntary data gathering and process optimization.

b. Need to decide if goal is a game of "gotcha" or of encouraging compliance.

➢ Current system is one of certainty: Compliance with emission limit determined by specific method, which is appropriate given inextricable relationship between EL and compliance method. E.g., 60° F difference in sampling temperature can yield 10-fold difference in what is defined as "PM."

- ➢ Complete uncertainty when the two are divorced: A plant manager can never know if his/her operations are complying because there's no clear measuring stick.

- ➢ EPA says it wants to promote "compliance," but it frustrates that goal by "undefining" what compliance means.

- ➢ EPA acknowledges that ACE removes clear measures of compliance by its extensive discussion of its prior exercise of enforcement discretion.

    - This is an admission that EPA would at least be empowered to pursue enforcement with any evidence, and that EPA itself (in administrative cases) and the courts are left to decide if a violation had occurred.

    - Plenty of other cases where we'd disagree with propriety of EPA's exercise of enforcement discretion, even in some of the cases cited in the Position Paper.

    - Unacceptable (constitutionally and philosophically) to empower EPA to decide how to define the source's obligation in an enforcement action.

- ➢ What EPA's examples of both EPA and citizen enforcement cases again illustrate is that neither is prevented from seeking penalties or corrective action under *current* law, without the ACE rules.

4. **ACE IS UNLAWFUL**

a. Primary alleged basis for ACE is § 113(e). Acknowledgment of what that provision actually says is conspicuously absent in Position Paper: "Any credible evidence" may be used to prove <u>duration</u> of violation for penalty purposes, not whether violation occurred in the first place. This recent CAA change thus only confirms that the <u>occurrence</u> of a violation must be established by the method provided in the underlying applicable requirement.

b. Even if § 113(e) could be read the way EPA is proposing to use it, no rules are required: It is a self-executing directive to the federal courts that they may use any

credible evidence concerning the duration of a violation in enforcement cases brought by EPA under § 113, for purposes of determining the appropriate penalty, once the occurrence of a violation has been determined via the prescribed compliance method.

- ➢ Congress cannot empower EPA to establish rules of evidence in federal court (including presumptions), only to define expected conduct.

- ➢ Even more disconcerting are the proposed changes to Parts 51 and 52 that would impose ACE in each SIP, along with several presumptions that states are to use:

  - Questionable whether Congress, much less EPA, is in a position to define the Rules of Evidence in State courts: State courts are creatures of state constitutions.

  - Even if Congress could do so, it didn't: § 113 speaks only to EPA enforcement actions, and there is no parallel language in § 110, which defines all requirements for approvable SIPs.

  - A reviewing court is not likely to accept Constitutionally questionable rules promulgated by an administrative agency absent a "plain statement" in the statute that Congress intended the Agency's approach. *E.g., Gregory v. Ashcroft*, 111 S.Ct. 2395 (1991).

c. ACE is unlawful because it changes the underlying standards:

- ➢ Effect of TM on stringency long-established:

  - By courts: *PCA v. Ruckelshaus,* 486 F.2d 375 (D.C.Cir. 1973)

  - Accepted by EPA: Otherwise, why has EPA been so protective of its reference methods?

- ➢ Even if EPA were authorized to increase stringency of all of its rules by fiat in one ACE rule, EPA cannot compel the States to do so:

- E.g., § 52.12(c) as proposed in 10/93 EM rules states, "notwithstanding any other provision, for enforcement purposes, any credible evidence may be used to determine a SIP violation." This proposed provision goes on to further list various presumptions of what is credible, including any method in EPA rules.

- States, however, have defined compliance with EL's by incorporation of specific compliance techniques, and as noted above (e.g., PM sampling temperature), TM defines EL.

- This one provision in Part 52, which appears to be self-executing, would override all of the State's decisions on how compliance is determined and thus of what the SIP actually requires. As such, § 52.12(c) (and its counterpart in Part 51) plainly violate § 110(i) and years of judicial pronouncements on the State-Federal relationship.

  (1) CAA § 110(i) provides that no SIP can be changed except by SIP call process.

  (2) Cases from *Train v. NRDC*, 95 S.Ct. 1470, 1481-82 (1975)(which first declared the limited EPA role in approving, not changing, SIPs) to *Bethlehem Steel v. Gorsuch*, 742 F.2d 1028, 1035-36 (7th Cir. 1984)(EPA cannot make SIP more stringent than intended by states except under procedures in § 110), to *U.S. v. Riverside Labs*, 678 F.Supp. 1352, 1356-57 (N.D. Ill. 1988)(EPA cannot enforce a SIP against alleged violator where state court concludes that SIP does not apply to defendant), consistently establish that EPA cannot override in one rule all of the carefully established emission limit/test method decisions made by the states and approved by EPA.

d. ACE is unlawful because rules would no longer provide adequate notice of what is prohibited: "Companies must be on notice as to what will constitute a violation," *PCA*, 486 F.2d at 398 n. 91.

Practical Remediation Technologies - Organics

"The Money Pit"

Evan K. Nyer

Author Biographical Information:

Evan K. Nyer is an expert in the research and application of technology to groundwater cleanup. As Vice President of Geraghty & Miller, Inc., he has been responsible for maintaining and expanding Geraghty & Miller's technical expertise in above-ground and in situ remediation, engineering, bioremediation, and many other areas. He also provides expertise in engineering services, including the design of treatment systems for sites with contaminated soil or water throughout the United States. He has designed and installed more than 200 groundwater and soil remediation systems. His books Groundwater Treatment Technology and Practical Techniques for Groundwater and Soil Remediation cover the state-of-the-art in groundwater and soil remediation. His latest book, In Situ Treatment Technology, extends his writings to the in situ methods. He is a member of the National Ground Water Association, the American Institute of Chemical Engineers, and the American Society of Civil Engineers.

PRACTICAL REMEDIATION TECHNOLOGIES

By

Evan K. Nyer
Geraghty & Miller, Inc.

INTRODUCTION

As we all know there is going to be a test next week. It will be 50% of your grade, and therefore an important part of your passing this course. In order to give everyone the best chance of success, the purpose of this column will be to review the main points that we have covered. (Everybody take two breaths and get over the flashback. Aren't mind games fun?)

Seriously, a little review never hurt anyone. While we have discussed many different specific topics recently, there have two major themes that we could place most articles in. First is that geology controls most remediations. We have discussed this as far as reaching remediation, design of remediation techniques, and strategies for selecting the right combination of remediation technologies. The second major theme has been the separation of remediation technologies into two major categories. The first category is the old pump and treat in which we used water as a carrier. The second category, and newer technologies, are all related in that they use air as the carrier.

Now I realize that these are simple ideas and that most of you understand them and are now bored with me discussing them. However there is a significant portion of the readers that

only concentrate on the flashy columns that have described the application of new technologies. As I have stated many times before, the only way to design a cost effective remediation is to understand these two basic areas, and the only way you're going to pass this test will be to understand these two areas. The flashy new technologies will only count as 10% of this test. So, let us review both basic ideas one more time.

GEOLOGY CONTROLS REMEDIATION NOT TECHNOLOGY

No matter how new or fancy the technology is, it's application will have limits when applied in the field to remediate a site. Those limits are related to basic geologic formations and properties. The limits show up in two important ways. First, we are finding that most contaminated sites will not reach MCL concentration for the particular organic while using water as a carrier. The second is that all technologies based on a carrier, water or air, will have a change in concentration over the life of the remediation that can be called the Life Cycle.

The basis of all pump and treat remediation systems is that water is used as the carrier to bring contaminants from the aquifer to above ground where the contaminants are removed from the water. There have been two prominent studies performed during the last several years that focused on the limitations of pump and treat as a remediation technology for aquifers. The EPA and the NRC both studied multiple sites at which pump and treat was applied to determine the capabilities of this technology. The details of these studies are available in other published work (Nyer et.al. 1996, Nyer 1995).

The good news from pump and treat systems is that two functions are carried on at the same time with a pump and treat design. The first function is to use the removal of the water from the aquifer to create a new flow pattern in the aquifer. This flow pattern, if designed correctly, can change the direction of groundwater movement. Since all plumes move by advection, controlling the water movement controls the spread of the plume. Both the EPA and NRC studies concluded that the control portion of the remedial design worked very well at most sites for pump and treat designs.

The second function of the pump and treat designs is to return the aquifer to "clean". Clean used to mainly be defined by the MCLs of the individual organic compounds. Both studies found that the pump and treat designs had severe limitations when trying to bring an aquifer back to clean conditions. In general, sites have an initial period of rapid removal of mass from the site, followed by gradual lessening of the rate of mass removal, ending in a long period of constant mass removal. The data pattern is consistent when shown as concentrations. The consistent mass removal rate or concentration can be described as the asymptote of removal curve.

This changing concentration over the life of the project is shown in Figure 1. Figure 1 is the Life Cycle of the concentration of the remediation system based upon pump and treat. While the scale on this curve may change depending on the geology and the organics involved with each individual project, the general shape of the curve occurs on every remediation project. What both studies found was that this consistent concentration was normally above the concentrations

required by the MCLs. Some of the monitoring wells would reach clean, but the entire site would not return to pre-contaminated conditions. In general, the wells near the original source of contamination will not go below MCLs. According to the NCR this was true for all sites that had chlorinated organics, and most sites that had degradable organics.

The Life Cycle curve can teach us several things about good remediation design. The first thing is that the design of all above ground treatment equipment must anticipate the change in concentrations over time. While we have only been discussing water treatment equipment so far, this statement is also true for treatment designs based upon air as a carrier. The above ground treatment equipment associated with Vapor Extraction Systems, Vacuum Enhanced Recovery, and Air Sparging all have to be designed with the change in concentration in mind. This is because geology controls the shape of the Life Cycle not the technology or the carrier that the technology uses.

The next lesson that the curve can teach us is that we can only design for the front part of the curve. Good technology and design can change the steepness of the drop in concentration at a site or, more importantly, the rate of mass removal from a site. The lower portion of the curve, the asymptote, however can not be controlled by technology. This portion of the curve is controlled by diffusion in the aquifer. Figure 2 shows a representation of a standard homogeneous aquifer. Even when the geologic conditions create homogeneous characteristics in the aquifer, certain flow patterns are set up in the ground for carrier movement. The simplest way to explain movement of carriers below ground is that there are main flow patterns of carrier

movement, minor flow patterns, and relatively stagnant areas. The lower part of the curve is controlled by the diffusion from the relatively stagnant areas of the aquifer into the minor and main flow patterns. Details of these flow patterns and the limitations that they cause for remediations are provided in other references (Nyer et.al. 1996).

The bottom line is that any remediation design that has an objective of removing mass from the aquifer must be designed for the initial part of the Life Cycle. The cost effectiveness of this design will be based upon the ability to remove the equipment and stop operation. If the equipment is left in place for the entire Life Cycle, the advantages of the technologies will not be realized in cost savings to the project. Unless that equipment is shutdown and removed after the mass removal portion of the project has been completed no savings will occur. This will be discussed further in the next section.

The final area that must be considered in all Life Cycle designs is monitoring. This is one area that most designers do not feel is important in their original design. However, due to the length of time most remediation systems and full clean-ups require, monitoring can become a significant portion of the cost, especially in later years of the project. Therefore, the original design of remediation must include consideration of monitoring over the Life Cycle of the project. As remediation progresses and the contaminants are brought under control and removed, the number of monitoring wells used, the frequency of their use, and individual chemicals monitored must reflect the conditions of the site over time. In other words, the monitoring must be wound down over the life of the project in order for a cost effective remediation to occur.

AIR VERSUS WATER REMEDIATION TECHNIQUES

The other main thing that we have kept constant over the last several years is that there is no such thing as *in-situ* technologies. Through several articles we have shown that the main three *in-situ* technologies vapor extraction systems, sparging, and vacuum enhance recovery all still rely on a carrier to remove the compounds from the aquifer. All of these methods are based on air as the carrier as opposed to water being the carrier. Due to the nature of air as a carrier, the air carrier methods can have an advantage of 200 to 10,000 over water as a carrier depending on the nature of the organics and the geologic conditions. We normally think of pump and treat methods over a ten to twenty year period, while we think of air methods over a 6-month to 2-year period.

Advantages of these methods are significant but they only address the initial part of the Life Cycle curve. As with water as a carrier, the air will have areas of main flow patterns, areas of minor flow patterns, and areas of relatively stagnant conditions. Once again, these relatively stagnant conditions will control the lower part of the Life Cycle curve and produce the asymptote of low concentration. This asymptote is controlled by the geologic conditions of the site. This relates right back to our original comment that geology controls remediations not technology. This statement is true in the air methods in addition to the water based carrier methods.

The key to good air based design then becomes the length of the time the equipment is on site. Since water and air both hit asymptotes, it is important to separate the conditions at which

the equipment is removed from the site from the conditions that signify the site is "clean". If the asymptote(or rebound) is above the MCLs, and the end of the project is defined as MCLs, then an air based method of remediation can be required to be on site for many years. Most of the savings between an air sparging system and a pump and treat system is lost if the sparging system has to run for 25 or 30 years. The basic advantage of air system is mass removal. The monetary advantage is that this mass removal from the air system can happen in a relatively short period of time of 6 months to 2 or 3 years. The equipment must be removed if this advantage is to be turned into cost savings. The lower part of the life cycle curve must then be dealt with by another remediation technology. We have discussed several biological, both microbiological and macrobiological (phytoremediation), technologies in conjunction with finishing the remediation project as reaches to the asymptote.

Cost effective remediation must understand the advantages of air over water as a carrier. To fully realize the cost advantages, however, the designer must also realize the limitation of air as a carrier. Both the advantages and the limitations are necessary in designing a cost effective remediation design.

CONCLUSIONS

Sorry about the boring review of "simple" stuff. The problem is that most of the design mistakes that I see in the field can be related to one of the basic ideas that I presented above. It seems that designers do not feel that they are doing a good job unless they put in the latest, most

technologically advanced designs that they can find in a magazine article. This is true for all over the world. The only time that I get a lot of requests for a copy of one of these columns from foreign readers is when a 'hot' technology is mentioned in the title.

Next column I promise to return to ADVANCED technology. One possible subject could come from a project that I have just finished. This remediation took one year from the time we received verbal approval from the regulatory agency. In that one year we designed, installed and operated a remediation system that covered an area of approximately 5 acres, required 38 well points screened 65 ft below land surface, two miles of interconnecting pipe, a water treatment system, and an air treatment system. In other words, it was not a small project. The system removed over 95% of the chlorinated organics from the aquifer in that time. Would the readers consider that advanced technology? The problem is that the design was not based upon any of the new or advanced technologies. It was based upon the basic criteria that I have presented in this column. It may be boring, but you can use these ideas to save significant amounts of money and time.

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Figure 1 Life Cycle Concentration During Remediation

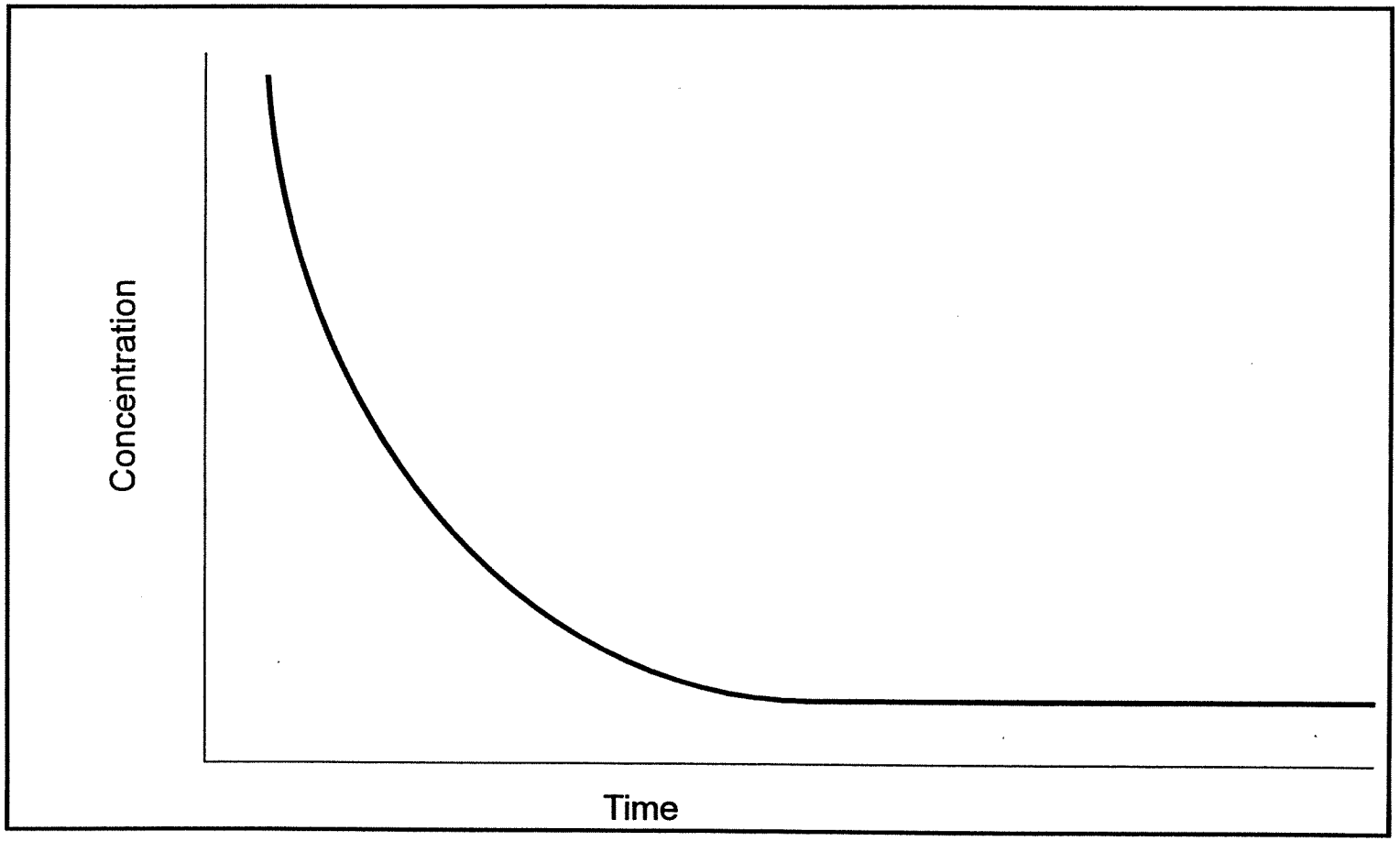
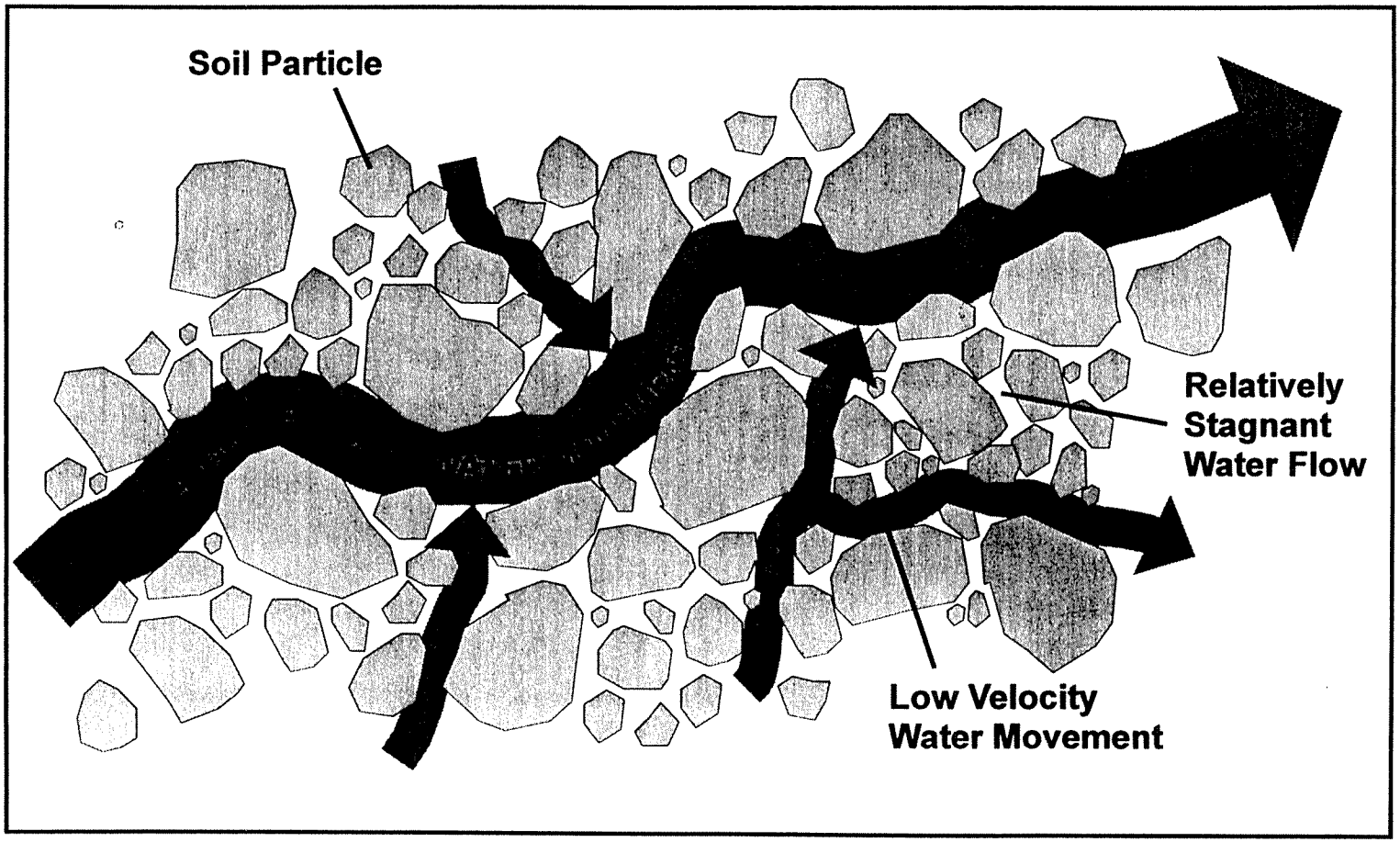


Figure 2 Water flow through soil microcosm.



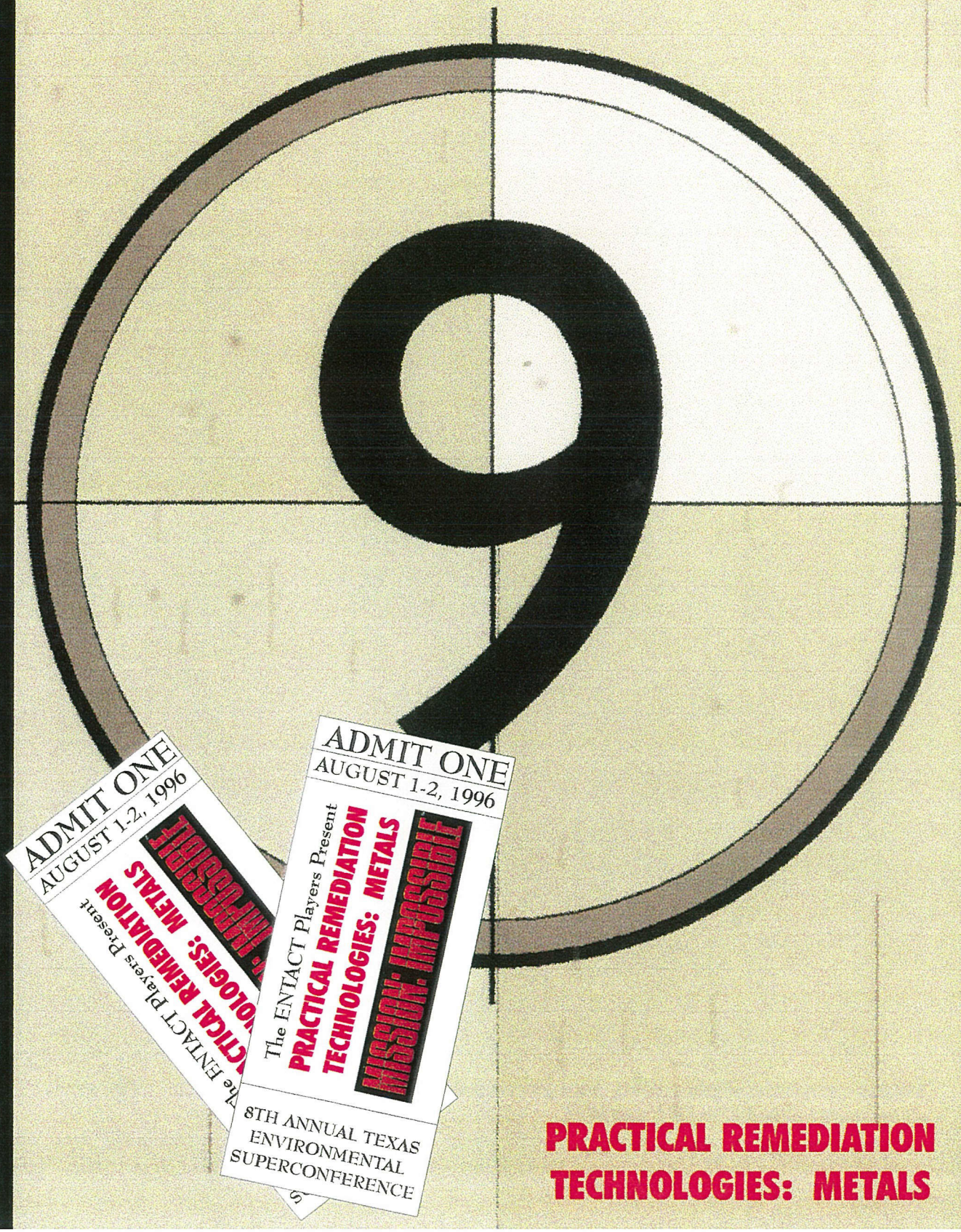
Practical Remediation Technologies

"Ironweed"

Mike Studer

8TH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

ENTACT



PRACTICAL REMEDIATION TECHNOLOGIES: METALS

ENTACT, INC.
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Enclosed are selected project profiles. For a more detailed Statement of Qualifications, please contact Mike Studer (214) 580-1323.

ENTACT

environmental tactics in waste management

AN INTRODUCTION TO ENTACT'S TOTAL PERFORMANCE APPROACH

ENTACT began with its primary experience in the organic contamination arena. This includes petroleum related wastes, TPH contamination and organic-based materials. We introduced our *Total Performance Approach* to the lead and heavy metals industry in 1991 and have been successful operating in this inorganic arena as well. Our customer base includes both the world's largest public and private companies operating secondary lead smelters and battery breakers and the world's largest battery manufacturer. In all of our work we utilize the deeply held belief in the demonstrated value of conducting projects with all the required competencies and accountabilities in one company - the *Total Performance Approach*. We believe this is an evolutionary improvement over the design/build concept.

What is our definition of *Total Performance Approach* (or what is called the consultant/contractor function)? There are three (3) primary components of most successful remediation projects. These include:

1) Regulatory strategy and negotiation,
2) Engineering and technical services (i.e., civil, environmental, geophysical, hydrology and geochemical disciplines), and
3) Field remedial and construction activities.

The common sense way for us to deliver the lowest cost solution is to integrate the regulatory, technical and construction talents into one unit. As an example, for every project we establish a business team which is responsible for delivering the identified objectives of:

Customer care
Profit plan
Safety and health program
People development
Innovative methods/solutions.

This business team is made up of highly-skilled people with regulatory, engineering/technical, field construction and customer care expertise.

Has this unique approach for our industry been effective? We welcome you to touch base with our customers and ask them. They have written checks for projects consisting of:

1) Excavation and/or treatment of more than 1.5 million tons of lead contaminated soils and materials,
2) Remediation of more than 400 residential lots which had lead contamination from former secondary lead refining, lead smelting and battery breaking operations,

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3) Design and construction of more than 41 acres of RCRA and composite caps,
4) Collection and analyses of more than 7,000 total lead and TCLP lead samples,
5) Collection and analyses of 18,000 XRF readings during the process of segregating, validating and/or treating 1.5 million tons of lead impacted soils,
6) Decontamination of approximately 1,000,000 square feet of lead impacted buildings and facilities,
7) Asbestos abatement of facility components, production systems and structures in more than 750,000 square feet of buildings,
8) Demolition, segregation and management of debris resulting from 1,325,740 square feet of buildings,
9) Transfer of a Texas State Superfund site into the Voluntary Clean-up Program and multiple VCP applications,
10) Numerous remedial activities associated with the removal of underground storage tanks, TPH and BTEX contaminated soils, groundwater investigations and remediation, subsurface containment systems, and waste management activities,
11) Design and development of patent-pending treatment additives and equipment for lead and heavy metal impacted soils and materials,
and
12) Development of remedy-based risk assessment models.

ENTACT has completed remediation projects using our *Total Performance Approach* (i.e., no oversight or third-party engineer) including secondary lead smelters and battery breakers, battery manufacturing facilities, residential cleanups and site closures.

Our project experience has included many PR challenges (i.e., residential or commercial areas with relatively high traffic conditions).

These projects have been performed using our *Total Performance Approach*. We would like to emphasize that our regulatory and technical design people produce innovative, environmentally safe, common sense and low cost solutions. This is because they have been "joined at the hip" with the field remediation and construction folks. The people doing the regulatory/technical design and those who will perform the field construction have a deep appreciation for the components of each activity. We started and built this company by uniting these components from day one. Our integrated service orientation and many past lessons have created an effective current performance.

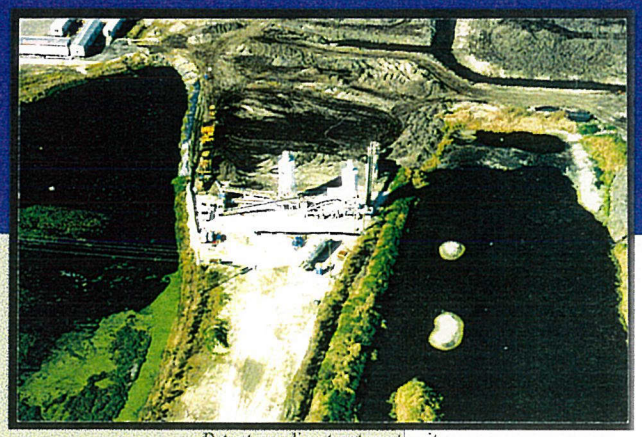
As a final thought, we would like to mention a point or two about our culture. We have an unusual combination of people and abilities. We truly love this business and we are especially charged by the opportunity to deliver a common sense, innovative work plan and implement a low cost field solution. One of the "walk the talk" agreements we have amongst ourselves is that a bulk of our compensation is performance based. The system is simple: great customer care equals greater reward. Additionally, we have broad based ownership meaning 80 % of the people on your site will be common stock holders. So how do we have this type of experience with 100% customer satisfaction? The simple answer is *"better, faster, cheaper"*.

Schuylkill Metals NPL Site

Plant City, Florida



Stabilized material monolith, excavation area, and treatment unit.



Patent pending treatment unit.

REGULATORY ACHIEVEMENTS

- DESIGNED, OBTAINED APPROVAL, AND IMPLEMENTED AN OPTIMIZED TREATABILITY STUDY WORKPLAN IN LESS THAN 45 DAYS THAT PROVIDED A MORE COST EFFECTIVE SOLUTION THAT ACHIEVED THE STRINGENT PERFORMANCE CRITERIA ESTABLISHED BY THE RECORD OF DECISION WHILE SIGNIFICANTLY REDUCING THE ADDITIVE TO MATERIAL RATIO
- NEW TREATABILITY WORKPLAN TOOK INTO ACCOUNT THE ADJACENT NEIGHBORHOODS, THE SURROUNDING WETLANDS, THE SHALLOW GROUNDWATER, THE NATURE AND EXTENT OF THE CONTAMINATION, AND THE STRINGENT PERFORMANCE CRITERIA
- NEGOTIATED WITH THE US EPA REGION IV, FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION, AND THE EPA CINCINNATI RESEARCH DIVISION, PERFORMING AS A LIAISON ON BEHALF OF THE CUSTOMER
- PREPARED AND/OR REVISED CONSTRUCTION MANAGEMENT PLAN, SAMPLING & ANALYSIS PLAN, TREATABILITY STUDY, AND SITE SAFETY & HEALTH PLAN
- NEGOTIATED THE REMOVAL OF A THIRD PARTY OVERSIGHT CONSULTANT AND EPA TECHNICAL ASSISTANCE TEAM

ENGINEERING/TECHNICAL ACHIEVEMENTS

- ENTACT ACCOMPLISHED THE REGULATORY NEGOTIATIONS, TREATABILITY STUDY ALTERATIONS, EQUIPMENT AND ADDITIVE DESIGN, PERFORMED AN ON-SITE PILOT STUDY THAT ACHIEVED THE PERFORMANCE CRITERIA WITHIN SEVEN MONTHS - OTHER FIRMS HAD WORKED ON THIS PROJECT FOR FIVE YEARS WITHOUT TREATING ANY MATERIAL
- HIGHER QUALITY AND MORE COST EFFECTIVE METHODS WERE IMPLEMENTED THROUGH SIGNIFICANTLY ALTERING THE TREATMENT METHOD AND ADDITIVE COMPOSITION
- DESIGNED A TREATMENT ADDITIVE AND SITE SPECIFIC TREATMENT PROCESS EQUIPMENT TO MEET A GROUNDWATER PROTECTION STANDARD OF 0.015 mg/l, A COMPRESSIVE STRENGTH >50 psi, A HYDRAULIC CONDUCTIVITY OF $<1 \times 10^{-6}$ cm/s, AND A TCLP LEAD CONCENTRATION < 5.0 mg/l
- TREATMENT EQUIPMENT DESIGNED SPECIFICALLY FOR THIS SITE WAS CAPABLE OF CRUSHING CONCRETE DEBRIS, PLASTIC, EBONITE BATTERY CASINGS TO < 0.5 INCHES, MEASURING ADDITIVE RATIOS, BLENDING CONTAMINATED PEAT, AND PROVIDING A HOMOGENEOUS MIXTURE OF MATERIALS
- DEVELOPED AN ADDITIVE FORMULATION WHICH REDUCED ADDITIVE TO MATERIAL RATIOS BY 40%, THUS REDUCING THE END VOLUME OF TREATED MATERIAL

ENTACT



Contaminated soil excavation.



Stabilized material compaction.



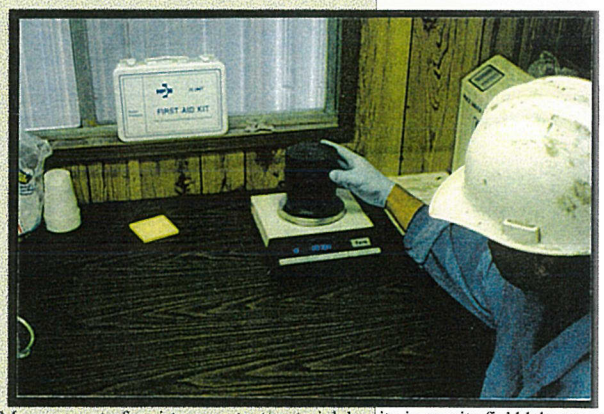
Material transfer into stabilization/solidification unit.



Stabilized material placement for final compaction.



Stabilization and material transfer activities.



Measurement of moisture content/material density in on-site field laboratory.

FIELD ACHIEVEMENTS

- EXCAVATION AND STABILIZATION/SOLIDIFICATION OF APPROXIMATELY 200,000 CUBIC YARDS OF METAL CONTAMINATED SOIL, DEBRIS, AND BATTERY CASINGS AT A PROCESS FLOW RATES UP TO 1,000 TONS PER DAY
- ALL STABILIZED MATERIAL ACHIEVED PERFORMANCE CRITERIA WITH ONE PASS THROUGH THE TREATMENT SYSTEM
- IN-SITU PERMEABILITY TEST PERFORMED ON THE TREATED MATERIAL MONOLITH EXCEEDED THE PERFORMANCE CRITERIA OF 1×10^{-6} cm/s - THIS WAS THE FIRST KNOWN IN-SITU PERMEABILITY TEST PERFORMED ON TREATED MATERIAL IN THE UNITED STATES
- FIELD COMPACTION EFFORTS IN 6 INCH LIFTS MAXIMIZED THE PERFORMANCE CRITERIA WHILE REDUCING THE OVERALL IN-PLACE VOLUME
- CONSTRUCTED A 6 ACRE MONOLITH WITH THE STABILIZED MATERIAL AND DESIGNED A COVER SYSTEM
- CONSTRUCTED FIELD LABORATORY TO MONITOR MOISTURE CONTENT, MATERIAL DENSITY, PREPARE PERMEABILITY CYLINDERS, AND CORRELATE XRF FIELD RESULTS
- PERFORMED AIR MONITORING THROUGHOUT THE PROJECT

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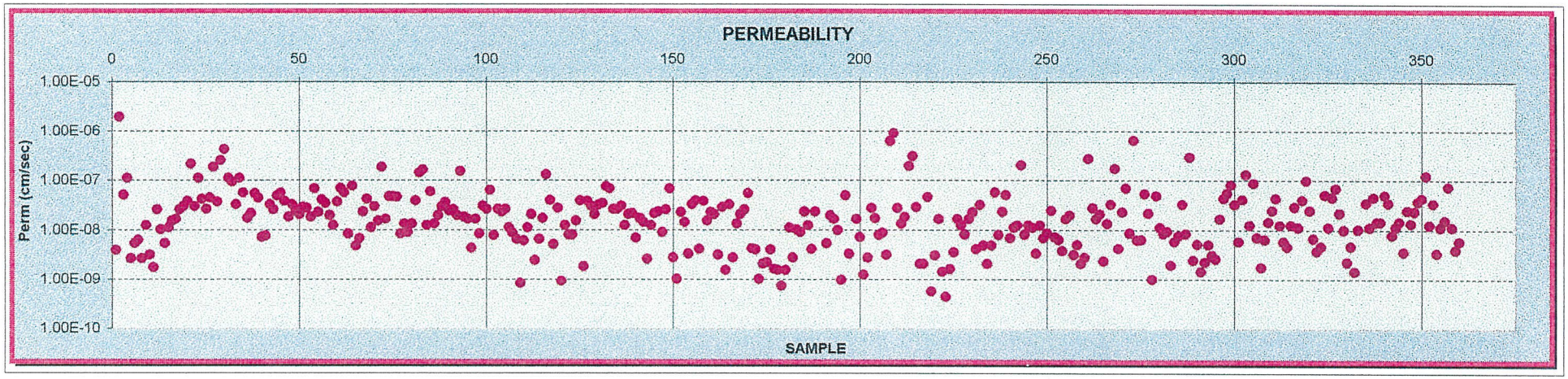
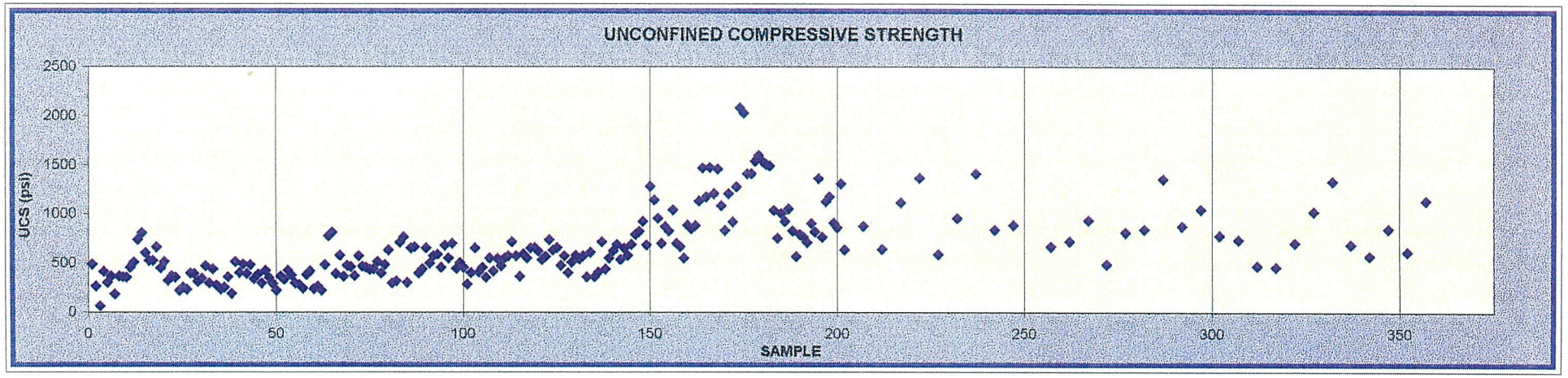
SMPCI

RESULT OF STABILIZATION/SOLIDIFICATION PROCESS

Battery Breaking/Recycling Facility





ENTACT, Inc.
7-29-96

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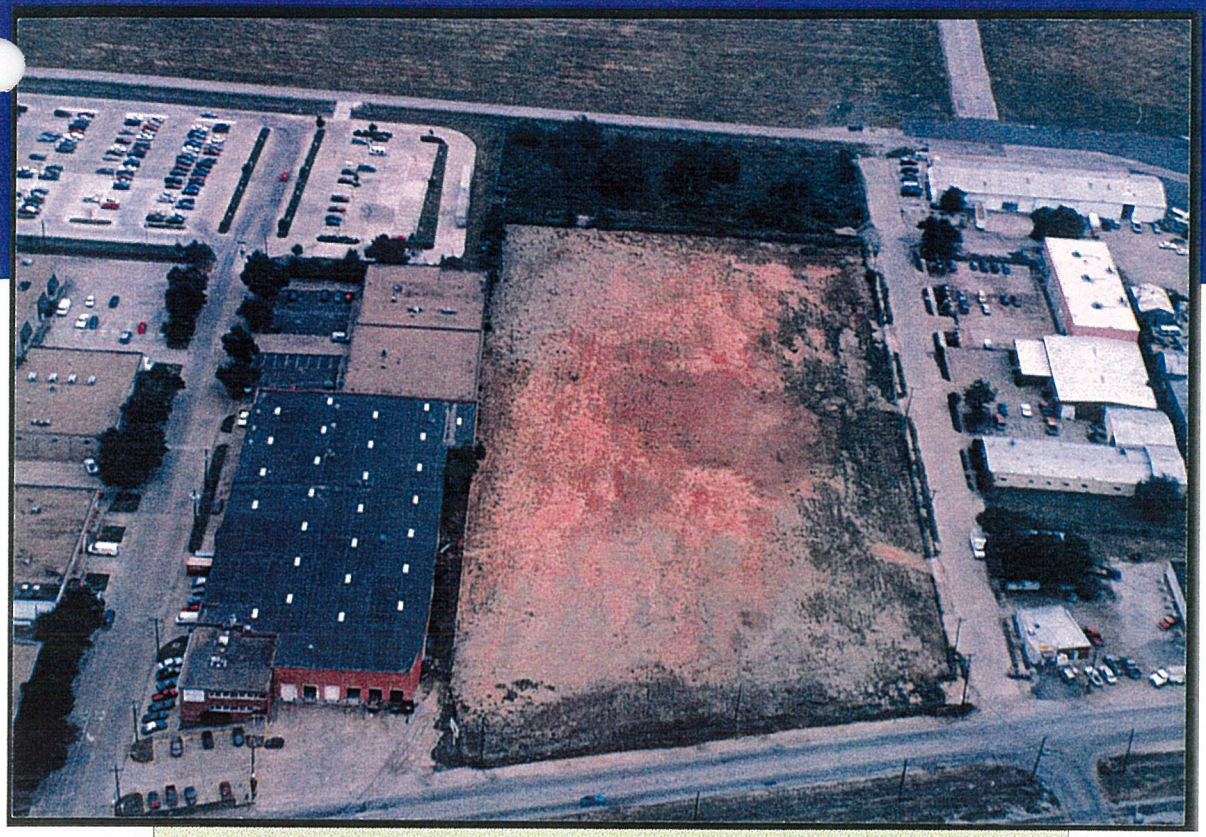
RESULT OF STABILIZATION/SOLIDIFICATION PROCESS

Battery Breaking/Recycling Facility

Sample/Batch Identification					Performance Criteria					
Batch / Sample Number	Quantity Treated tons	Quantity Treated to Date	Placement Grid Area	Placement Depth ft	Perm Results cm/s	UCS Results psi	TCLP Lead mg/l	TCLP Cadmium mg/l	TCLP Chromium mg/l	TCLP Arsenic mg/l
							Allowable Limits			
					<1EE-6	>50	<5.0	<1.0	<5.0	<5.0
374	127	191,056	BB11-BC, BB12-AD	22-24'	1.3EE-8	N/A	<0.20	N/A	N/A	N/A
375	379	191,435	AA7-ADBC, AA8-AD	22-24'	2.0EE-8	N/A	<0.20	N/A	N/A	N/A
376	10	191,445	AA7-ADBC, AA8-AD	22-24'	7.2EE-9	N/A	<0.20	<0.05	<0.010	<0.20
377	133	191,578	AA8-BC, AA9-ADBC	22-24'	1.0EE-8	N/A	<0.20	N/A	N/A	N/A
378	222	191,800	AA8-BC, AA9-ADBC	22-24'	2.5EE-8	N/A	<0.20	N/A	N/A	N/A
379	366	192,166	AA8-BC, AA9-ADBC	22-24'	2.8EE-8	N/A	<0.20	N/A	N/A	N/A
380	10	192,176	AA8-BC, AA9-ADBC	22-24'	6.2EE-9	N/A	<0.20	N/A	N/A	N/A
381	250	192,426	AA10-ADBC,AA11-AD	20-22'	3.1EE-8	N/A	<0.20	0.091	<0.010	<0.20
382	105	192,531	AA10-ADBC,AA11-AD	20-22'	2.7EE-8	645	<0.20	N/A	N/A	N/A
383	376	192,907	AA5-BC, AA6-ADBC	20-22'	1.7EE-9	N/A	<0.20	N/A	N/A	N/A
384	10	192,917	AA5-BC, AA6-ADBC	20-22'	5.8EE-9	N/A	<0.20	N/A	N/A	N/A
385	364	193,281	AA7-ADBC, AA8-AD	20-22'	3.0EE-9	N/A	<0.20	N/A	N/A	N/A
386	375	193,656	AA8-BC, AA9-ADBC	20-22'	3.4EE-8	N/A	<0.20	<0.050	<0.010	<0.20
387	70	193,726	AA10-ADBC,AA11-AD	20-22'	2.3EE-8	N/A	<0.20	N/A	N/A	N/A
388	305	194,031	AA10-ADBC,AA11-AD	20-22'	1.4EE-8	N/A	<0.20	N/A	N/A	N/A
389	375	194,406	AA7-ADBC, AA8-AD	20-22'	2.7EE-8	N/A	<0.20	N/A	N/A	N/A
390	334	194,740	AA8-BC, AA9-ADBC	20-22'	1.0EE-9	N/A	<0.20	N/A	N/A	N/A
391	41	194,781	AA8-BC, AA9-ADBC	18-22'	5.0EE-9	N/A	<0.20	0.099	<0.010	<0.20
392	200	194,981	AA10-ADBC,AA11-AD	18-22'						

Former Battery Site

Dallas, Texas



Aerial view of former battery site.

TNRCC REGULATORY ACHIEVEMENTS

- PREPARATION OF REMEDIAL ACTION PLAN AND SAFETY PLAN WITH THE RISK REDUCTION RULE #1 (I.E., CLEAN CLOSURE) AS THE CLOSURE PERFORMANCE STANDARDS.
- THE REMEDIAL ACTION PLAN WAS CONSTRUCTED IN SUCH A WAY THAT PREVENTED THE CHARACTERIZATION OF THE SITE AS HAZARDOUS. THE SITE WAS NOT REQUIRED TO HAVE REMEDIAL ACTIVITIES PERFORMED UNDER A RCRA CLOSURE PLAN.
- ENTACT PROVED TO THE TNRCC THAT GROUNDWATER HAD NOT BEEN IMPACTED BY THE FORMER OPERATION OF THIS FACILITY. THIS RULING AVERTED THE NEED FOR EXTENSIVE GROUNDWATER INVESTIGATION.
- NEGOTIATED WITH THE TEXAS NATURAL RESOURCE CONSERVATION COMMISSION TO ALLOW FOR REMEDIATED PROPERTY TO BE RELEASED FOR SALE BY OWNER PRIOR TO EXTENT OF CONTAMINATION SURVEY COMPLETION.

ENGINEERING/TECHNICAL ACHIEVEMENTS

- PREPARATION OF REMEDIAL ACTION PLAN AND SITE HEALTH AND SAFETY PLAN.
- PREPARATION AND IMPLEMENTATION OF A BACKGROUND STUDY.
- PREPARATION OF BENCH SCALE TREATABILITY STUDY.
- PREPARATION OF ALL CLOSURE REPORTS IN ACCORDANCE WITH TNRCC RISK REDUCTION CLOSURE RULES.



Removal of concrete debris.



Excavation of lead-contaminated soil.



XRF verification of excavation depth.



Aerial view during excavation and treatment.



Soil stabilization process.



Treated soil conveyed to stockpile.

FIELD ACHIEVEMENTS

- EXCAVATION AND CONSOLIDATION OF APPROXIMATELY 40,000 CUBIC YARDS OF LEAD-CONTAMINATED SOIL AND DEBRIS.
- REMOVAL AND DECONTAMINATION OF 600 LINEAR FEET OF WASTE WATER TREATMENT PIPE AND FIVE (5) UNDERGROUND STORAGE SUMPS.
- STABILIZATION OF APPROXIMATELY 15,000 CUBIC YARDS OF HAZARDOUS LEAD-CONTAMINATED SOIL, BATTERY CASINGS AND COMPONENTS, DEBRIS AND MISCELLANEOUS MATERIAL TO TEXAS CLASS II STANDARDS (I.E., BELOW 1.5 TCLP LEAD).
- OFF-SITE NON-HAZARDOUS DISPOSAL OF APPROXIMATELY 40,000 CUBIC YARDS.
- BACKFILL USING APPROXIMATELY 40,000 C.Y. OF IMPORTED BACK-HAULED MATERIAL.

ENTACT

DENTON DRIVE
FORMER BATTERY MANUFACTURER
DALLAS, TEXAS

STABILIZATION RESULTS

Sample ID	TCLP Lead mg/L	Sample ID	TCLP Lead mg/L
1	0.24	21	0.07
2	2	22	0.13
3	1.2	23	0.04
4	0.55	24	0.21
5	0.05	25	0.19
6	0.07	26	0.41
7	0.03	27	0.72
8	0.03	28	0.47
9	0.03	29	0.38
10	0.03	30	0.03
11	0.07	31	0.03
12	0.61	32	3
13	0.61	33	0.1
14	0.27	34	0.25
15	0.03	35	0.49
16	0.16	36	0.16
17	0.76	37	0.85
18	0.21	38	0.03
19	0.25		
20	0.03		

TREATED SOIL SAMPLE AVERAGE 0.39

Secondary Lead Smelter

Dallas, Texas



Cap installation activities at a former lead smelter.

REGULATORY ACHIEVEMENTS

- NEGOTIATED STATE ADMINISTRATIVE ORDER
- GAINED APPROVAL FOR FULL FACILITY CLOSURE
- GAINED APPROVAL FOR ON-SITE CONSTRUCTION OF CONTAINMENT SYSTEM FOR DISPOSAL OF CONTAMINATED MATERIALS IN FLOOD PLAIN AND RESIDENTIAL AREAS
- COORDINATED ALL ACTIVITIES WITH TNRCC FOR NECESSARY APPROVAL TO IMPLEMENT PLANS
- PREPARATION AND APPROVAL OF REMEDIAL ACTION PLAN, CLOSURE PLAN FOR 18 HAZARDOUS WASTE UNITS, RFI WORKPLAN, STORMWATER PERMIT POLLUTION PREVENTION PLANS, OFF-SITE FACILITY INVESTIGATION, AND POST- CLOSURE CARE PERMIT

ENGINEERING/TECHNICAL ACHIEVEMENTS

- DESIGN OF A 5,800 FOOT SUBSURFACE SLURRY WALL AT A DEPTH OF 30 FEET
- DESIGN OF A SYSTEM TO CRUSH AND TREAT 45,000 CUBIC YARDS OF SLAG, LEAD CONTAMINATION SOIL, AND BATTERY CASINGS
- DESIGN OF A 13 ACRE RCRA GRADE CAP
- DESIGN OF A GROUNDWATER MONITORING AND REMEDIATION SYSTEM
- DEVELOPED AND PERFORMED RCRA FACILITY INVESTIGATION (RFI)
- ESTABLISHED ADJACENT AREA BACKGROUND CLEANUP LEVELS

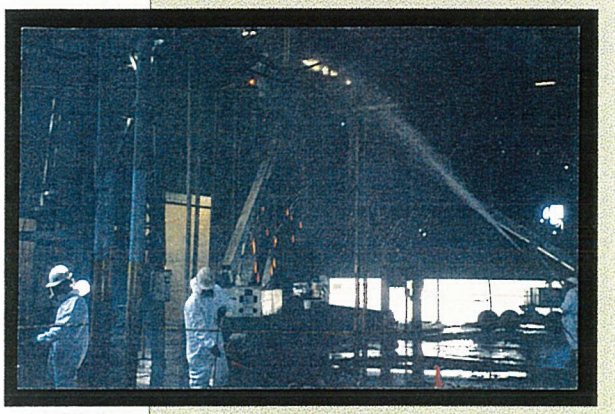
ENTACT



Wastewater treatment tank decontamination activities.



Slurry wall installation on perimeter of cap.



Interior smelter facility decontamination prior to demolition.



Installation activities during cap phase.



Excavation and removal of material from properties adjacent to the smelter.



Completed cap.

FIELD ACHIEVEMENTS

- DECONTAMINATION AND DEMOLITION OF A 75,000 SQUARE FOOT BUILDING INCLUDING SMELTER BUILDINGS AND EQUIPMENT
- DECONTAMINATION OF A 18 HAZARDOUS WASTE UNITS
- REMOVAL OF K069 CONTAMINATED DEBRIS FOR THE BDAT TREATMENT AND RECOVERY AT A SECONDARY LEAD SMELTER
- TREATMENT OF 45,000 CUBIC YARDS OF CONTAMINATED SOILS AND SMELTER SLAG TO CLASS II NON-HAZARDOUS LEVELS
- IN-SITU NEUTRALIZATION OF LOW pH SOILS
- CONSTRUCTION OF A SUBSURFACE SLURRY WALL 30 FEET DEEP AND 5,800 LINEAR FEET
- CONSTRUCTION OF A 13 ACRE RCRA GRADE CAP
- IN-PLACE CLOSURE OF 250,000 CUBIC YARDS OF CONTAMINATED MATERIAL INSIDE CONTAINMENT SYSTEM
- ON-SITE TREATMENT OF CONTAMINATED WATER AND DISCHARGE TO CITY FACILITY
- INSTALLATION OF 31 MONITORING WELLS
- REMEDIATION AND RESTORATION OF RESIDENTIAL PROPERTIES ADJACENT TO THE SMELTER FACILITY

ENTACT

DIXIE METALS CORPORATION
SECONDARY LEAD SMELTER
DALLAS TEXAS

STABILIZATION RESULTS - TCLP LEAD

Sample Identification	Results (mg/L)	Sample Identification	Results (mg/L)	Sample Identification	Results (mg/L)
1A	0.68	23	<0.05	46	0.06
1B	0.57	24	<0.05	47	0.10
2A	0.57	25	0.90	48	<0.05
2A dup	0.10	26	<0.05	49	<0.05
2B	5.83*	27	<0.05	50	0.07
2B dup	9.28	28	<0.05	51	0.11
4A	0.55	29	0.10	52	0.08
5A	0.08	30	0.06	53	0.07
6A	1.12	31	<0.05	54	0.05
7B	1.02	32	<0.05	55	0.10
8A	0.08	32B	0.06	56	<0.05
9A	1.05	33	0.38	57	0.53
10	0.12	34	0.06	58	0.09
11	1.28	35	<0.05	59	0.22
12	2.34	36	0.11	60	<0.05
13A	<0.05	37	0.14	61	<0.05
14A	1.05	38	<0.05	62	<0.05
15A	0.09	39	<0.05	63	<0.05
16A	<0.05	40	0.07	64	0.07
18	<0.05	41	0.06	65	<0.05
19	0.10	42A	<0.05	66	0.07
20	<0.05	43	<0.05	67	0.19
21	<0.05	44A	<0.05	68	0.07
22	<0.05	45	<0.05	69	0.06

DIXIE METALS CORPORATION
SECONDARY LEAD SMELTER
DALLAS TEXAS

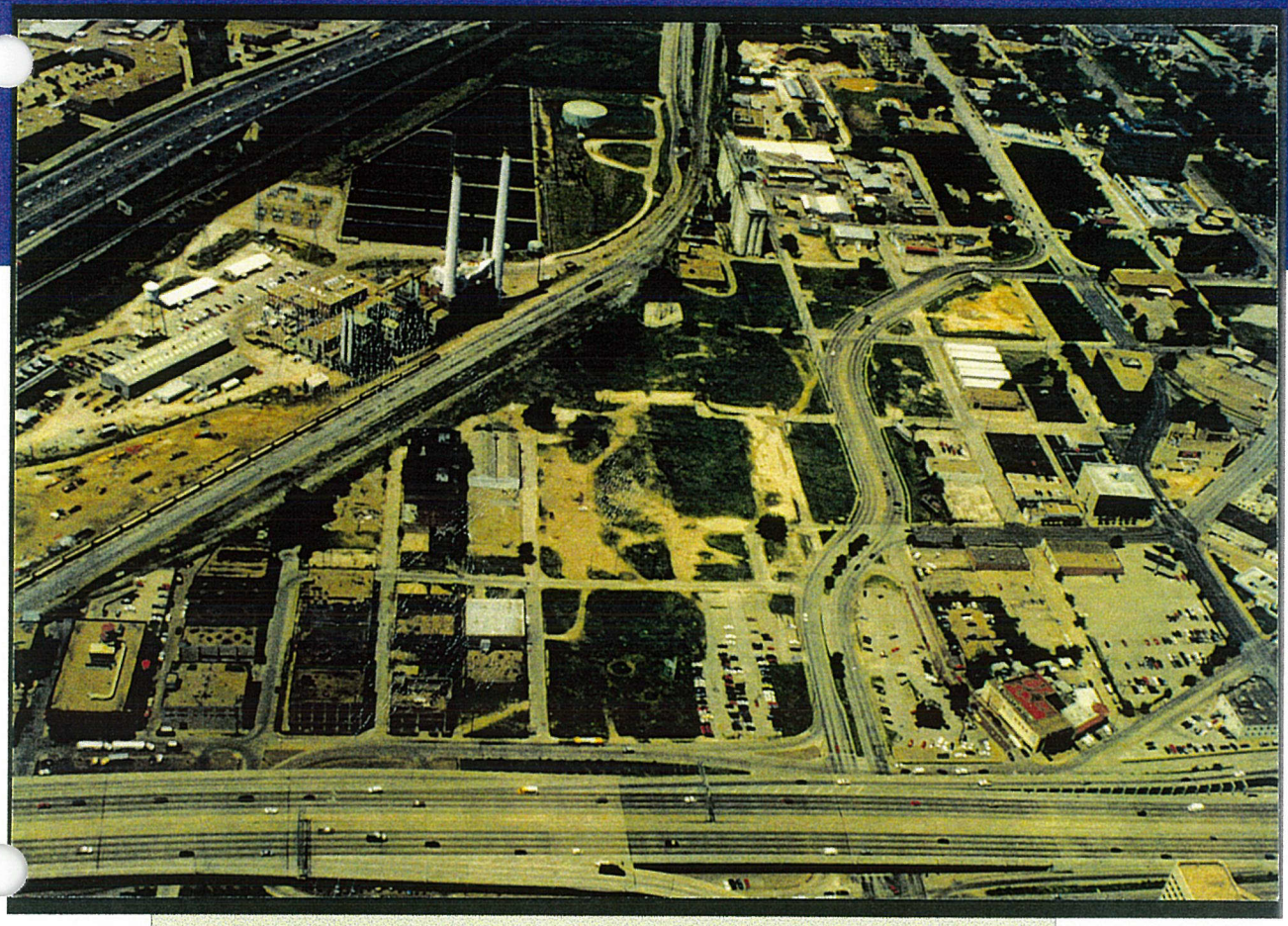
STABILIZATION RESULTS - TCLP LEAD

Sample Identification	Results (mg/L)	Sample Identification	Results (mg/L)	Sample Identification	Results (mg/L)
70	<0.05	91	0.11	117	0.05
71	<0.05	92	0.13	118	26.4
72	<0.05	93	0.10	118 (recheck)	12.2
73	0.10	94	0.13	119	0.07
74	<0.05	95	0.16	120	1.37
75	<0.05	97	0.29	121	39.7
76	<0.05	98	0.05	121 (recheck)	0.04
77	0.24	100	0.16	122	1.54
78	0.10	101	<0.05	122 (recheck)	1.48
79	<0.05	102	<0.05	123	0.12
80	<0.05	103	0.07	124	0.27
81	0.06	104	<0.05	125	<0.05
82	0.11	104A	0.12	126	2.58
83	<0.05	105	0.05	126A	<0.05
84	<0.05	106	<0.05	127	10.8
85	0.10	107	0.08	127 (Re-run)	11.3
86	0.10	108	0.31	127A	<0.18
87	0.84	109	<0.05	128	0.11
88	0.10	110	<0.05	129	0.05
89	2.41	111	<0.05	131	0.07
89 (retest)	2.56	112	0.06		
89 (dup)	50.2	113	0.14		
89 (retest 2)	0.11	114	5.27		
90	0.08	114 (recheck)	2.47		

FINAL TREATED SOIL SAMPLE AVERAGE = 0.32 mg/L

Former Industrial Site

Dallas, Texas



Aerial view of former industrial Site.

REGULATORY ACHIEVEMENTS

- PARTICIPATION IN THE TEXAS NATURAL RESOURCE CONSERVATION COMMISSION (TNRCC) VOLUNTARY CLEANUP PROGRAM (VCP).
- NEGOTIATED VCP REQUIREMENTS WITH TNRCC.
- PREPARATION OF WORKPLAN, SAMPLING AND ANALYSES PLAN, HEALTH AND SAFETY PLAN AND STORMWATER MANAGEMENT PLAN.
- COMPLIANCE WITH EPA STORMWATER PERMITTING REQUIREMENTS.
- AMENDED VCP AGREEMENT TO INCLUDE TWO UST SITES.
- MAINTAINED CLOSE CONTACT WITH TNRCC REGARDING PROJECT SCHEDULE AND ATTAINMENT OF VCP AGREEMENT REQUIREMENTS.
- PRESENTED DRAFT REPORT FORMAT AND CONTENT TO TNRCC PRIOR TO COMPLETION OF FIELD ACTIVITIES.

ENGINEERING/TECHNICAL ACHIEVEMENTS

- NEGOTIATED LEAD BACKGROUND CLEANUP CRITERIA.
- ANALYSIS OF SPLP DATA TO DEFEND RISK-BASED CLEANUP LEVELS FOR CADMIUM, CHROMIUM, MERCURY, NICKEL, ZINC AND SEMIVOLATILE COMPOUNDS (SVOCs) REPORTED IN EPA METHOD 8270.
- CONSOLIDATED DATA FROM SEVERAL INVESTIGATIONS TO DEFINE EXTENT OF REMEDIATION.
- PERFORMED VERIFICATION AND WASTE CLASSIFICATION SAMPLING.
- COMPILATION OF PROJECT REPORT DURING PROJECT WILL RESULT IN EXPEDITED ISSUANCE OF CERTIFICATE OF COMPLETION.

ENTACT



ENTACT crews excavate material from a designated grid area.



XRF sampling is performed during grid excavation.



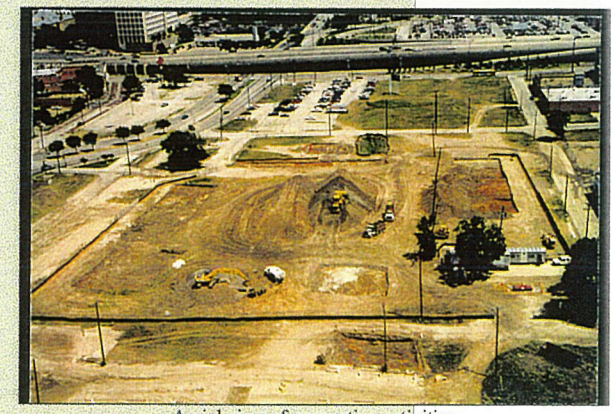
Excavated material is transferred.



A composite sample is collected from the site for analysis.



Excavated materials are loaded for transfer.



Aerial view of excavation activities.

FIELD ACHIEVEMENTS

- REMEDIATION OF THE SITE TO RISK REDUCTION STANDARD 1 (RRS1) AND RRS2 FOR OTHER METALS AND SVOCs.
- RESOLUTION OF GROUNDWATER ISSUES UNDER RRS2 WITHOUT INSTALLATION OF GROUNDWATER REMEDIATION EQUIPMENT.
- ONGOING EXCAVATION AND CONSOLIDATION OF 32,500 CUBIC YARDS OF SVOC CONTAMINATED SOIL–CLASS 2 NON-HAZARDOUS.
- ONGOING EXCAVATION AND CONSOLIDATION OF 1,000 CUBIC YARDS OF LEAD CONTAMINATED SOIL–CLASS 2 NON-HAZARDOUS.
- STABILIZATION OF 500 CUBIC YARDS OF LEAD CONTAMINATED SOILS TO LEVELS BELOW 1.5 MG/L TCLP LEAD.
- DEMOLITION, SIZING AND RECYCLING OF CONCRETE SLABS AND FOUNDATIONS.
- LOADING AND OFF-SITE TRANSPORTATION AND DISPOSAL OF 39,220 CUBIC YARDS OF CLASS 2 NON-HAZARDOUS MATERIALS.
- BACKFILLING OF EXCAVATIONS WITH SELECT FILL MATERIAL TO ACHIEVE 98% STANDARD PROCTOR DENSITY.
- COLLECTION AND MANAGEMENT OF APPROXIMATELY 500 VERIFICATION SAMPLES.
- DATA MANAGEMENT AND REPORT COMPILATION.
- PREPARATION OF SITE FOR CONSTRUCTION OF URBAN REDEVELOPMENT PROJECT.
- COMPREHENSIVE HEALTH AND SAFETY PROGRAM RESULTING IN ACCIDENT-FREE PROJECT SITE.

ENTACT

Manufacturing Facility

Dallas, Texas



Aerial photo of site.

REGULATORY ACHIEVEMENTS

- CONDUCTED NOTIFICATION AND MEETINGS WITH THE TNRCC.
- ENTERED SITE INTO VOLUNTARY CLEANUP PROGRAM (VCP).
- NEGOTIATED VCP AGREEMENT WITH TNRCC.
- RESPONSE ACTION WORKPLAN APPROVAL FROM TNRCC.
- CLOSURE OF UNDERGROUND STORAGE TANKS UNDER THE RISK BASED CORRECTIVE ACTION PROGRAM.
- MANAGEMENT OF ADDITIONAL SOURCE AREAS UNDER THE RISK REDUCTION STANDARDS.
- CONDUCT ALL PROJECT REPORTING NECESSARY FOR SITE CLOSURE.

ENGINEERING/TECHNICAL ACHIEVEMENTS

- REVIEW EXISTING DATA AND DEVELOP SITE STRATEGY.
- TECHNICAL REVIEW OF GROUNDWATER INVESTIGATION CONDUCTED BY OTHERS.
- EVALUATION OF FREE PRODUCT CONDITION DISCOVERED AFTER THE PREVIOUS SITE INVESTIGATION.
- DETERMINE CONTAMINANT TRANSPORT PATHWAY FROM SOURCE AREA.
- DEVELOP RESPONSE ACTION WORKPLAN.
- DESIGN INVESTIGATION TO DEFINE VERTICAL AND HORIZONTAL EXTENT OF SOIL AND GROUNDWATER CONTAMINATION.
- DESIGN FREE PRODUCT REMOVAL SYSTEM AS AN INTERIM SOLUTION.
- ASSESSMENT OF RESIDUAL CONTAMINATION REMAINING FROM PETROLEUM TANK REMOVALS.

ENTACT



Soil investigation.



Removal of residual product from process sump.



Installation of wells in the former UST area.



Groundwater testing.

FIELD ACHIEVEMENTS

- FREE PRODUCT DISCOVERY AND REMOVAL FROM AN EXISTING MONITORING WELL AS AN INTERIM SOLUTION.
- REMOVAL OF PRODUCT FROM SOURCE AREA.
- INSTALLATION OF MONITOR WELLS INSIDE OF ACTIVE MANUFACTURING AREA AND ADJACENT TO FORMER STORAGE TANK HOLD.
- DECONTAMINATION OF PROCESS AREA SUSPECTED AS THE ORIGINAL PRODUCT SOURCE.
- INSTALLATION OF SOIL BORINGS TO DEFINE EXTENT OF CONTAMINATION INSIDE AN ACTIVE MANUFACTURING AREA.
- DEVELOPMENT AND INSTALLATION OF A MONITORING WELL SYSTEM FOR THE KNOWN CONTAMINANT PLUME.
- INVESTIGATION OF A MONITORING WELL THAT WAS SUSPECTED AS A MIGRATION PATHWAY FOR THE GROUNDWATER CONTAMINATION.
- DESIGN AND INSTALLATION OF A PERMANENT RECOVERY SYSTEM FOR THE REMOVAL OF PRODUCT FROM THE IMPACTED WELL.

ENTACT

EPA Region VI Update

"North Dallas Forty"

Myron Knudson

Myron O. Knudson - Biographical Sketch

PERSONAL: Born in Hamilton, Texas, June 16, 1939; he and his wife, Doris, have a son and a daughter, Lars and Lisa.

EDUCATION: Bachelor of Science in Civil Engineering (1962), from the University of Texas at Austin; a Master of Science in Civil Engineering (Environmental Option - 1968) from Northeastern University in Boston.

PROFESSIONAL BACKGROUND: A registered Professional Engineer in Texas, Massachusetts, and New Hampshire; an Engineer with the Federal Water Pollution Control Administration 1966-1970; from 1970 until the present time with the U.S. Environmental Protection Agency. Served as Director, Surveillance and Analysis Division, Region 6, Dallas, Texas, March 13, 1975 - May 19, 1979. Served as Director, Water Management Division, Region 6, Dallas, Texas, May 20, 1979 - July 22, 1995. Appointed as Director, Superfund Division, Region 6, Dallas, Texas, July 23, 1995.

PRESENT TITLE: Director, Superfund Division, (6SF)
Environmental Protection Agency, Region 6
Suite 1200, 1445 Ross Ave., Dallas, TX 75202-2733
(214) 665-6701

ORGANIZATIONS: Member - American Society of Civil Engineers; Water Environment Federation; American Water Works Association and National Society of Professional Engineers.

Remarks Prepared for
MYRON O. KNUDSON, P.E., DIRECTOR
SUPERFUND DIVISION, ENVIRONMENTAL PROTECTION AGENCY, REGION 6
before the
EIGHTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE
Austin, Texas • August 1, 1996

INTRODUCTION

I appreciate the opportunity to be at this Eighth Annual Texas Environmental Superconference. I have been privileged to attend several previous such conferences and know how beneficial they are. As I look over the conference program, I am envious of those of you who will be able to attend the entire conference. It looks like a productive, informative two days.

I plan to spend the next several minutes talking about challenges facing the Environmental Protection Agency, our reinvention initiatives, our community based programs, and where I believe we are headed.

It really is good to be here ... to be able to conduct our business as we should. For many months, the Environmental Protection Agency was one of the Federal agencies which operated under continuing resolutions rather than a budget, including more than three weeks of furloughs for some of our staff. During this time, mail piled up, inspections were passed over and many of our employees remained idle. We had to fund our programs -- grants, contracts, and funding for our environmental partners -- piece meal. We were all relieved when Congress and the President completed the budget process with the omnibus budget bill in April so we could move full steam ahead to continue our efforts to protect public health and the environment.

Over 20 years ago, politicians, the American public, educators and environmentalists asked for the government to protect what we all share -- the air, the water, and the land that we hold in common trust. And the government responded: in 1970, President Richard Nixon established the US Environmental Protection Agency. We can all appreciate the results:

- We no longer have rivers that catch on fire.
- Our skies are cleaner.
- Hundreds of toxic dump sites have been cleaned up.
- We have banned toxic substances like DDT.
- We have protected millions of children from lead poisoning.
- And, we have cut toxic emissions from factories in half.

We have had many success stories across the Nation -- but one of the most interesting ones -- and one which is of special interest to those of us from Texas -- is the Houston Ship Channel. Until the creation of EPA in 1970 and promulgation of wastewater discharge laws in the Clean Water Act of 1972, there was little regulatory authority to curb industrial and municipal wastewater discharges into sewers and streams that fed into the Houston Ship

Channel. As more and more industries settled along the channel, more wastewater contaminated with chemicals, solvents, and toxins was discharged into it. The Ship Channel, which has been in existence for over 100 years, became a chemical 'soup' in which no fish or other aquatic life could survive.

EPA and the State of Texas pursued the issuance and enforcement of discharge permits under the 1972 Act -- focusing first on industry and then on municipalities. Today, thanks to good environmental management and cooperation by EPA, the State, local governments and industry, the channel has been dramatically cleaned up. Fish and aquatic life have returned to the lower reaches of the channel. A few years ago, when I was directing the EPA Region 6 water program, we received a report of a fish kill in the Houston Ship Channel. Normally, reports of a fish kill are received with great anxiety at EPA because they reflect poor conditions in a stream. In this case, however, I was excited ... a fish kill indicated that there were now fish in the Houston Ship Channel!

That does not mean that our job is done. Today, our challenges are different. We are looking at lifestyle changes such as how often we drive our cars and where we get them inspected. How are you using your household pesticides and fertilizers? Do you recycle your household or business wastes? We are asking small businesses and consumers to handle their share of pollution reduction and prevention in their communities and states.

In addition, our State programs have matured. When EPA was formed some 25 years ago, there was an uneven playing field among the States. States had a dis-incentive to set protective pollution standards. They would lose business to the State with the least restrictive standards. Today, our States have sophisticated environmental agencies. The playing field has been leveled by Federal law that sets national pollution standards. EPA's role is evolving, also. Now, in many cases, States are performing direct regulatory functions and EPA's role has become one of providing technical assistance and encouragement.

Although the environment has changed in the last 25 years, and EPA is changing to meet today's needs, one thing has not changed. Americans feel as strongly as ever that there is a need for a strong regulatory presence in the environmental field. A variety of national polls show that, while the American people desire less government intervention in their day-to-day lives, a majority support increased environmental protection. Here in Texas, a 1994 Rice University poll found that although a majority of Texans want less government in their daily lives, 72% still believe stronger regulations are needed to control industrial pollution.

A 1995 Harris Poll showed that a 56% majority of all adults believe that EPA is needed more today than when it began 25 years ago. Only 13% think that it is needed less.

Although a recent Superfund reform coalition poll found that many people believe the government is doing too many things which would be better left to state and local governments, their attitude

changes when discussing the environment: 36% saying there are not enough environmental laws, and 31% saying that current levels of environmental regulations are about right. Our challenge is to improve our programs using common sense and less dictatorial approaches -- not to roll back the environmental protection that the public expects of us. Our vision is to maintain high standards and use more flexibility and common sense.

We are not getting any increases in funding this year for our environmental programs. To quote Administrator Carol Browner, we are having to learn to do things cleaner, cheaper, and smarter.

REINVENTION INITIATIVES

As you have heard, the Clinton administration is reinventing environmental regulation by improving the way we do business. The President is encouraging innovation and flexibility to achieve better environmental results -- by tapping the creativity of industry as well as State and local communities to increase protection for all Americans.

There are many examples of how we are putting our reinvention initiatives to work. For example:

1. Project XL: If a company can find a cleaner, cheaper, and smarter way to get environmental results than through normal regulatory compliance, EPA encourages the company to do so. Proposed XL projects request flexibility in exchange for an enforceable commitment to achieve better environmental results than would have been realized through full compliance with regulations. XL Facilities Projects require the community to be involved in the project or at the facility -- we want the facility and the community to work together to build a healthy and sustainable future. Two of the dozen or so national XL Facilities Projects are in Region 6 -- Union Carbide in Taft, Louisiana and Lucent Technologies (formerly AT&T) in Mesquite, Texas. Others are in the development stage. I encourage each of you to consider an XL Facilities Project as a smarter way to achieve environmental results.

XL Communities Projects, on the other hand, serve as a way for entire communities to be involved in innovative ways to prevent pollution or meet environmental standards. Anaheim, California, is the first such project in the nation. Here in Region 6, we are working with cities such as Plainview, Texas, to find innovative ways to address water issues.

2. Another new program is the Common Sense Initiative, or CSI, -- which is a fundamentally different kind of environmental protection program that replaces the pollutant-by-pollutant approach with an industry-by-industry approach. Under CSI, governmental officials, environmentalists, and industry leaders are working together to create new ways to protect the environment that are cleaner, cheaper, and smarter. There are six industry sectors in CSI:

- Automobile manufacturing;
- Computers and electronics;
- Iron and steel;
- Metal finishing;
- Petroleum and refining; and,
- Printing.

EPA Region 6 has the lead for the petroleum or oil and gas industry since Region 6 has the greatest number of petroleum refineries, some 35%, in the United States. Marathon Oil, a Texas refinery, has volunteered as a pilot location for a "One Stop Reporting and Public Access Project." The goal of the project is to reduce redundant, overlapping and obsolete air emission reports, replacing those with one consolidated report. The consolidated report would be used by Federal and State agencies, local regulators, the regulated industry and the affected community. We have great expectations for this innovative program.

3. EPA has also instituted Open Market Air Emission Trading where companies such as electrical utilities can buy and sell the right to trade smog-creating emissions much like one buys and sells shares of a corporation. Similar programs exist to trade water discharge rights within watersheds and to protect wetlands in areas of development.

4. We are also working to redefine State and Tribal Performance Partnerships. As part of a National Environmental Performance Partnership System, or NEPPS, states and tribes are given more flexibility in setting environmental priorities and directing Federal resources to meet their greatest environmental needs. We have signed an agreement with the State of Oklahoma to put this initiative into practice and are negotiating an agreement with Texas. We will continue outreach efforts to the other states to develop such agreements.

In addition to these changes, we are committed to cutting red tape at EPA. EPA is making changes to more than 70% of its regulations and is working to eliminate 1,400 pages of obsolete rules or 10% of the total.

We are also working to help small businesses comply with EPA rules. Too often violations occur because businesses, particularly small businesses, lack the technical assistance needed to comply with environmental laws. EPA is helping small businesses comply with environmental standards in three ways.

1. Common Sense Compliance Policy for Small Business
   Penalties for first-time violators can be waived or reduced if the business comes forward to find and fix problems. In addition, small businesses have a 180-day grace period to correct non-criminal violations without penalty where there is not a serious, immediate environmental threat and the company makes a good faith effort to comply.
2. Small Business Compliance Assistance Centers
   We have established these centers in each of the five States here in Region 6 to help small businesses protect

public health and prevent pollution before it starts. Small businesses can get information they need about standards that apply to their business -- in plain, easy-to-understand language.

3. Small Business Regulatory Enforcement Fairness Act of 1996

On March 29, 1996, President Clinton signed this Act into law which states that Federal agencies should emphasize regulatory compliance rather than punishment. It also established a small business ombudsman and ten regional Small Business Regulatory Fairness Boards to monitor enforcement of Federal rules. In requires agencies to publish compliance rules in plain language and to establish programs and policies to assist small entities in their efforts to comply with regulations. Penalties can be waived or reduced for first time violators.

COMMUNITY BASED PROGRAMS

We are also working more closely with communities. The Community Based Environmental Protection program, or CBEP, is a problem solving approach to environmental protection at the community level. It is not a new funding program or a new regulatory effort. In the past, we looked at pollution problems as either air, water or hazardous waste dumping. The CBEP program focuses on environmental problems that are intertwined and often competing for scarce funds and technical expertise at the community level. For example, in Henryetta, Oklahoma, we are pooling our experience to help the city reclaim the use of an abandoned smelter site and to design solutions for pollution and infrastructure problems in water supply, hazardous waste and solid waste. The CBEP program has expanded to other cities in the Region and we expect to see great results over the next few months and years.

The EPA of today is an active laboratory -- with experiments going on that will change the way we protect the environment. We are giving States and communities autonomy and leeway. For example, EPA worked with State and local officials in Tulsa, Oklahoma, to create the "Tulsa Flexible Attainment Project" ... on a voluntary basis. This program encouraged Tulsa residents to develop and implement measures to solve their air quality problems as the community sees fit and not as EPA requires. We are using our experience in Tulsa to help resolve air pollution problems across the Region.

In Arkansas, EPA worked with the city of Jacksonville to develop and implement a flexible solution to clean up two municipal landfills listed on the Superfund National Priorities List. The city was able to actively participate in the cleanup of two sites located in their community, literally saving millions of dollars for that city by offering "in kind" city services in lieu of cash

payments for cleanup. With the support of the city, the landfills now have been successfully cleaned up. It was cleaner, smarter, and cheaper ... and best of all, it was a local solution.

Another new community based initiative is Brownfields. Poor environmental practices in the past left many urban abandoned or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. Where actual contamination exists, problems range from leaking underground storage tanks, to dry cleaning establishments, and to former industrial warehouses where dumping and spillage occurred. There may be as many as half a million such sites which EPA has dubbed Brownfields.

Under the current Superfund law, stringent cleanup and liability standards, originally developed for the most heavily polluted sites, have also applied to Brownfields sites. The result has been that prospective developers and lenders have become fearful they might inherit cleanup liability for contamination they did not create. Thus, these same prospective developers and lenders shun these sites in favor of new development on pristine land outside of urban areas.

One of EPA's highest priorities is to return these Brownfields to productive use. EPA's goal is to empower states, communities and other agents of economic redevelopment to work together in a timely manner to prevent, assess, safely cleanup, and sustainably reuse Brownfields. EPA wants to identify barriers to cleanup and redevelopment as well as ways to overcome these barriers. Effectively addressing Brownfields promotes a cleaner environment, the creation of new jobs, the removal of health risks, the expansion of the tax base, the removal of urban decay, and increased community optimism. EPA firmly believes that environmental cleanup is a building block in this process of economic revitalization, not a stumbling block.

On January 25, 1995, EPA Administrator Carol Browner announced the Brownfields Action Agenda which is a collection of bold and exciting new strategies to encourage the cleanup and redevelopment of Brownfields. Current initiatives and strategies outlined in the Brownfields Action Agenda include the following:

- implementing Brownfields pilot programs across the country to explore non-traditional approaches and innovative program ideas in a non-precedent setting environment;
- addressing liability and other issues of concern to lending institutions, municipalities, property owners, developers, and prospective purchasers via common sense administrative reforms;
- establishing public/private partnerships with other Federal agencies, States, cities, communities and stakeholders; and,
- protecting community involvement by supporting job training and education activities linked to the Brownfields Initiative.

One of the cornerstones of the Brownfields Action Agenda is the Brownfields Pilot Program. In 1995 and 1996 EPA is funding some 60 pilots nationwide. These two-year pilot projects are funded for $200,000 and will be used to test redevelopment models, direct special efforts toward removing regulatory barriers without sacrificing protectiveness, and facilitate coordinated efforts at the Federal, State, and local levels. Community groups, investors, lenders and developers will work together to address assessing and planning the cleanup or redevelopment of Brownfields.

We have awarded Brownfields grants to Dallas, Laredo, Houston, New Orleans, and Shreveport. I am confident that what results from these efforts will not only benefit those cities but also serve as models for other communities with similar problems.

In other efforts to return Brownfield sites to productive use, EPA is working with State and local governments as they develop voluntary cleanup programs. Our goal is for State and local governments to establish programs to return sites to productive use and where EPA's role will be one of technical assistance and overall direction. The Texas Natural Resource Conservation Commission's Voluntary Cleanup Program became operational on September 1, 1995. On May 1 of this year, EPA and the State of Texas signed a Memorandum of Agreement on the State's Voluntary Compliance Program which recognized the State's capability to provide assurance to EPA with regard to Brownfields. We are excited about this step forward and are eager to see the program succeed.

EPA has also started issuing so called "comfort letters" promising not to take action on specific sites. "Prospective Purchaser Agreements" are being issued which contain EPA's commitment not to file a lawsuit against prospective purchasers. Most significantly, EPA also reviewed its list of some 38,000 sites and determined that at some 24,000 sites, no further remedial action is needed. These sites have been removed from the list of hazardous waste sites and are ready to be returned to the tax rolls.

EPA's efforts over the last year to implement numerous initiatives outlined in the Brownfields Action Agenda will begin to reverse the spiral of unaddressed contamination while maintaining deterrents to future problems. While many of the Agency's activities have concentrated on removing liability barriers and clarifying cleanup issues, the Agency recognizes the importance of providing financial incentives to spur the cleanup and redevelopment of Brownfields properties. In 1995, the Agency worked closely with the Comptroller of the Currency to revise the Community Reinvestment Credit Act to include giving credit to banks which provide loans for the assessment, cleanup or redevelopment of Brownfields sites.

On March 11, 1996, President Clinton announced a Brownfields tax incentive that would encourage the cleanup and redevelopment of Brownfields. Under the President's proposal, environmental cleanup costs would be fully deducted in the year in which they are

incurred, a significant incentive that would reduce the cost of capital for these types of investments by more than half. The two billion dollars incentive could leverage $10 billion in private investment, returning an estimated 30,000 Brownfields to productive use.

Although changing patterns of housing and transportation may discourage some industry from returning to urban areas, the Brownfields Initiative should allay industry fears about the use of these types of sites for new activities. EPA is hopeful that the Brownfields Initiative will serve as a catalyst for true renewal of urban areas across the country.

EPA can provide community assistance other than through the Brownfields program. Most local communities have adequate fire and emergency capabilities to handle normal emergency situations in the community and have been doing a good job of handling these types of situations. But should a major environmental emergency occur, one that requires a response beyond what the local fire and emergency departments can supply, EPA's Superfund program can help.

EPA Superfund can provide help with an overturned tanker truck carrying hazardous materials, a fire, or help in characterizing a warehouse full of abandoned drums of questionable origin. If local capacity is exceeded in responding to these types of situations, EPA Superfund provides assistance and is able to tap the resources of a significant number of other Federal agencies. Superfund leverages Federal government assistance when local capacity to respond to emergencies is exceeded.

One of the real successes for Superfund for communities has been the Emergency Removal program. EPA conducts about 25 Superfund removals every year in the five-state area comprising Region 6. These removals are conducted in both large and small communities and are always closely coordinated with State and local officials. In this program, EPA On-Scene Coordinators work directly with the community to respond to environmental problems resulting from an accident or from abandoned waste sites.

In addition, under certain circumstances, the EPA Superfund program can reimburse the city for costs the city incurs when it takes action to remove hazardous waste.

Going hand-in-hand with responding to environmental emergencies is EPA's authority to keep the public informed of just what hazards exist in the community. The Emergency Planning and Community Right to Know Act, better known by its acronym EPCRA, has been in place for some ten years. The EPA Superfund program uses EPCRA to assist communities and Local Emergency Planning Committees to prepare for environmental emergencies. EPCRA has greatly increased the number of reports of chemical releases to State and local officials, while reducing the time from which a substance is released to when it is reported. This helps the local, State and Federal officials make response determinations faster and more effectively. In Texas, the number of reports increased from about 800 to over 3,000 in 1995, while in the entire Region, the time from when the release occurred to when it was reported has

decreased by 23% in those nine years. This does not necessarily mean that chemical releases have increased, just that companies - small and large - have improved their reporting of these releases. It has also greatly increased the information local officials have on chemical inventories and locations within the community, helping planning efforts for chemical emergencies.

Local Emergency Planning Committees, or LEPCs, have become forums in many areas for citizens to work out environmental problems at the local level and to find out more about their community and its risks. For example, LEPCs around the Houston Ship Channel, and throughout the Gulf Coast, are considered models nationally for others to follow. Many times, EPA at both the regional and national levels, has developed training for other local emergency planning committees by using these active Texas groups.

Many large companies continue to provide technical and resource support to local communities for emergency planning, preparedness, and response. This type of support includes computer equipment for modeling, emergency response equipment and training, and support for full-scale hazardous materials exercises. If this sounds like something you could do to help your community, I encourage you to get involved.

A new program, the Accidental Release Prevention-Risk Management Program was implemented this spring. This Risk Management Program will help facilities determine the extent of risk in the community from a release from their facility. It will also help facilities implement a program to prevent releases and in determining the response efforts by the facility with a release. Facilities such as chemical manufacturers, refineries, and large wholesalers, as well as propane dealers, refrigerated warehouses, ammonia fertilizer dealers, and water treatment facilities are covered by the program. Each facility will develop information on release risks, prevention and response and will make the information available to local emergency planners and the public.

EPCRA and the Risk Management Program will continue to ensure that facilities and local community officials work together to reduce the risk from chemical releases and properly prepare for response to an accidental release. The assistance that companies provide to local communities will continue to play a major role in this success.

REGION 6 REORGANIZATION

As you can see, we have undertaken many initiatives to improve what we do and how we do it. Some have evolved out of the National Performance Review led by President Clinton and Vice-President Gore; others are more home grown.

Internally, we in EPA Region 6 reorganized a little over a year ago. We streamlined our operations, increased our staff to supervisor ratio, and rotated all of our senior managers. We combined all Superfund activities, including legal, from site

assessment to cost recovery in one group under one Director. We also combined all enforcement programs under one Director. We are also increasing our efforts to develop close, working partnerships with the States. We believe our national and local reinvention efforts are working and making it easier for industry and municipalities to achieve compliance with environmental regulations while at the same time providing protection of public health and the environment.

EPA'S FUTURE ROLE

With such an emphasis on State and local empowerment, what will EPA be doing in the future? Here are some of the things I see for EPA's future.

- EPA will set national standards. In the future, EPA will wontinue to have a national standard setting role. But local areas will have more flexibility in meeting these standards. I also think that in places like the national parks, or in nationally sensitive ecosystems such as the Everglades, EPA will play an active role. And, we will stay involved in interstate or regional issues, such as interstate watersheds, regional transport of air pollution, and the U.S./Mexico border.
- EPA will be a resource to others. EPA has both technical and information resources than can help others deal with difficult environmental problems. Sometimes we can form partnerships with other stakeholders to solve problems of mutual concern, or bring groups with different agendas together.
- EPA will try to anticipate the environmental problems of the future. It is easier and cheaper to prevent pollution than to clean it up. If we can identify the potential problems of the future now, they can be corrected before they become crises.
- EPA will be more selective. EPA will not be able to engage on every issue. We will have to pick our targets, using two criteria: (1) how significant is the public health or environmental risk; and (2) can EPA action make a constructive difference.
- EPA will intervene if a State of local government abdicates its responsibilities. "Abdicate" is a strong word, and I use it advisedly. There are a lot of things it does not cover. In particular, it does not cover differences in judgement where experts can disagree and which, when measured against their impact on public health of the environment, don't matter very much. On these things, you will see increasing deference to the States.

But, and this is a major point, if any level of government walks away, and the consequence is a threat to public health or the

environment or a disregard for Federal law, EPA will be there. I fervently hope this will be a rare event -- but if it happens, we will be ready.

CONCLUSION

In conclusion, I just want to emphasize that we must work together -- using a common approach -- in order to achieve our environmental goals. We have been challenged to leave our environment safe and clean for the next generation. We must rise above our individual differences and make protecting the environment a priority for us all.

Thank you.

TNRCC Procedural Rules

"The Crying Game"

Geoff Connor

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

FOR YOUR INFORMATION

GEOFF CONNOR

Geoff Connor was named General Counsel of the Texas Natural Resource Conservation Commission (TNRCC) on September 27, 1995 by Chairman Barry McBee, Commissioner John Baker and Commissioner Ralph Marquez. This position is the chief legal officer and chief ethics advisor for the agency.

Before coming to the TNRCC, Connor was the Assistant Commissioner for Legal Affairs and the General Counsel for the Texas Department of Agriculture. He was named to that position as the Agriculture Department's chief attorney in 1991 by Commissioner Rick Perry.

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NOTES

TAB 9

TNRCC Procedural Rules: Recent Changes Made Pursuant to Regulatory Reform

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8th Annual Environmental Law Superconference
TNRCC Procedural Rules: Recent Changes Made Pursuant to Regulatory Reform

Richard S. O'Connell[1]

I. Introduction

This paper seeks to give the experienced environmental law practitioner an overview of the recent changes made to the procedural rules of the Texas Natural Resource Conservation Commission ("TNRCC" or "Commission"). The changes were made in connection with the TNRCC's regulatory reform effort to simplify, consolidate, and shrink the overall volume of agency rules and processes. The paper emphasizes the General Counsel's role and authority under the rules to manage the processing of matters set for the Commission's consideration.

Regulatory reform at the TNRCC is not complete. While this paper refers to "the procedural rules," this is not intended to signify that all TNRCC rules concerning the processing of applications are found in the chapters discussed below. Other requirements concerning the processing of applications are often found in the chapter concerning the specific type of application. However, chapters 70 and 80 discussed below do contain all the rules on processing enforcement petitions.

Obviously, uniform compliance and enforcement of rules is a necessary component of any regulatory reform effort. Now that the Commission's procedural rules have been consolidated it is only fair that the public, and especially experienced practitioners, should be expected to follow the requirements. Absent unusual circumstances, the General Counsel fully intends that the rules should be followed especially with respect to simple matters such as filing and service requirements, in order that everyone has a fair and equal opportunity to present their case to the Commission. The practitioner should carefully follow the rules so as to avoid the waiver of any rights or privileges.

II. New Procedural Rules

The Commission's procedural rules have undergone two rounds of rule-making changes during the past year, with the latest rules being in effect less than two months. In Summer 1995 the Commission adopted the "phase I" revisions to its procedural rules.[2] This action was necessitated by laws passed by the 74th Texas Legislature, namely Senate Bill 12 and Senate Bill 1546. Senate Bill 12 transferred the TNRCC's hearings examiners to the State Office of Administrative Hearings ("SOAH"), effective September 1, 1995.[3] Senate Bill 1546 required the Commission to adopt rules specifying factors that must be considered in determining whether a request for a contested case hearing is made by an affected person, and whether an association of persons is entitled to standing in contested case hearings.[4] As part of this rule making the Commission also adopted rules intended to implement Senate Bill 741, which allowed the Commission to delegate to the Executive Director the authority to approve uncontested applications.[5] The phase I revisions implemented these statutes but they did not make other needed changes. That effort was reserved for the "phase II" revisions to the procedural rules that were recently adopted by the Commission, and that became effective June 6, 1996.[6] (This paper will refer to the phase II rules as the "new procedural rules" or "new rules.") The TNRCC's new procedural rules reorganize procedural requirements according to the following numbered chapters:

1	Purpose of rules, General Provisions
3	Definitions
5	Advisory Committees
10	Commission Meetings
20	Rulemaking

40	Alternative Dispute Resolution Procedure
50	Action on Application
55	Request for Contested Case Hearings
70	Enforcement
80	Contested Case Hearings
86	Special Provisions for Contested Case Hearings

On the date the Commission adopted the new procedural rules, it also repealed several chapters on procedural requirements, including almost all of the chapters that were the subject of the phase I rule making.[7] The new rules contain several significant changes in procedural requirements that go well beyond mere renumbering and reorganization. The sections below highlight the most significant changes.

III. Filing and Service Requirements

Chapter 1 specifies the Commission's rules on the filing and service of documents.[8] The applicability of the filing and service requirements is really very narrow, applying only to a person seeking (1) the Commissioners' consideration of a document in connection with a matter that is set for a Commission agenda meeting[9], or (2) a judge's consideration of a document in connection with a contested case that has been referred to SOAH. For other circumstances, for example, an applicant's submission of an application to the TNRCC, the rules on filing and service do not apply, and the applicant should mail or deliver the application to the Executive Director's appropriate staff.[10]

Assuming the Chapter 1 filing requirements apply, a person must:

(1) file with the TNRCC's Chief Clerk an original or one copy of the document (for a matter that has been referred to SOAH) or file 11 copies (for a matter set for consideration at a Commission agenda meeting); and

(2) (for contested case hearings referred to SOAH) serve copies of the document on the SOAH Judge and the parties.[11]

A practitioner who plans to file a document should review the rules in detail as they specify the time of filing, time of service, certificate of service requirement, and other requirements.

The new rules continue the TNRCC's practice of allowing for as much convenience as possible for the practitioner and other members of the public who file documents, while maintaining the integrity of the Commission's decision-making process. For example, documents may be filed by fax, but the person filing must file with the Chief Clerk the appropriate number of copies within three days.[12] The Commissioners may also chose not to consider documents filed within two days of an agenda meeting.[13] Furthermore, the new rules add a provision that whenever a party has the right or is required to do some act within a prescribed period after the service of a document and the document is served by mail or by telephonic document transfer, then three days shall be added to the prescribed period.[14] Nevertheless, this provision does not apply when documents are filed for consideration at a Commission agenda meeting.[15] Finally, the new rules add provisions on the service of documents that parallel those provisions found in the Texas Rules of Civil Procedure.[16]

IV. Public Notice

The requirements for public notice of an application vary widely depending on the type of application. Generally speaking, the Chief Clerk issues notice of an application and the opportunity for the public to submit comment or request a hearing after the Executive Director's staff has completed its technical review and has

prepared a draft permit. Once the period for public comment expires then final action may be taken on the application.[17]

As explained in the last section of this paper, public notice requirements for applications are currently the subject of proposed rule-making efforts.

V. The Executive Director's Approval of Uncontested Applications

The Commission has the authority to delegate to the Executive Director the authority to approve uncontested applications.[18] This is cumulative of authority the Commission already held concerning applications under the Texas Clean Air Act.[19]

Chapter 50 implements the Commission's authority to delegate certain powers to the Executive Director.[20] Compared to the superseded phase I rules, Chapter 50 does not change the requirements that must be met before the Executive Director may issue final approval of an application.[21] The requirements generally are: (1) public notice must be complete, (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, and (4) neither the Executive Director's staff, or the public interest council have raised objections, and there are no requests for hearing or protests filed.[22]

Chapter 50 does contain some changes to the TNRCC's rules on delegation. The new rules delegate to the Executive Director additional types of applications that may be approved under Chapter 50.[23] The new rules are also more specific concerning the types of applications that he may not approve under the chapter.[24] The list of types of applications excluded under the chapter is a list of applications that either (1) the Commission must itself approve, or (2) applications which the Executive Director may approve, but under other Commission rules and not Chapter 50. The practitioner must refer to the rules on the specific type of application to learn if the Executive Director may approve the application pursuant to the other chapter. Generally speaking, this authority will be found in the chapters concerning the TNRCC's air program.

The new procedural rules clarify procedure when an application is contested and then the interested persons settle or withdraw their protests. At any time during the processing of an application if all protests and hearing requests are withdrawn then the application may be remanded to the Executive Director, who may issue final approval of the application.[25] Even an application scheduled for consideration at a Commission agenda meeting may be remanded to the Executive Director.[26] In fact, the new rules specify that the Chief Clerk shall remand the item to the Executive Director, which reduces confusion about the final processing of the application and eliminates the need for formal requests and approvals of remands. The new procedural rules also clarify when a SOAH Judge may remand an application over which he has jurisdiction.[27] The Judge may do so only after providing an opportunity for all affected persons to be named parties.

The new procedural rules generally do not change the procedure for a motion for reconsideration concerning the Executive Director's final approval of an application. Chapter 50 provides that the applicant, public interest council, or other person may file a motion for reconsideration no later than 20 days after the date the Executive Director's signed approval of the application is mailed to the applicant.[28] The Commission then considers the motion for reconsideration during an agenda meeting, or allows the motion to expire by operation of law. The new procedural rules continue the procedures in the phase I rules,

which are very similar to the rules on motions for rehearing under the Administrative Procedure Act.[29] Nevertheless, the new rules contain new provisions for the Commission or General Counsel extending the time to act on a motion for reconsideration.[30] The new rules also delete the provision on the Executive Director himself acting on a motion for reconsideration filed by the applicant.[31]

VI. Alternative Dispute Resolution Procedure

The Commission continues to encourage mediation and settlement of disputes. Chapter 40 specifies alternative dispute resolution procedures ("ADR") at the agency, and encourages mediation at any time during the processing of an application.[32] The new rules do not make substantial changes to the ADR rules, yet this should not be interpreted as a sign of the Commission's lack of commitment to ADR efforts. Indeed, during the past year the Commission created a separate Office of Alternative Dispute Resolution whose Director is charged with the duty to oversee and manage all ADR efforts at the agency. The Office of Alternative Dispute Resolution has had considerable success in resolving conflict in proceedings before the Commission.

VII. Evaluating Hearing Requests

Chapter 55 of the new procedural rules concern the procedure and the standards by which the Commission evaluates hearing requests concerning an application.[33] The new rules slightly revise the procedures in this contentious area of agency practice, and may not be the Commission's final word on how it will process hearing requests. Comments concerning the Commission's implementation of Senate Bills 1125 and 1546 have come from many quarters.[34] Yet while the TNRCC will continue work to make this process fair and predictable, notice should be taken of the successes during the few months the Commission has implemented the statutes. The Commission has directed the Office of Alternative Dispute Resolution to play an active part in the processing of hearing requests, and with good results. A hearing requester's concerns are more often addressed through negotiation and settlement rather than by holding a hearing.

The new rules revise the filing deadlines concerning the processing of hearing requests, giving the Executive Director, the applicant, and the hearing requesters slightly more time to file documents. Under the rules hearing requests are evaluated by the Commission during an agenda meeting, and interested persons may file comments concerning the hearing requests.[35] Generally speaking, the Chief Clerk will schedule the hearing request for the Commission's consideration at an agenda meeting to be held roughly 40 days after the end of the public comment period for the particular application.[36] The Executive Director, the applicant, and the Public Interest Counsel may file written responses to the hearing requests no later than 20 days before the agenda meeting.[37] The hearing requesters may then file replies to those responses no later than six days before the agenda meeting.[38] It is important that the interested persons timely file their comments before the agenda meeting and in accordance with the deadlines in the rules. Unless there are particularly difficult or controversial issues presented, the General Counsel typically advises the interested persons in advance of the agenda meeting that the Commission will not take oral argument or public comment during the agenda meeting and will make its decision based on the written documents filed.

The new rules also clarify procedures for persons aggrieved by Commission decisions. The phase I procedural rules did not contain any requirements on how a person aggrieved by a Commission decision to grant or deny a hearing request could contest the decision. The new

rules specify how an aggrieved person may preserve error, when they may file a motion for rehearing, and specify when the Commission's decision is final and appealable.[39] If the aggrieved person is a hearing requester whose request was denied, the person must, if a hearing is convened, appear at the hearing and seek party status.[40] The aggrieved person must file a motion for rehearing within twenty days after the date the person is notified of the Commission's final decision or order *on the application*, so that all motions for rehearing (concerning decisions on both hearing requests and on the application itself) will be filed at the same time. This process is intended to avoid the occurrence of simultaneous administrative and court proceedings on the same application.

What the new rules do not change are the three substantive requirements for hearing requests. A request must be: (1) made by an affected person, (2) reasonable, and (3) supported by competent evidence.[41] The new procedural rules do not change the list of factors that the Commission will consider upon determining affected person status, and the new rules, like the phase I rules, do not define "competent evidence."[42] Also, the new rules continue to provide two sets of criteria for determining the reasonableness of a hearing request, one set of criteria for air quality applications, and the other set for all other types of applications.[43] For applications other than air quality applications, the new rules allow for considering all relevant factors, including whether the request is based on concerns related to other media that cannot be addressed by the pending application, even though within the jurisdiction of the Commission.[44]

VIII. Contested Case Rules for Matters Referred to SOAH

Perhaps the most significant change concerning the rules for contested cases referred to SOAH is the consolidation of procedural rules into new Chapter 80. The consolidation has eliminated the duplication of hearing rules formerly found in both the chapter on applications referred to SOAH, and the chapter on enforcement matters referred to SOAH. The consolidation also eliminates three sets of discovery rules; Chapter 80 specifies that discovery shall be conducted according to the Texas Rules of Civil Procedure, unless TNRCC rules provide or the Judge orders otherwise.[45]

The new rules also change some procedures. The phase I rules allowed for a person to file a motion for a summary disposition of a case, but the rule was limited to enforcement cases.[46] The new rules allow for a motion for summary judgement disposition in any case (including cases on applications) referred to SOAH.[47] The new rules clarify the procedure for an applicant that wishes to withdraw its application. The Commission may grant a motion to withdraw an application without prejudice; the new rule, like its predecessor, does not contain express standards by which the Commission will evaluate the motion.[48] The new rule does clarify the procedure by which an applicant may withdraw an application with prejudice, or without prejudice by agreement of the parties.[49] The new rules authorize the Judge to require the applicant to pay for transcript fees in advance of the hearing, which payment would be subject to reimbursement from the other parties in accordance with the Commission's final order on the application.[50] The phase I rules allowed this procedure only if the hearing was expected to last three days or more.[51]

IX. Commission Action on Proposal for Decision and on Other Matters

The new procedural rules change slightly the procedure on the Commission taking final action on matters, and clarify the General Counsel's role as manager of the process. The Commission holds public meetings in order to

consider and take action on matters. These meetings are regularly held on Wednesdays and are known as "agenda meetings." During the meetings the Commission may consider: (1) Judge's proposals for decisions concerning applications and enforcement matters, (2) hearing requests, (3) contested applications not subject to an opportunity for evidentiary hearing, (4) rule-making proceedings, and (5) other matters. Chapter 1 specifies the requirements for filing and serving documents that a person wishes the Commission to consider during a meeting. Chapter 10 sets a few basic guidelines, such as designating the Chairman to preside at the meetings, and establishing standards for attendees' conduct and decorum. For contested cases referred to SOAH, Chapter 80, Subchapter F, specifies the procedures for the Commission's consideration of a Judge's proposal for decision.

The new rules clarify that the General Counsel shall manage the preparation for Commission meetings. The Commission's consideration of a proposal for decision begins with the Chief Clerk, in coordination with the Judge, scheduling the proposal for decision for an agenda meeting. The Chief Clerk also schedules other matters for Commission consideration such as hearing requests. Nevertheless, after the original scheduling of matters the General Counsel manages the agenda process. He may set deadlines for filing documents for the Commission's consideration, and set revised deadlines.[52] He may reschedule a matter, either on his own motion or by agreement of the parties and any Judge assigned to the matter.[53] He may advise the interested persons that the Commission will hear oral argument on certain issues and within specified time limits.[54] Just prior to the adoption of the new rules, the Commission issued a resolution that delegated to the General Counsel authority to manage Commission meetings. The authority delegated pursuant to the resolution is not intended to repeal or change the General Counsel's duties and authority found in Commission rules. (A copy of the resolution is attached to this paper as Attachment A.)

The new rules change the deadlines specified by rule for filing exceptions and replies to exceptions concerning a Judge's proposal for decision. The new deadlines are: (1) 20 days after the date of issuance of the proposal for decision for exceptions, and (2) 30 days after the date of issuance of the proposal for decision for replies to exceptions.

X. Issuance of Commission Orders, Motions for Rehearing

The new procedural rules have new requirements concerning the issuance of a Commission order intended to reflect the Commission's vote at an agenda meeting. Nevertheless, the requirements codify existing practice at the agency and should not surprise the practitioner. If the Commission or the General Counsel request that a party prepare a draft order to reflect the Commission's action concerning a contested case, the party should attempt to reach an agreement among the parties on the form of the draft order, and a written explanation of the parties' positions on the form of the draft order shall accompany the draft order. Once the order is in its final form, the Chairman or a Commissioner may sign the order only if they did not vote against the actions reflected in the order.

The new rules do not change procedure concerning the Commission's review and action on a motion for rehearing; however, there is new practice at the agency of which the practitioner should be aware. The Chairman has directed the General Counsel to schedule for the Commission's consideration at an agenda meeting all motions for rehearing, so that all motions for rehearing will be voted on by the Commission and none will be denied by operation of law. The General Counsel will advise the parties on a case-by-case basis

whether the Commission will take oral argument at the agenda meeting. If the Commission votes to deny a motion for rehearing the Commission does not then issue a written order to that effect. Rather, the General Counsel customarily issues a letter to the parties advising them of the Commission vote.[55]

XI. Enforcement Rules

Chapter 70 concerns the TNRCC's procedure on enforcement matters. The new rules contain one significant change; the rules for enforcement matters referred to SOAH have been combined with the rules for applications. Now all contested cases referred to SOAH, whether enforcement matters or applications, are processed under the contested case rules in Chapter 80, discussed above.

XII. Regulatory Reform Will Continue -- Public Notice Requirements, Submission of Application Requirements

Regulatory reform is an ongoing process that has not yet touched all TNRCC rules on the processing of applications. The rules on the required public notice of applications and enforcement matters are currently the subject of regulatory reform efforts. The proposed rules on public notice have been published in the Texas Register, and the Commissioners may consider adopting the rules in the near future.[56] Also, as mentioned in the introduction to this paper, the new procedural rules do not cover the requirements for the submission of an application to the Executive Director. These requirements are often found under the chapter concerning the specific type of application, and for many types of applications they are under Chapter 305 (concerning Consolidated Permits) and Chapter 281 (concerning Applications Processing).[57] Regulatory reform will take place here, too.

1. The author greatfully acknowledges the assistance provided by Robby P. Abarca in preparing this paper.

2. 20 Tex. Reg. 7284 (1995).

3. Act of May 17, 1995, 74th Leg., R.S., ch. 106, 1995 Tex. Gen. Laws 898.

4. Act of June 16, 1995, 74th Leg., R.S., ch. 882, 1995 Tex. Gen. Laws 4380.

5. Act of June 16, 1995, 74th Leg., R.S., ch. 860, 1995 Tex. Gen. Laws 4303.

6. 21 Tex. Reg. 4689 (1996).

7. 21 Tex. Reg. 4794 (1996) (repealing, among others, ch. 261 subchapter A, ch. 263, 264, 265, 337, but not repealing ch. 261 subchapter B and D, which concern environmental impact statements).

8. 21 Tex. Reg. 4689, 4696 (1996) (to be codified at 30 TEX. ADMIN. CODE §§ 1.10, 1.11).

9. This paper refers to the Commission's public meetings as "agenda meetings," which is the common phrase used for such meetings.

10. 21 Tex. Reg. 1349, 1352 (1996), *adopted* 21 Tex. Reg. 4689 (1996) (to be codified at 30 TEX. ADMIN. CODE § 1.8).

11. 21 Tex. Reg. 4689, 4696 (1996) (to be codified at 30 TEX. ADMIN. CODE §§ 1.10 - .11); (There are additional requirements for serving documents concerning the Commission's consideration of hearing requests; 21 Tex. Reg. 4742, 4750 (1996) (to be codified at 30 TEX. ADMIN. CODE § 55.25(e), (f)).

12. 21 Tex. Reg. 4689, 4697 (1996) (to be codified at 30 TEX. ADMIN. CODE § 1.10 (c)).

13. 21 Tex. Reg. 4689, 4697 (1996) (to be codified at 30 TEX. ADMIN. CODE.§ 1.10 (g)).

14. 21 Tex. Reg. 4689, 4697 (1996) (to be codified at 30 TEX. ADMIN. CODE § 1.11 (e)).

15. Id.

16. 21 Tex. Reg. 4689, 4697 (1996) (to be codified at 30 TEX. ADMIN. CODE § 1.11); *compare* TEX. R. CIV. P. 21a.

17. 21 Tex. Reg. 5539, 5540 (1996) (prop. to be codified at 30 TEX. ADMIN. CODE § 39.9).

18. *Supra* note 5. (codified at TEX. WATER CODE ANN. § 5.122).

19. TEX. HEALTH & SAFETY CODE ANN. § 382.061 (Vernon 1992 & Supp. 1996).

20. 21 Tex. Reg. 4734 (1996) (to be codified at 30 TEX. ADMIN. CODE §§ 50.2 . . . .41).

21. 21 Tex. Reg. 2128, 2131 (1996), *adopted* 21 Tex. Reg. 4734 (1996) (to be codified at 30 TEX. ADMIN. CODE § 50.33); *compare* 21 Tex. Reg. 7284, 7300 (1995), *repealed* 21 Tex. Reg. 4794 (1996).

22. Id. For air quality applications, the Executive Director may approve an application even if there are protests.

23. 21 Tex. Reg. 4734, 4741 (1996) (to be codified at 30 TEX. ADMIN. CODE § 50.31).

24. Id.

25. 21 Tex. Reg. 2128, 2131 (1996), *adopted* 21 Tex. Reg. 4734 (1996) (to be codified at 30 TEX. ADMIN. CODE § 50.37).

26. Id.

27. 21 Tex. Reg. 4763, 4772 (1996) (to be codified at 30 TEX. ADMIN. CODE § 80.101).

28. 21 Tex. Reg. 4734, 4742 (1996) (to be codified at 30 TEX. ADMIN. CODE § 50.39).

29. Id.; *compare* TEX. GOV'T CODE ANN. § 2001.146 (Vernon Pamphlet 1996).

30. *Supra* note 27.

31. 20 Tex. Reg. 7293, 7301 (1995), *repealed* 21 Tex. Reg. 4794 (1996).

32. 21 Tex. Reg. 4726 (1996) (to be codified at 30 TEX. ADMIN. CODE §§ 40.1 - .9).

33. 21 Tex. Reg. 4742 (1996) (to be codified at 30 TEX. ADMIN. CODE §§ 55.1, 55.3, 55.21, 55.23, 55.25, 55.27, 55.29, 55.31).

34. The rules implement Senate Bill 1546 (*supra* note 4), which states that the Commission is not required to hold a hearing if the Commission determines that the basis of a person's request for a hearing as an affected person is not reasonable or is not supported by competent evidence. The statute specifies that a person affected means a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the hearing. Also, an interest common to the general public does not qualify as a personal justiciable interest. The rules also implement Senate Bill 1125 (Act of May 19, 1995, 74th Leg., R.S., ch. 149, 1995, Tex. Gen. Laws 1996), which specifies that certain requests for hearing concerning air permit renewal applications are unreasonable, and must be denied.

35. 21 Tex. Reg. 4742, 4750 (1996) (to be codified at 30 TEX. ADMIN. CODE § 55.27).

36. 21 Tex. Reg. 4742, 4750 (1996) (to be codified at 30 TEX. ADMIN. CODE § 55.25).

37. Id.

38. Id.

39. 21 Tex. Reg. 4742, 4750 (1996) (to be codified at 30 TEX. ADMIN. CODE § 55.27).

40. Id.

41. Id.; *compare* 20 Tex. Reg. 7293, 7303 (1995), *repealed* 21 Tex. Reg. 4794 (1996).

42. Id. A conclusion of law in one Commission order provided: "Competent evidence is evidence admissible under the rules of evidence which tends to prove, or actually prove, a fact." Conclusion of law No. 7 in Docket No. 95-1543-IHW; Application by Heat Energy Advanced Technology to Renew a Hazardous Waste Permit, issued April 9, 1996.

43. 21 Tex. Reg. 4742, 4751 (1996) (to be codified at 30 TEX. ADMIN. CODE § 55.31).

44. Id.; *compare* 20 Tex. Reg. 7293, 7304 (1995), *repealed* 21 Tex. Reg. 4794 (1996).

45. 21 Tex. Reg. 2136, 2144 (1996), *adopted* 21 Tex. Reg. 4763 (1996) (to be codified at 30 TEX. ADMIN. CODE § 80.151).

46. 30 TEX. ADMIN. CODE § 337.39, *repealed* 21 Tex. Reg. 4801 (1996).

47. 21 Tex. Reg. 4763, 4775 (1996) (to be codified at 30 TEX. ADMIN. CODE § 80.137).

48. 21 Tex. Reg. 2136, 2140 (1996), *adopted* 21 Tex. Reg. 4763 (1996); *compare* 30 TEX. ADMIN. CODE § 265.42, *repealed* 21 Tex. Reg. 4795.

49. 21 Tex. Reg. 2136, 2140 (1996), *adopted* 21 Tex. Reg. 4763 (1996) (to be codified at 30 TEX. ADMIN. CODE § 80.25).

50. 21 Tex. Reg. 4763, 4771 (1996) (to be codified at 30 TEX. ADMIN. CODE § 80.23).

51. 30 TEX. ADMIN. CODE § 265.30, *repealed* 21 Tex. Reg. 4795 (1996).

52. 21 Tex. Reg. 4712, 4719 (1996) (to be codified at 30 TEX. ADMIN. CODE § 10.3).

53. Id.

54. 21 Tex. Reg. 4763, 4779 (1996) (to be codified at 30 TEX. ADMIN. CODE § 80.263); *see also* Attachment A, Commission's Order Delegating Certain Authority to the General Counsel.

55. The General Counsel mails a letter as a courtesy to the parties; the letter is not an order of the Commission and parties should not rely on receiving it. The Texas Court of Appeals recently ruled that an agency did not violate the Administrative Procedure Act when it failed to inform the parties that a motion for rehearing was denied by operation of law; the agency's failure to inform a party did not excuse her failure to timely seek judicial review of the order. Hernandez v. Texas Department of Insurance, No. 03-95-00503-CV (Tex. App. - Austin May 22, 1996, n.w.h.). As stated in this paper, the Commission's practice is to vote on every motion for rehearing so no motions will be denied by operation of law, and therefore the chain of events described in the court opinion likely would not occur at the TNRCC. Nonetheless, the opinion stands as a warning to practitioners that they should not rely on the General Counsel to give them notice of a Commission vote taken in open meeting denying a motion for rehearing.

56. 21 Tex. Reg. 5539 (1996) (prop. to be codified at 30 TEX. ADMIN. CODE §§ 39.1 - .253).

57. 21 Tex. Reg. 5539, 5540 (1996) (prop. to be codified at 30 TEX. ADMIN. CODE § 39.9).

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

A RESOLUTION concerning the delegation of certain duties and authority to the General Counsel. Docket No. 96-0406-RES.

WHEREAS, the Texas Natural Resource Conservation Commission ("Commission") is an agency of the State of Texas;

WHEREAS, in accordance with applicable law, the Commission has appointed a General Counsel to serve as the Commission's chief legal officer;

WHEREAS, the Commission's General Counsel is empowered by statute to perform such duties as authorized by law or delegated by the Commission;

WHEREAS, the Commission has determined that it is in the best interests of the Commission to include within the General Counsel's duties the responsibility to manage the Commission's public meetings, including the management of the number and type of matters to be considered at a particular meeting;

WHEREAS, the Commission has determined that it is in the best interests of the Commission to include within the General Counsel's duties the responsibility to advise the Commission on legal matters, including litigation matters, and the duty to take certain actions in legal matters;

WHEREAS, the Commission does not intend by the issuance of this resolution to affect the duties and authority of the Executive Director; and

WHEREAS, the Commission does not intend by the issuance of this resolution to repeal or change the additional duties and authority delegated to the General Counsel by Commission rule;

NOW, THEREFORE, BE IT RESOLVED, that the Texas Natural Resource Conservation Commission delegates to its General Counsel the following:

1. Managing the Commission's public meetings, including the number and types of matters to be considered, whether argument or comment will be held and time limits, rescheduling of matters and related deadlines, and referral of matters to the Alternative Dispute Resolution Office when the interested persons agree to referral;

2. Disposition of motions for reconsideration or motions for rehearing, whether by setting such motions for Commission public meetings, or by allowing such motions to expire by operation of law;

3. Representation of the Commission, including discussions with the Office of the Attorney General of the State of Texas or discussions with other state or federal officials;

4. Referral of matters in litigation to the Texas Attorney General or other appropriate officials;

5. Make decisions for the Commission in litigation matters involving Commission permits and orders;

6. Make decisions for the Commission in litigation matters in which the Commission is a named party;

7. Retention of outside counsel to represent the Commission in litigation matters;

8. Make requests to the Texas Attorney General to issue a written opinion on a question concerning the official duties of the Commission;

9. Management of administrative matters in the Office of the Commissioners; and

10. Authority to delegate the duties and authority set forth in this resolution to the attorneys in the Office of the General Counsel.

THE COMMISSION FURTHER RESOLVES that the Commission's resolution of May 25, 1995, concerning the delegation of certain duties to the General Counsel (Docket No. 95-0822-EXE), is rescinded and replaced by this resolution.

Issue Date: MAR 25 1996

TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION

Barry R. McBee, Chairman

ATTEST:

Gloria A. Vasquez, Chief Clerk

Standing and Other Issues

"Stand and Deliver"

Gregg Cooke

REQUESTS FOR HEARING BEFORE THE TEXAS NATURAL RESOURCE CONSERVATION COMMISSION: WHO IS ENTITLED TO A HEARING?

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PREPARED FOR THE EIGHTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE AUGUST 1-2, 1996

REQUESTS FOR HEARING BEFORE THE TEXAS NATURAL RESOURCE CONSERVATION COMMISSION: WHO IS ENTITLED TO A HEARING?

I. Introduction

The resolution of Requests for a contested case hearing before the Texas Natural Resources Conservation Commission ("TNRCC") has been one of the most difficult issues faced by the TNRCC Commissioners appointed by Governor Bush. The 1995 Texas Legislature attempted to "streamline" the process for requesting a contested case hearing and attempted to define what type of persons would have the legal standing to request a hearing. The Legislature's avowed purpose was to make it quicker and easier for a business to wind its way through the TNRCC's administrative permitting process and reserve a trial-type, contested case hearing only for those parties who are truly "affected" by a proposed permit and where their requests are demonstrated to be "reasonable."

The implementation of the Legislature's mandates, however, have produced, at least in the short term, a far different result. The Commissioner's good-faith attempts to implement rules for these legislative changes have resulted in seemingly inconsistent and confusing decisions which has earned them criticism from both business and environmental interests. As a result, the Commissioners are again re-writing their rules to bring order and consistency to this process.

This paper will address the legislative mandates and their impact on the TNRCC; *for example*, the impact of S.B. 12, which transferred the hearings functions of the TNRCC to the State Office of Administrative Hearings (SOAH), and the creation of the natural resources division within SOAH; the passage of S.B. 1546 and S.B. 1125 which redefined the definitions of "affected person" and "reasonableness" respectively; and a recent case recently decided by SOAH and adopted by the Commission that demonstrates the difficulty in applying these rules.

II. Transfer of hearing functions from TNRCC to SOAH

Since its creation in 1991, the State Office of Administrative Hearings (SOAH) has constantly absorbed new areas of responsibility. SOAH currently conducts hearings for over 60 state agencies, including the Texas Department of Insurance, Texas Department of Health, and Texas Alcoholic Beverage Commission.

In 1995 legislative session greatly expanded SOAH's jurisdiction. Senate Bill 12 transferred the hearing function of the Texas Natural Resource Conservation Commission to SOAH, effective September 1, 1995. This legislation also created two new divisions within SOAH, a Natural Resource Division and a Utility Division. They further provided that hearings and contested cases sent to SOAH by the TNRCC and the Public Utility Commission could only be conducted by Administrative Law Judges (ALJs) in the Natural Resources Division or Utility Division, respectively.

A. Natural Resources Division

As previously stated, S.B. 12 created and specified that a Natural Resource Division should be created within SOAH. The mandate of the division is to conduct hearings relating to contested cases before the Commission, other than those hearings conducted by one or more Commissioners. In reality, TNRCC Commissioners have rarely conducted any hearings.

The Natural Resources Division (NRD) of SOAH consists of a division director and 10 Administrative Law Judges.

All division ALJs, regardless of temporary or permanent status, must be licensed to practice law in the State of Texas and have the expertise necessary to conduct hearings regarding technical or specialized subjects that may come before the TNRCC.

Assignments of cases are made by the NRD director. Because most of the ALJs have experience in many areas of the TNRCC practice, along with considerable other legal experience, assignments often depend, in large part, on availability and work load.

B. Changes in Hearing Procedure and Practice as a Result of S.B. 12.

As will be discussed in the subsequent section, the Legislature changed the standards for who may be "an affected person" for purposes of requesting a contested hearing before the TNRCC. Previously, TNRCC staff would make a preliminary review of the Request for Hearing and determine whether or not the individuals requesting a hearing were "affected persons". Now, due to both the change in the substantive law and because of the transfer of the hearings examiner to SOAH from the TNRCC, this practice has changed.

Specifically, the TNRCC may refer or remand matters for hearing on limited issues. Since September 1995, the Commission has referred several matters for hearing on the limited issue of whether a hearing request meets the minimum requirements set out in the statutes and rules for entitlement to a hearing. The determination is whether the requesting individual, group or entity is an "affected person" and whether or not the hearing request is "reasonable." (*See* 30 TAC § 55.29 and § 55.31 which are attached as Exhibit "E".) Many of the referrals specify that the ALJ is to make a recommendation to the Commission on the hearing requests. Others provide that, if the ALJ finds that one or more requests are valid, the ALJ may proceed to hearing on the merits of the matter.

There are some procedures and practices in hearings on hearing requests to which participants should be aware. First, the hearing will generally be referred to the ALJ on ten days notice following the referral to SOAH. Second, the hearing is limited to consideration of only those requests for hearing referred by the Commission, and no other hearing request will be considered by the ALJ. If the Commission determines that any of the requests for hearing meet the substantive requirements, requests for party status should be considered at the initial preliminary hearing on the matter.

In essence, the transfer of the hearing function from the TNRCC to SOAH, especially with the possibility of a preliminary hearing concerning the determination of "affected persons", means there must now be a hearing to determine whether to have a contested case hearing. As a result, what was first intended to be a streamlining of the hearings process, has, in many cases, resulted in a duplication of the hearing function that requires a potential permit applicant to go through a two-step hearing process that will result in additional delay.

III. S.B. 1546 and 1125: <u>What is an "affected person," and what are "reasonable" hearing requests?</u>

In the 1995 legislative session, several legislators sought to streamline the permitting process before the TNRCC by narrowing the definition of who could potentially contest a proposed permit. The result of these efforts were S.B. 1546 sponsored by Teel Bivens (R-Amarillo), Exhibit C, and S.B. 1125, sponsored by Sen. Sims (D-Paint Rock), Exhibit D. The most important of these bills is S.B. 1546. This legislation defined for the purpose of an administrative hearing held by the TNRCC, an "affected person" means:

"A person who has a personal justiciable interest related to a legal right, duty, or privilege affected by the administrative hearing other than an interest common to members of the general public. The Commission is not required to hold a hearing if the Commission determines that the basis of a person's request for a hearing as an affected person is not reasonable. The Commission may adopt rules necessary to carry out this subsection."

As a result of passage of this legislation, the TNRCC proposed new hearing request rules as set out in Chapter 55, Subchapter B of the Commission's rules. Environmental groups argue that this definition is more conservative than the previous requirement for "standing" under traditional Texas law.

In a very similar change, S.B. 1125 amended the Health & Safety Code so that a hearing for an applicant for a permit to emit air pollutants is not required if such a request for hearing is "unreasonable." Copies of S.B. 1546 and S.B. 1125 are attached as Exhibits "C" and "D" respectively.

A. Evaluation of Hearing Requests

When evaluating hearing requests, the threshold issue before the Commission is whether the person requesting the hearing is an "affected person." Agency rules define "affected person" as "a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." The rules direct the Commission to consider "all relevant factors" and to provide some specific guidelines for this determination. The Commission will thus consider, among other things, the Protestant's proximity to a proposed facility and the likely impact of the facility on his or her health, safety, and use of property.

Even when the Commission finds that a Protestant is an "affected person," the rules permit the Commission to decline to hold a hearing if the basis for the request is not reasonable or is not supported by competent evidence. In judging the reasonableness of a request, the Commission distinguishes between applications for air quality permits and applications for all other permits. For permits other than air quality permits, the Commission will find a hearing request to be unreasonable if it is based solely on something outside of the Commission's jurisdiction; e.g., where a Protestant alleges that a proposed landfill will result in a reduction of property value.

For air quality permits, a request will be deemed unreasonable where a permit amendment, modification, or renewal will not result in an increase in allowable emissions or the emission of an air contaminant not previously emitted, and where the applicant's compliance history is not at issue. In reviewing air quality permits, § 55.31(b), mandates that "reasonableness" could be evaluated based on such criteria as:

(e) whether the hearing request is based solely on something other than concerns about air pollution; and

(f) the extent to which the person requesting a hearing is likely to be impacted by the emissions.

B. Disposition of Hearing Requests

After evaluating a hearing request under the criteria discussed above, the Commission may act on the request in one of four ways:

1) Find that the request is not valid because it does not meet the above requirements;

2) Find that the request is valid and send the matter to SOAH for a contested case hearing;

3) Refer the matter to SOAH for the limited purpose of determining whether the request is valid; or

4) Refer the matter to Alternative Dispute Resolution.

The Commission will use the procedure referenced in (3) above in matters where a hearing request presents fact issues that are in dispute or need further development. As the Mitsui case analysis presented in Section V of this paper concludes, the Commission will not receive sworn testimony or make factual findings. Rather, hearing requests involving fact questions are referred to SOAH, where an ALJ will hold an evidentiary hearing.

During a "limited" referral, the applicant, the Executive Director and the Protestants will have an opportunity to present evidence in support of their positions and cross-examine witnesses presented by other persons. Having heard from the respective parties, the ALJ will forward his or her findings, together with a recommendation on the limited issue of whether a Protestant has presented a valid hearing request, to the Commission for consideration as discussed above.

IV. Analysis of hearings request before the TNRCC.

Environmental and public interest groups who were opposed to the passage of this legislation have begun an analysis of the requests for hearing submitted before the TNRCC to determine whether or not public participation before the TNRCC has been curtailed. Rick Lowerre, an Austin attorney, charged in a March 15, 1996 letter to Chairman Barry McBee of the TNRCC that the TNRCC has implemented these new laws to limit the public participation. Lowerre claims that the TNRCC rules apply a stricter test of who can ask for a hearing than required by law and that the Commission has adopted a restrictive interpretation of when hearings will be deemed to be "reasonable". Some of his conclusions and materials are attached hereto as Exhibit "A".

Of the 28 cases that Mr. Lowerre examines, he alleges that hearings were denied by the Commissioners in 16 of 28 cases, or 57% of the time. In only five cases did the Commissioners rule that a full hearing on the merits of the application should be held and in three of those cases, some requests for hearings were denied.

As a result of his analysis, Mr. Lowerre concludes that TNRCC has implemented the new Texas legislation in a manner which is more stringent than what was required.

Not surprisingly, the TNRCC disputes Mr. Lowerre's analysis as not examining the full range of requests pending before the TNRCC. In a preliminary analysis prepared by the TNRCC, TNRCC staff examined requests made from November of '95 through May of '96. In that analysis, which is attached hereto as Exhibit "B", they examined 79 hearing requests. Of this number, 59 (75%) of the total number of hearing requests were granted, withdrawn, or were pending at SOAH. Only 20 (25%), of the hearing requests were denied. Thus, the TNRCC concludes that they have not utilized the new legislation to restrict public participation in any way other than implementing the changes made by the Legislature.

V. Case Example: Mitsui San Antonio Components, Inc.

The history of the application for an air permit by Mitsui San Antonio Components, Inc. ("Mitsui") highlights the pitfalls confronting the Commissioners with regard to the resolution of hearing requests.

A. Background

On November 1, 1995, Mitsui filed its application for an Air Quality Permit with the TNRCC to install melting furnaces at a proposed aluminum diecasting facility on the east side of San Antonio, at the intersection of I-10 and 410.

On January 2nd, 1996, the San Antonio Coalition for Environmental to Economic Justice (SACEEJ) submitted over 100 requests for a hearing. In response, the TNRCC held a public meeting at a high school in San Antonio to discuss Mitsui's application. Mitsui maintained that the air modeling data prepared for this application showed that none of the residents would be impacted by the facility, and the two pollutants of concern, hydrogen chloride and hydrogen fluoride, were produced at levels far below TNRCC regulatory standards. However, coming in the wake of controversial environmental cases in San Antonio such as the "Alamodome" controversy, the residents were not inclined to accept the representations of either Mitsui or the Executive Director concerning the impacts of the proposed facility.

In February, 1996, Mitsui filed its response to the hearing requests and submitted sworn testimony attached to the response that due to the low, almost undetectable levels of emissions, the Protestant's requests for hearing were not reasonable pursuant to § 55.31, which sets forth the factors to be considered when determining whether a request for hearing is "reasonable."

At this point in the process, Mitsui believed that the Commissions could directly evaluate "competent evidence" under the rules and determine whether the Protestants were "affected parties." The Executive Director took the same approach by filing a brief with supporting affidavits by TNRCC personnel, including a staff toxicologist, in support of the position that levels of emissions from the facility would not impact local residents and the requests were not "reasonable." Both Mitsui and the Executive Director believed that if the Commissioners wanted to make their own decision based upon competent evidence, then submitting sworn affidavit testimony would provide a basis for making the decision. The Protestants were not represented by counsel at this time.

On March 6, 1996, the Protestants' Requests for Hearing were considered by the Commissioners. After hearing from many of the citizens, and attorneys from both the Executive Director and Mitsui, the Commissioners voted 2-1 to deny the Requests for Hearing and issue the permit, with Chairman McBee dissenting.

In explaining his vote, Chairman McBee explained that he was uncomfortable with taking evidence from all sides, either sworn or unsworn, where there was no administrative record in the case. McBee expressed that he did not want to begin hearing testimony and make a decision based on that testimony without a recommendation from an ALJ - instead, these cases should be sent to SOAH and then returned to the Commissioner for final decision.

Commissioner Baker expressed the view that the Commissioners should take a "common-sense" approach and evaluate these matters and dispose of them quickly.

The Protestants subsequently retained legal counsel and filed a Motion for Rehearing, which was set for argument. On May 23rd, 1996, the Commissioners entertained the Motion for Rehearing and reversed their prior decision, referring the matter to SOAH for the limited purpose of considering whether the request for hearing meets the tests for "affected person" (§ 55.29) and "reasonableness" (§ 55.31).

On June 13th and 14th, an administrative hearing was conducted in San Antonio by Tommy Broyles, an ALJ with SOAH. Despite the "limited" nature of the hearing, the Protestants, Applicant and Executive Director introduced evidence concerning almost every aspect of the proposed facility.

On June 28, Judge Broyles issued a "Proposal for Decision" ("PFD") that recommended that the Protestant's Requests for Hearing be denied on the basis they were not "reasonable."

B. Mitsui Proposal for Decision

The Mitsui PFD was the first time that § 55.31, the rule for Determination of Reasonableness, was thoroughly examined in an air permit case, and as such is a decision of first impression. A copy of the PFD is attached as Exhibit "F".

The Examiner divided the PFD into certain issues which he determined were the primary policy issues to be addressed. The threshold issue was: "What level of review should be applied to Coalition's (*i.e.*, Protestants) Request for Hearing to determine if a reasonable basis for potential impact exists?"

The Protestants' counsel argued that the question of whether a hearing request should be granted should be determined by a very

low threshold, similar to a preliminary judicial determination of standing. Of course, the Protestants maintained that where there is a factual issue regarding the justiciable interest of a party, the Commission should look to the pleadings of the moving party and accept them as true for purposes of the threshold decision. If this threshold determination is achieved either by the pleadings or by the filing of affidavits, or in this case, the evidence submitted at the hearing, then there must be a determination that the requests are reasonable and that the parties are "affected". Essentially, the Protestants argued that a determination of the "reasonableness" of a request was no different than a determination of whether a party was "affected."

In response, Mitsui argued that all evidence offered by the parties should be weighed to determine if the Protestants had met its burden by proving by "a preponderance of the evidence" that there was some potential for impacts from the facility. Mitsui pointed to the wording of § 55.31(b)(1)(F): "The extent to which the person requesting hearing is likely to be impacted by the emissions." Using language such as "extent" and "likely" indicate that all evidence regarding a request for hearing should be evaluated. In addition, Mitsui argued that the Chairman had sent this matter to SOAH based upon a desire to have all the evidence thoroughly evaluated, specifically including the air modeling prepared by the Applicant.

The Administrative Law Judge concluded that a determination of reasonableness is not a mere threshold decision, as advocated by the Protestants. Instead, ". . . the Protestants must prove by a preponderance of the evidence that it is reasonable to grant the hearing request, with consideration given to all relevant factors found in § 55.31 of the Commission Rules, including the extent of likely impacts shown." (*See* PFD at p. 3)

Once the ALJ established this evidentiary test, he found that the Protestants failed to meet this burden with regard to the potential impact of other elements, such as hydrogen chloride and hydrogen fluoride.

The other important aspect of this PFD was the ALJ's determination of the scope of the hearing. The Protestants attempted to introduce evidence regarding best available control technology ("BACT"), and the other permit terms that they alleged could be improved as a result of a contested case hearing. The ALJ determined that evidence regarding BACT and additional permit terms was outside the scope of

this particular hearing, and would not be considered for determinations of reasonableness.

On July 24, 1996, the Commission adopted the Mitsui PFD on a 3-0 vote. The Commissioners explained their individual basis for accepting the PFD. For example Commissioner Marquez stated that in evaluating hearing requests, that he viewed this as a three-part "triangle" - one side was "reasonableness," one side was "affected persons," and the other side was competent evidence. He would evaluate all of these elements to determine whether or not a hearing request would be granted. However, Commissioners Marquez and Baker both expressed reservations that the "preponderance of the evidence test" established too high a threshold for potential Protestants to meet in establishing their right to a hearing.

Chairman McBee indicated that he was not troubled by the preponderance of the evidence test, and instead the process had proven to him that the Commission itself was not an appropriate venue to make initial factual determinations, and such matters should be sent to SOAH.

C. Lessons from Mitsui

Counsel for the Coalition argued that the acceptance by the Commission of the Mitsui PFD would establish a precedent that would effectively restrict the public's right to participate in the permitting process. However, it seems that the Mitsui PFD, especially in light of the oral comments of the Commissioners, will in general be limited by its facts and that every future determination of hearing requests will be made on a case-by-case basis. However, the acceptance of the PFD by the Commissioners does provide some general guidance for practitioners.

First, the Chairman and the Commissioners have established that they will generally not evaluate contested facts in matters brought before them. As a result, any time that there are requests that articulate a general basis for a hearing, such matters will be sent to SOAH for determination.

Second, despite the contentions of the Protestants, the determination of "reasonableness" pursuant to § 55.31 is a separate determination from the determination of an "affected party". Introducing evidence to meet the "reasonableness" test, in addition to demonstrating a justiciable interest as an "affected" party, does create a higher

standard for participation than would be required under state or federal common law.

Third, even though some of the Commissioners have reservations regarding the establishment of an evidentiary standard, the Protestants' view that only a threshold evidentiary test is required to prove both "affected person" and "reasonableness" status has been rejected. For the moment, the preponderance of the evidence has been adopted as the appropriate evidentiary standard.

VI. Conclusion

Neither environmental interest groups, industry, nor the Commission is satisfied with the current system of resolving hearing requests. However, each of these interests are taking dramatically different approaches to refining the system.

The Commissioners have opened comments on revisions to the rules for disposition of hearing requests with the goal of making the system more responsive and easier to understand. They are currently soliciting comments from all interested parties and hope to announce new draft rules in the next few months.

At the same time, some environmental organizations believe that the Legislature's current mandates as implemented by the TNRCC have gone too far in restricting public participation. On June 17, 1996, the Environmental Defense Fund, as represented by Rick Lowerre, notified the Commission of a citizens' suit to withdraw the EPA's approval of the Underground Injection Control Program of the TNRCC under the Safe Drinking Water Act. One of the primary allegations in this lawsuit is the failure of the TNRCC to allow for sufficient public participation in state environmental enforcement. This lawsuit, if it proceeds, will undoubtedly also test the state's implementation of the rules regarding requests for hearing.

At the same time that some environmental interest groups are complaining about the lack of public participation, the Texas Chemical Council has indicated that they will once against support legislation in the next session of the Legislature to effectively abolish contested case hearings. Legislation that would further restrict contested case hearings was filed last session, but failed to receive a final vote in the Senate. A copy of last session's proposed bill is attached as Exhibit "G".

Environmentalists also say they will convince the Legislature to provide greater public participation. In the meantime, the Commission hopes to craft a set of rules that will provide better guidance until, of if, the Legislature considers any statutory changes.

REQUESTS FOR HEARING BEFORE THE TEXAS NATURAL RESOURCE CONSERVATION COMMISSION: WHO IS ENTITLED TO A HEARING?

Index of Exhibits:

Exhibit "A": Review of Decisions on Requests for Hearing
Exhibit "B": Disposition of Hearing Requests by TNRCC
Exhibit "C": S.B. 1546
Exhibit "D": S.B. 1125
Exhibit "E": TNRCC Rules §55.29 and §55.31
Exhibit "F": Mitsui Proposal for Decision
Exhibit "G": H.B.2491

EXCERPTS FROM

A Review of Decisions on Requests for Hearings of the Texas Natural Resource Conservation Commission From September 1, 1995 to January 10, 1996

June 1996

Henry, Lowerre, Johnson, Hess & Frederick
202 West 17th Street
Austin, Texas 78701

EXHIBIT H

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TABLE 1 SUMMARY OF CASES	2
CONCLUSIONS	3
INDEX TO CASES	4
DESCRIPTION OF DECISIONS (EXCERPTS[1])	8

[1]This document is a short version of the full review of the actions of the Executive Director and the Commissioners of The Texas Natural Resources Conservation Commission. The detailed description of most cases that were resolved when the application was withdrawn or when the parties reached an early settlement and not included in this document.

PREFACE

This report covers certain decisions by the Commissioners of the Texas Natural Resource Conservation Commission (TNRCC) on public participation during the first four and one-half months following the effective date of two new laws on public participation. The decisions occurred after TNRCC had promulgated a new set of procedural rules on requests for hearings pursuant to one of these new laws. (NOTE: This report does not include water utility and water rights matters.)

The decisions were made at Commission agendas beginning September 6, 1995 and ending January 10, 1996. All items on the Commission agendas during this period were reviewed, and all items involving requests for hearings on the agendas are included in the report. The dates and item numbers from the agendas are included for easy reference.

The decisions reflect the actions of the three new Commissioners appointed by Governor Bush in 1995. They were directed by the Legislature to implement the two new laws governing public participation in TNRCC decisions involving permits. The more significant of the laws, Senate Bill (SB) 1546, took effect on September 1, 1995 and applies to all permits. The other, Senate Bill 1125 applies only to permits involving air pollutants.

This report examines how TNRCC has interpreted those two laws. On the Senate floor when SB 1546 was debated, the sponsor said, "I think I can represent to you that this, this statute would reflect their current practice and case law." In one of the first legal analyses of the law, two lawyers that often represent applicants for TNRCC permits said, "it is possible that the TNRCC may continue to exercise broad discretion in granting or denying requests for permit hearings in the future."[2]

What is not immediately clear from the record is that the Commissioners used the laws to limit public participation significantly. In brief, the Commissioners applied a much stricter test of standing than had been used in the past. The Commissioners also used language in SB 1546 and SB 1125 directing them to consider the reasonableness of the requests for hearings to further limit hearings and thus public participation.

Of the 43 permit applications ("cases") on which hearing requests were made, only 28 required a ruling from the Commissioners'. The other cases involved withdrawals of the requests for hearings, withdrawals of the applications, or other circumstances that eliminated the need for a Commission decision.

Hearings were denied by the Commissioners to all requestors in about 16 of the 28 cases, or 57 % of the time. In only 5 cases did the Commissioners rule that a full hearing on the merits of the application should be held. In three of those cases some requests for hearings were denied. A tabulation of the results of the decisions is provided in Table 1 the next page.

This report was sent in draft form to the TNRCC for its comments. Because the files of the TNRCC had been relied upon for the data, some information was not available in the files at the time of the draft report. TNRCC provided a number of very useful comments.

TNRCC's comments do not change the conclusions of this report. However, the conclusions apply to decisions made 6 to 10 months ago. It appears that in some recent cases the Commissioners are relaxing their standards somewhat.

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[2] "A Double Play for Business", Texas Lawyer, July 31, 1995 at page 27.

TABLE 1

SUMMARY OF FINDINGS

APPROXIMATE NUMBER OF APPLICATIONS FOR PERMITS, AMENDMENTS OR RENEWALS WHERE THERE WERE OPPORTUNITIES FOR THE PUBLIC TO REQUEST A HEARING	1500 TO 2000[3]
NO. OF APPLICATIONS WITH REQUESTS FOR HEARINGS	43
Wastewater discharge and irrigation permits	27
Air emission permits	10
Municipal waste management permits	2
Hazardous waste management permits	1
Sludge use permits	1
Other	2
NO. OF APPLICATIONS WHERE THE COMMISSIONERS DID NOT RULE ON THE REQUESTS FOR HEARINGS BECAUSE THE REQUESTS WERE WITHDRAWN PRIOR TO SUCH A RULING OR BECAUSE THERE IS ONGOING MEDIATION	12
NO. OF APPLICATIONS WHERE, AFTER A HEARING REQUEST OR OTHER OBJECTION WAS FILED, THE APPLICANT ASKED TO WITHDRAW THE APPLICATION OR TO RETURN IT TO STAFF FOR MORE REVIEW	3
NO. OF APPLICATIONS WHERE THE EXECUTIVE DIRECTOR RECOMMENDED DENIAL OF ALL THE HEARING REQUESTS[4]	28
NO. OF APPLICATIONS WHERE THE COMMISSIONERS DENIED ALL THE HEARING REQUESTS	16
NO. OF APPLICATIONS WHERE WERE REQUESTS SENT TO THE STATE OFFICE OF ADMINISTRATIVE HEARINGS (SOAH) FOR HEARING SOLELY OR INITIALLY ON VALIDITY OF REQUEST (I.E. STANDING AND REASONABLENESS OF THE REQUEST)	8
NO. OF APPLICATIONS WHERE HEARING REQUESTS WERE GRANTED AND THE APPLICATION SENT TO SOAH FOR A FULL HEARING ON THE MERITS	5

[3] It is difficult to get statistics from TNRCC on the number of applications where hearings could have been requested. Part of the problem with getting such statistics is that the TNRCC Office of the Chief Clerk issues all notices of permits except those for the air programs. The Chief Clerk's office does keep some informal statistics on notices. Based on those figures, it appears that TNRCC will have issued about 1800 notices of the opportunity to request a hearing in any six month period over the last few years. Of those 1800, about 250 involve water quality permits, 1500 air quality permits, 20 hazardous waste permits, and less than 10 each industrial waste, municipal waste, injection wells and radioactive materials permits.

[4] ED recommendations on the hearing request(s) were only found in 38 cases. Thus, the ED recommended denial of any hearing in 28 of 37 cases or 75% of the cases. Some applications involved multiple requests for hearings. In some cases the ED recommended granting some requests and denying others. While the ED recommended denial of all requests for hearing in 29 cases, the ED also recommended denial of many other requests for hearings in other cases.

CONCLUSIONS

There are a number of conclusions that can be drawn from a review of the decisions. Most of these conclusions are explained in more detail in the comments with the description of the cases in the report. In summary:

1. There is no flood of hearing requests. Only 43 requests for hearings were considered by the Commissioners during the four and one-half month period. During this period, TNRCC probably issued between 1500 and 2000 notices of opportunities to request hearings on applications.

2. Public participation has been reduced. Many people who were denied hearings on permits would have been granted a hearing under the prior law. The prior law allowed TNRCC to find that a person or local government would have standing even if that person or government would not have standing under traditional Texas law. In essence, prior to 1995, TNRCC applied a standing test similar to that used at the U.S. Environmental Protection Agency and in federal courts (See case #'s 9, 16, 19, 28, 31, and 36).

3. TNRCC applies a test that is more stringent than that used in Texas Courts. The Commissioners (and the Executive Director) have interpreted the standing test in SB 1546 to be even more restrictive than the standing test used by Texas courts (See case #'s 19, 28, 33, 35, and 43).

4. Requestors must follow more stringent procedures at TNRCC than they would in Texas Courts. Because the Commissioners are making decisions based on the letters requesting hearings rather than allowing the requestors to present evidence, hearing requests are denied when those requesting the hearing 1) do not provide a detailed explanation of their concerns, 2) do not know the legal requirements for standing, or 3) do not use the legally correct terms. The Commission also applies a much tighter time schedule to requestors (than do Texas courts on plaintiffs), even if those requestors are not represented by attorneys and do not know TNRCC rules (See case #'s 6, 25, and 30).

5. TNRCC is not providing assistance to the public to encourage public participation. There seems to be little effort by TNRCC staff to contact requestors to assist them with their requests. The Executive Director has even made recommendations to deny hearings when a requestor clearly expressed strong opposition to a permit but failed to use the "magic words" to explicitly ask for a hearing (See case #'s 12, 25, 30, and 38).

6. TNRCC is not providing any meaningful alternatives for public participation. Because of the procedural rules, those denied a hearing are given no other effective opportunity to submit comments or otherwise participate in TNRCC's permit decisions. Further, the process eliminates any real possibility that the agency will review the comments and concerns of people denied hearings, and it precludes any response by the agency to such comments (See case #'s 5, 8, 9, 12, 16, 26, 35, 36, 38, 39, 42, and 43).

7. There is a significant reduction in the opportunities for judicial review of TNRCC permit decisions. With the new laws and TNRCC's interpretations, many people who would have the right to seek judicial review of a permit that was issued prior to September 1, 1995 cannot now do so.

8. There is a serious risk that Texas could lose delegation of federal permit programs and federal grants. With the restrictive implementation of the new hearing limitations, Texas is now violating its agreements with EPA to provide broad opportunities for public participation. These agreements were made by Texas in order to gain approval to implement (in place of EPA) the federal permit programs for hazardous waste management, municipal waste management, injection wells and air pollution management. With the loss of those approvals, EPA would also have to deny the millions of dollars of federal funds that are annually provided to TNRCC.

INDEX TO CASES

SE #	DATE/ COUNTY	APPLICANT/ACTIVITY	CONCERNED CITIZEN(S)	TNRCC ACTION
	01-10-96 Nueces	CITGO REFINING Refining Operations	Twenty neighboring Residents	Denied hearing requests.
	01-10-96 Denton	ACME BRICK CO. Wastewater Discharge	R. & A. Walker and E. Hubbard	Sent to "Alternative Dispute Resolution," (a mediation process referred to as ADR) to see if an agreement between the parties could be reached.
	01-10-96 Harris	WILLIAM HEFNER Wastewater Discharge	Marshall Gildermaster	Hearing request withdrawn.
	01-10-96 Rockwall	BUFFALO CREEK UTILITY Sewage Discharge	G.W. & Donna Matthews, Al Adams, J.I. Piper Estate, & Robert & Mary McCutcheon	Denied McCutcheons' request, remanded to SOAH to determine standing of Adams & Piper, granted hearing to Matthews.
	01-10-96 Limestone	BROWNING-FERRIS MSW Landfill	Dr. H. C. Clark	Denied hearing request.
	12-20-95 Bexar	BROWNING-FERRIS MSW Landfill	Peggy Kruse, Mary Ann Freitag, Betty Dzierzanowski, Eddie & Bobbie Goodloe, & Darrell & Cheri Goodloe	Sent to SOAH to determine validity of Freitag and Dzierzanowski's requests; other requests were denied.
	12-20-95 Collin	DOUGLAS M. YARBOROUGH Sludge Disposal	Central Baptist Church, Citizens of Lowry Crossing, Concerned Citizens Group, City of McKinney, and Senator Florence Shapiro	Sent to SOAH for hearing on the merits of all technical issues.
	12-13-95 Bosque	CSLW, LTD. Lime Kiln	Robert A. Clark	Denied hearing request.
	12-13-95 Bosque	CSLW, LTD. Lime Kiln	Robert A. Clark	Denied hearing request.
	12-13-95 Cherokee	CITY OF RUSK Sewage Discharge	Dr. Vassil & Karen Tchokoev	Sent to SOAH for hearing on the merits of the permit.

1	12-13-95 Bexar	U.S. AIR FORCE Sewage Discharge	G. Rodriguez, San Juan Capistrano Mission & Congressman Tejeda	Sent to ADR.
2	12-13-95 Denton	ACME BRICK CO. Wastewater Discharge	P. Morris, N. Stallings, J. Harrison (CACEJ), C. Shahan	Denied requests of Morris, Stallings, and Harrison. No evidence of action on Shahan's request.
3	12-13-95 Johnson	B. NEWSOM DAIRY Wastewater Disch.	Mrs. Joe W. Wharton	Sent to SOAH to determine validity of request for hearing.
4	12-13-95 Orange	CITY OF ORANGE Sewage Discharge	M. Dies & K. Pigg	ADR and parties agreed on permit to be issued.
5	12-06-95 Harris	ODEECO, INC. Concrete Plant	Timbergrove Manor Neighborhood Association (petition signed by over 150 residents), State Senator Mario Gallegos, U.S. Rep. Gene Green, State Rep. Jessica Farrar, Houston City Council Member Felix Fraga, and Cottage Grove Civic Club (signed by over 150 residents)	Applicant withdrew application.
6	12-06-95 Hidalgo	SPENCE CONCRETE Concrete Plant	Nearby residents and Golden Acres Retirement Community	Denied hearing request.
7	12-06-95 Montgomery	SAN JACINTO R.A. Sewage Discharge	P.B. Smith	ADR and settlement reached. Request for hearing withdrawn.
8	12-06-95 Kerr	CITY OF KERRVILLE Sewage Discharge)	Upper Guadalupe R.A. & Texas Rivers Protection Assn.	Settlement reached, requests for hearing withdrawn.
9	12-06-95 Cameron	CAMERON CO. FWSD Sewage Discharge	Sierra Club, Audubon Soc., Lower Laguna Madre Fndn., M.L. Campbell, Tx. Shrimp Association, John Thobe, & Walt Kittelberger.	Sent to ADR, no agreement. Then sent to SOAH for a hearing on validity of request by Shrimp Assn. Other requests for hearing denied.
20	12-06-95 Caldwell	GBRA Sewage Discharge	C. Staacke, M. Ayres and C. Henderson	ADR, agreement reached, requests withdrawn.

1	12-06-95 Midland	CITY OF MIDLAND Sewage Discharge	J. A. Walton & R. C. Floyd	ADR, both requests withdrawn.
2	12-06-95 Live Oak	IEC Ground Water Uranium Mine	CAPIT, Live Oak Co., Live Oak UWCD	Hearing request denied. After Motion for Rehearing, the hearing was granted.
3	11-29-95 Wood	CITY OF MINEOLA Sewage Discharge	Estate of W. W. Caruth, Jr.	Applicant withdrew application.
4	11-16-95 Montgomery	MONTGOMERY CO. MUD-15 Sewage Discharge	G. Ensign & J. Allen	Sent to SOAH on validity of requests, requests withdrawn before date of hearing.
5	11-16-95 Hopkins	DON HINTON Wastewater Irrigation	R. & A. Francis and Dick Pogue	Sent to SOAH for hearing on validity of requests, protestants did not appear, returned permit to ED to issue.
6	11-16-95 Limestone	SMITH CRUSHED STONE Sewage Discharge	P. Stuver	Denied hearing request.
7	11-16-95 Comanche	GERARD HOEKMAN Wastewater Irrigation (CAFO)	J. Scott, A. Cole, G. Stephens, F. Brown and C. Davis	Sent to SOAH for hearing on validity of hearing requests.
8	11-16-95 Live Oak	EVEREST EXPL. Uranium Mine Irrig.	N. Lisenba	Denied hearing request, later sent to ADR.
9	11-16-95 Denton	LAKEWOOD VILLAGE Sewage Discharge	W. D. Boyd	Hearing request withdrawn after negotiations with City.
10	11-01-95 Grayson	CITY OF WHITESBORO Sewage Discharge	D. & M. Cain	Hearing request withdrawn.
11	11-01-95 Johnson	JOHNSON CO. FWSD #1 Sewage Discharge	B. & R. Fagan, P. & R. Waddell, City of Burleson and City of Arlington	Denied Arlington's hearing request, granted 3 others' requests, sent to SOAH for hearing on the permit amendment.
12	11-01-95 Parker	CITY OF SPRINGTOWN Sewage Discharge	Tarrant County WCID #1	Hearing request withdrawn.
13	11-01-95 Kaufman	CITY OF CRANDALL Sewage Discharge	About 20 nearby residents	Sent to SOAH for hearing on validity of requests.
14	11-01-95	CITY OF THE COLONY	P. Laster	Denied hearing request.

	Denton	Sewage Discharge		
5	11-01-95 Smith	LAST DAYS EVANGELICAL ASSOC. Wastewater Discharge	Fourteen nearby landowners	Denied hearing requests.
6	11-01-95 Dallas	HEAT Hazardous Waste Storage	West Dallas Coalition for Environmental Justice	Sent to SOAH for hearing on validity of hearing request. SOAH recommended granting the hearing request. Commission overruled SOAH's decision and denied hearing request.
17	10-18-95 Hidalgo	FRISBY BELL GIN Cotton Gin	Six nearby residents	Denied hearing requests.
18	10-18-95 Ellis	GIBSON-HOMANS CO. Asphalt Roofing Products	D. & C. Hellstern	Denied hearing request.
19	10-11-95 Williamson	RAINBOW MATERIALS Concrete Plant	Over 200 nearby residents and Senator J. Wentworth	Denied hearing requests.
10	09-27-95 Frio	C & W MANHATTAN Wastewater Irrigation	J. Hibdon	Hearing request withdrawn.
11	09-27-95 Live Oak	USX CORPORATION Uranium Mine-Ground water	Tom Davis	Sent back to staff review for six months.
12	09-13-95 Ellis	N.TEX. CEMENT CO. Cement Kiln	Cynthia Fava (CAUSE) and Downwinders at Risk	Denied hearing requests.
13	09-06-95 Robertson	SANDERSON FARMS Feedmill	Corn family	Denied hearing request.

CASE #

DESCRIPTION OF DECISIONS

January 10, 1996

1 Item 3. Docket No. 96-0086-AIR. APPLICATIONS BY **CITGO REFINING AND CHEMICALS, INC.** for renewal of Permits Nos. 2696A, 2699A, 2700A, 2706A). If granted, the renewed permits would allow Citgo to continue operation of the following units: Demex Unit (2696A), Jet Kerosene Merox Unit (2699A), FCC Gasoline Merox Unit (2700A), and Unsaturated Gas Merox Unit (2706A) at its facility located at 1801 Nueces Bay Boulevard, Corpus Christi, **Nueces County**, Texas. The Commission will consider the applications and hearing requests that have been filed on the applications. (Kevin Jung/John Barrientez)

Approximately 20 neighbors of the plant signed form hearing requests, citing concerns about threats to their health by the air pollution from the facility and requesting comprehensive modeling of the effects of the contaminants from Citgo and other facilities in Nueces, Aransas and San Patricio Counties.

No ED response was found in the file (reviewed 2/16/96) nor any written orders.

Hearing requests denied; permit issued.

(**Comment:** Apparently the ED takes the position that the Commission has no discretion to grant a hearing request on this type of action because of SB 1125. If that were true, the ED would not issue a notice of the opportunity of hearing on such cases. The law makes it clear that the Commission can grant a hearing if there are compliance problems. TNRCC general statutes and its own rules also provide that the Commission can grant a hearing on any application. (See, for example, 30 TAC §305.92. Also see 30 TAC §263.23(g)) In fact, under this rule any one Commissioner can send a matter to hearing. In many cases where one Commissioner believed that a hearing should be provided and the other two did not, the one Commissioner could require a hearing. There were, in fact, many two-to-one votes by the Commission denying hearing requests. Moreover, TNRCC rules state that if the Commission finds that a public hearing would serve the public interest, the Commission **shall** conduct a public hearing (30 TAC 105(d).) (Also see comments to case #8.))

3 Item 5. Docket No. 96-0084-MWD. APPLICATION BY **WILLIAM DAVID HEFNER** for renewal of Permit No. 13054-01 to authorize a discharge of treated domestic wastewater effluent at a volume not to exceed an average flow of 10,000 gallons per day from the L and D Mobile Home Park Wastewater Treatment Plant. The plant site is at 20810 Cypress Wood Drive in **Harris County**, Texas. The treated effluent is discharged into a drainage ditch; thence to Cypress Creek in Segment No. 1009 of the San Jacinto River Basin. The Commission will consider the application and hearing requests that have been filed on the application. (Bob Sweeney/Tom Weber)

Marshall Gildermaster, a downstream landowner with property frontage on Lake Houston, requested a hearing based on his concerns about increased water pollution along the San Jacinto River and in Lake Houston. He also cited concerns about health hazards of eating fish he catches and the impacts to recreation such as water skiing. Mr. Gildermaster withdrew his request for hearing after discussion with TNRCC staff.

The ED's response recommended that Mr. Gildermaster's request be denied because he failed to show that he is an affected person

since 1) his property is approximately 10 miles downstream from the discharge point, and 2) the volume of discharge is too small to significantly impact the water quality of Lake Houston.

Hearing request withdrawn; permit issued.

(**Comment:** Despite the statement about recreation by the requestor, there is no indication in the files that TNRCC made an effort to determine if the requestor also used the river near the site of discharge for recreation such as fishing. A lay requestor would not normally know to identify all potential ways he or she may be affected in a request for hearing. In fact, there is no notice to requestors to do so. Instead, TNRCC assumes requestors understand the law and TNRCC rules on what it takes to get standing and how to plead all of the relevant facts. TNRCC's requirements are a much tougher standard than that established in Texas courts. For lawsuits, the pleading of all of the facts is not required. Instead the pleadings of a plaintiff must simply provide notice of the issues. If the defendant takes the position that the plaintiff lacks standing, or fails to plead a basis for standing, the defendant has to object in sufficient detail to allow the plaintiff to understand the defendant's objection. The plaintiff is then given sufficient time to replead. Then an evidentiary hearing may be granted to allow the plaintiff to present evidence. In the early cases, TNRCC gave the requestor no notice that he or she could file a supplemental request to plead additional facts. Later in the fall, TNRCC started advising requestors of that opportunity, but often gave a requestor only five days to respond. Moreover, the ED rarely provides any assistance to requestors to explain the legal requirements and assist the public to prepare adequate requests. (TNRCC's position is also shown in a number of cases below, including case #19.))

4 Item 6. Docket No. 96-0085-MWD. APPLICATION BY **BUFFALO CREEK UTILITY, INC.** for an amendment to Permit No. 11974-01 to authorize an increase in the discharge of treated domestic wastewater effluent from a volume not to exceed an average flow of 125,000 gallons per day to a volume not to exceed an average flow of 200,000 gallons per day. The applicant is also requesting a variance to the buffer zone requirements in accordance with 30 TAC Chapter 309.13(e)(1)(A). The wastewater treatment facilities are approximately 400 feet south of Rockwall Lake Dam and approximately 400 feet northwest of the point where Farm-to-Market Road 3097 crosses Buffalo Creek in **Rockwall County, Texas.** The treated effluent is discharged into Buffalo Creek; thence to the East Fork Trinity River in Segment No. 0819 of the Trinity River Basin. The Commission will consider the application and hearing requests that have been filed on the application. (Bob Sweeney/Tom Weber)

G.W. & Donna Matthews, adjacent landowners, requested a hearing, citing concerns about spills and dumping of sludge onto their property, pollution, noise, odor and unsightly appearance. The J.I. Piper Estate, located 1 ½ miles from the plant, requested a hearing based on concerns about flooding with polluted water. Robert & Mary McCutcheon (2 miles away) and Al Adams (<5 miles away) also requested hearings, but cited only flooding and property devaluation concerns.

The ED recommended that the Commission grant the Matthews' request because of their proximity to the plant and that their concerns about spills and pollution are governed by the permit's applicable law. The ED recommended denying the rest of the protestants' requests because they only cited concerns about flooding, which is not governed by the permit's applicable law.

Hearing request of McCutcheons denied; sent to SOAH to determine standing of Adams and Piper Estate, grant hearing request to Matthews.

(**Comment:** With the obvious standing of the adjacent landowners, taking this matter to the Commission rather than sending it directly to SOAH under TNRCC rule 263.23(g) appears to be a waste of time and money for all concerned. SOAH could have made the decision on the other requestors and allowed those other requestors time to explain any additional basis for standing that they might have. Clearly, there was a benefit in having the Commissioners see the full range of cases. After a few months, however, the practice of taking everything to the Commission just costs applicants and protestants extra time and money.)

5 Item 7. Docket No. 96-0087-MSW. APPLICATION BY **BROWNING-FERRIS, INC.** (MEXIA LANDFILL) for an amendment to Permit No. MSW 1558-A. The amendment will authorize operation of a Type I municipal solid waste facility to receive, dispose of and process municipal solid waste. The existing site covers approximately 143 acres of land and authorized wastes are to be received at a rate of approximately 70 tons of solid waste per day. The facility is on LCR 460, approximately 1.2 miles east-southeast of the intersection of State Highway 14 and Farm-to-Market Road 2705, southwest of the City of Mexia in **Limestone County**, Texas. The Commission will consider the application and hearing requests that have been filed on the application. (Margi Ligarde/Susan Janek)

Dr. H.C. Clark, a landowner in the County, requested a hearing based on his concerns about possible groundwater pollution dating from the landfill's past as an industrial landfill. He also stated concerns such as odors, dust and above-ground contamination, and property devaluation.

The ED's response recommended denying Dr. Clark's request because his property is located 13 miles away and thus shares his concerns with members of the general public.

Hearing request denied; amendment to permit issued.

(**Comment:** Dr. Clark, a geology professor from Rice with years of experience on landfills, asked for a hearing because it was the only route given to him to get his technical concerns before TNRCC. On the day the hearing request was denied, the permit was issued. Thus, under TNRCC's process, Dr. Clark's data, analysis and comments were not considered by TNRCC. The ED made no substantial response to Dr. Clark's comments. The ED simply fought his request for hearing.)

December 20, 1995

6 Item 2. Docket No. 95-1699-MSW. CONSIDERATION OF AN APPLICATION BY **BROWNING-FERRIS, INC.**(Tessman Road Landfill) for an amendment to Municipal Solid Waste Permit No. MSW1410-B. The facility is located at 7790 Tessman Road, approximately two (2) miles south of the intersection of Farm to Market Road 1516 and IH 10 East at the Termination of Tessman Road in the City of San Antonio, **Bexar County**, Texas. The Commission will consider the application and the hearing requests that have been filed on the application.

A letter opposing the amendment, dated May 1, 1995 was received from Lloyd Booth, a nearby landowner. Peggy Kruse, secretary of HOME (Help our Martinez Environment) sent a letter July 5, 1995 requesting a public hearing. Mary Ann Freitag and Betty Dzierzanowski requested hearings on October 24, 1995. Eddie and

Bobbie Goodloe sent two letters of protest and requested hearings on Nov. 11 and 28, 1995. Darrell and Cheri Goodloe requested a contested case hearing on Nov. 28, 1995, after sending a protest letter on Nov. 17, 1995. Save Our Martinez Environment sent a hearing request on Dec. 6, 1995 with 28 signatures.

The ED's response recommended denying all hearing requests. The ED recommended denying Peggy Kruse's request because she did not comply with TNRCC rules in stating where she lives in her letter. The ED recommended that Bobbie and Eddie Goodloe's request be denied because their only stated concern was the effect on their property's value. The ED argued that consideration of property values is not an agency concern, especially since the landfill already exists and is not being laterally expanded. In the case of Cheri and Darrell Goodloe's request, the ED made the same recommendation for denial on the basis of concerns about property values, even while acknowledging that their request included concerns about vectors, surface water contamination, and environmental justice. The ED asserted that a vertical expansion of the landfill would not increase vectors, surface water protection would continue to be adequate, and the Goodloe's did not elaborate on their claim of environmental injustice in their hearing request. The ED recommended denying Betty Dzierzanowski's hearing request because the amendment would not change the controls in place for odors and vectors, and the rate of disposal would not change, so noise would not increase. Mary Ann Freitag's hearing request was recommended for denial by the ED because her complaint about odor is similar to Dzierzanowski's, and her complaint about air pollution is generic. A Supplemental Response by the ED agreed with the applicant that Darrell and Cheri Goodloe's requests were untimely, as they were postmarked four days after the November 20 deadline. The Public Interest Counsel recommended granting all requests.

Sent to SOAH to determine validity of hearing request of Mary Ann Freitag and Betty J. Dzierzanowski and all other requests were denied. Freitag and Dzierzanowski were later granted a hearing.

(**Comment:** While the Commissioners correctly rejected the ED's recommendation on some of the requests, the logical and safer decision would have been to send all requests to SOAH to allow the taking of evidence on all requests. The problem the Commissioners may create by denying some requestors the right to present their evidence is that the requestors may be able to show through evidence a justiciable interest that was not clear in their written request for hearing. If so, such a requestor could seek judicial review to reverse any permit eventually issued by TNRCC and require a full rehearing. In addition, the response by the ED seems to show confusion over the merits of the application and the issue of being an affected person. A person can be affected economically and have standing in Texas because of reduced property values. The fact that the hearing on the merits cannot deal directly with property values is not relevant to the issues of whether property values are a basis for standing under Texas law. In fact, property values can often be protected by stricter permit limitations.)

December 13, 1995

8 Item 3. Docket No. 95-1621-AIR. APPLICATION BY CLSW, LTD. DBA CHEMLIME for renewal of Permit No. 4335A). If granted, the renewed permit would allow Chemlime to continue to operate Lime Kiln No. 2 at its facility located on Farm to Market Road 2602, two miles west of State Highway 6 in Clifton, Bosque County, Texas. The Commission

will consider the application and hearing requests that have been filed on the application. (Ronnie Jones/Mike Gould)

A hearing request was filed by Robert A. Clark, a nearby resident, in October 1994. He cited health concerns about limestone dust and products of combustion such as nitrogen oxides, sulfur dioxide, carbon monoxide and volatile organic compounds. He claimed to suffer adverse health effects from the daily inhalation of these contaminants. He also included several photos showing the proximity of his property relative to the facility.

The ED recommended denying Mr. Clark's hearing request because it was unreasonable. Citing Section 382.056 (d) of the Texas Clean Air Act, he stated that "a hearing request on the renewal of a permit will be considered unreasonable if the renewal would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted." Despite there being one unresolved permit violation for a minor exceedance of the maximum allowable emission rate for particulate matter, he stated that a hearing would not be allowed under Section 382.056(e).

Hearing request denied; permit issued.

(**Comment:** In addition to SB 1546, which restricts hearings for all TNRCC permits, SB 1125 was passed by the Legislature to define when hearings may be granted on air permits. SB 1125 (now Section 382.056 of the Texas Clean Air Act), like SB 1546, requires a showing that the request for hearing is reasonable. SB 1125, however, also states that a hearing request on a permit amendment or renewal where there is no increase in emissions or no emission of a new air pollutant is not reasonable and should be denied. The one exception stated in the law is a showing that the applicant has a poor compliance history. Here, the opponent raised issues related to violations, including nuisance conditions affecting his health. A hearing clearly could have been granted (See also case #'s 16, 35, 37, 38, and 43.). A bigger problem is the next case. The applicant also proposed to build a new kiln. These two cases should have been consolidated into one hearing.)

9 Item 4. Docket No. 95-1620-AIR. APPLICATION BY **CLSW, LTD. DBA CHEMLIME** for a construction permit (Proposed Permit No. 23214). If approved the permit would allow Chemlime to construct Lime Kiln No. 1 at its facility located on Farm to Market Road 2602, two miles west of State Highway 6 in Clifton, Bosque County, Texas. The Commission will consider the application and hearing requests that have been filed on the application. (Ronnie Jones/Mike Gould)

Mr. Clark filed a hearing request on the proposed permit, citing the same concerns as he did in case # 8, with specific regard to the pollutants' effects on the soil quality of his property.

The ED's response recommended granting Mr. Clark a hearing on the proposed permit.

Hearing request denied; permit issued.

(**Comment:** The ED's reasoning in recommending a hearing was clearly correct and consistent with SB 1125. This is a new permit, not a renewal. The requestor had a legal right to challenge the permit conditions with his own evidence and experts. The Commission improperly denied Mr. Clark's hearing request.)

10 Item 5. Docket No. 95-1680-MWD. APPLICATION BY **CITY OF RUSK** for an amendment to Permit No. 10447-01 to authorize an increase in the

discharge of treated domestic wastewater effluent. The discharge is to be increased from a volume not to exceed an average flow of 1,200,000 gallons per day to a volume not to exceed an average flow of 1,750,000 gallons per day. The wastewater treatment facilities are approximately 1.5 miles south of mid-town Rusk, at a point approximately 1/4 mile west of Farm-to-Market Road 752, adjacent to One-Eye Creek in Cherokee County, Texas. The effluent is discharged into One-Eye Creek; thence to Boxes Creek; thence to the Neches River Below Lake Palestine in Segment No. 0604 of the Neches River Basin. The Commission will consider the application and hearing requests that have been filed on the application. (Bob Sweeney/Tom Weber)

Adjacent landowners Dr. Vassil V. & Karen Tchokoev wrote a letter of protest on September 11, 1995 against the permit amendment. They expressed their concerns about further degradation of water quality, but never explicitly requested a hearing on the matter.

In his first response, the ED stated that the Commission was not obligated to grant the hearing request because the Tchokoevs never explicitly requested a hearing. In an amended response to the request for hearing, the ED stated that it is the Commission's discretion to interpret whether or not the Tchokoevs were requesting a hearing.

Sent to SOAH for hearing on technical merits of the permit.

(**Comment:** The ED tried several times in the fall of 1995 to convince the Commissioners to reject hearing requests that did not use magic words like "I request a hearing." By this time, the Commissioners had rejected that approach. The ED staff, however, has not created a process to contact requestors whose letters are not clear to determine whether or not they are seeking a hearing or simply want to submit comments. (See also cases #6, 12, 25, and 30.))

11 Item 6. Docket No. 95-1677-IWD APPLICATION BY **U.S. DEPARTMENT OF THE AIR FORCE** for a permit (Proposed Permit No. 03830) to authorize a discharge of treated groundwater at a volume not to exceed an average flow of 32,000 gallons per day. The applicant proposes to conduct a groundwater treatability study and groundwater remediation at Brooks Air Force Base. The plant site is just inside the southwest corner of the Brooks Air Force Base boundary, east-northeast of the convergence of Old Corpus Christi Road, South Presa Street, and Villamain Road in the City of San Antonio, Bexar County, Texas. The effluent is discharged into an unnamed tributary of the San Antonio River; thence to the San Antonio River in Segment No. 1911 of the San Antonio River Basin. The Commission will consider the application and hearing requests that have been filed on the application. (Bob Sweeney/Tom Weber)

Hearing requests were filed by Gloria Rodriguez for her mother, Stella Hernandez, regarding odors and decreased property values because of her proximity to the plant. San Juan Capistrano Mission and 11 residents requested a hearing and an opportunity to address the Commission on the merits of the permit, but did not elaborate on their concerns. Congressman Frank Tejeda wrote to request a hearing on behalf of the San Juan Capistrano Parish committee monitoring the Air Force's permit, regarding impacts of the discharge and stating his deep concern for the community's right to know and participate through hearings and meetings. The Archdiocese of San Antonio also expressed concern about sufficient notice to its parishioners of the proposed permit and asked that

the matter be delayed from the Dec. 13 Agenda. Gloria Rodriquez withdrew her request and that of Ms. Hernandez after a meeting with representatives of the U.S. Air Force, but later wrote a letter dated Dec. 11, 1995 to TNRCC stating that she had been misled by USAF and still supported the requests of the others.

The ED's response only addressed the request by Gloria Rodriquez and Stella Hernandez. He recommended her request be denied because her property is located 3/4 mile away from the treatment plant, that the odors from the treatment facility are " unlikely" to affect them, and that the concerns about adverse effect to their property value and marketability are not bases for personal justiciable interest under the laws applicable to this application.

Sent to ADR.

(**Comment:** With regard to the ED's position that the "protestants are unlikely to be affected by odors," that is a fact issue that even the ED would agree was not clearly resolved. Thus, a hearing should have been granted, at least, on standing. Further there is no response by the ED to the clear request for hearing by the San Juan Capistrano Mission, which is downstream of the discharge, and apparently closer than one mile. Apparently the ED viewed the request as late and the ED recommends denying all late hearing requests even if the request is one day late. (See, for example, Case #39.) Yet the Commission has a rule that allows for the extension of the deadlines on hearing requests. (30 TAC §305.105 (a)) The commission has broad discretion to grant a hearing on any application. (See Case #1.) Instead of advising the Commission of this fact and allowing the Commission to balance the interests, the ED simply takes the position that a late request can not be granted. Yet, there may be valid reasons for a late filing. Moreover, there may be important reasons to balance the late filing with the reasons to grant a hearing. Finally, there also is no indication that the ED tried to deal with the Rodriguez-Hernandez statements that the applicant lied to them to get them to drop their request for hearing.)

12 Item 7. Docket No. 95-1769-IWD. **APPLICATION BY ACME BRICK COMPANY** for a permit (Proposed Permit No. 03844) to authorize an intermittent, flow variable discharge of mine pit water and stormwater via Outfall 001 from the Herbert Clay Mine. The mine is adjacent to the south side of U.S. Highway (US Hwy) 380 immediately west of the junction of US Hwy 380 and US Hwy 377 near the City of Crossroads, **Denton County**, Texas. The effluent is discharged into an unnamed tributary; thence to Lewisville Lake in Segment No. 0823 of the Trinity River Basin. The Commission will consider the application and hearing requests that have been filed on the application. (Bob Sweeney/Tom Weber)

Nearby and adjacent landowners Peggy J. Morris and Neta Stallings filed hearing requests citing concerns about dust created by mine operation and water pollution. James Harrison, on behalf of Citizens Action Coalition for Environmental Justice (CACEJ), also requested a hearing, citing dust problems and general pollution concerns.

The ED recommended denial of hearing requests by Morris, Stallings and Harrison (for CACEJ) on the grounds that a) dust is not a concern governed by the permit, and b) none of the requestors could prove any justiciable interest different from that of the general public.

Hearing requests denied; permit issued.

(**Comment:** Again, there is nothing in the TNRCC public files to suggest that the staff made any attempt to contact Mr. Harrison to clarify CACEJ's concerns and potential location of CACEJ's members.)

13 Item 8. Docket No. 95-1676-AGR. APPLICATION BY **BILLY E. NEWSOM DAIRY** for a permit (Proposed Permit No. 03801) to authorize disposal of waste and wastewater from a dairy. The dairy will consist of a maximum of 400 milking cows on an average daily basis. Wastewater will be disposed of by irrigation on 31 acres of agricultural cropland. Manure/solids will be disposed of as fertilizer on agricultural cropland. No discharge of pollutants into the waters of the State is authorized by this permit. The dairy is on Johnson County Road 1005 between Johnson County Roads 913 and 915 near **Godley, Johnson County**, Texas. This location is in the drainage area of the Brazos River Basin in Segment No. 1228 of Lake Pat Cleburne. The Commission will consider the application and hearing requests that have been filed on the application. (Bob Sweeney/Darrell Williams)

Mrs. Joe W. Wharton, an adjacent landowner to the proposed facility, requested a hearing on August 25, 1995, citing her concern for possible runoff contamination of her stock pond.

The ED's response recommended that the Commission refer the matter to SOAH to determine whether Mrs. Wharton meets the statutory requirements to request a hearing on the basis of alleged facts.

Sent to SOAH to consider validity of request for hearing.

(**Comment:** In a case like this, sending such a matter to SOAH for an evaluation of only the validity of the hearing request would appear to be a waste of time and resources. The process that requires SOAH to take its recommendation back to the Commissioners even if SOAH finds a valid basis for a hearing only delays the full hearing and costs all parties unnecessary resources. TNRCC rules allow either the ED or the applicant to send a matter to SOAH for hearing without going to the Commissioners when the validity of the hearing request is clear. This shortcut was rarely, if ever, used, despite the clear intention of the Commission to create this shortcut when it promulgated the rules. It could appear that neither the ED nor applicants use the short cut because they hope that the Commissioners will decide to deny the hearing requests.)

16 Item 5. Docket No. 95-1619-AIR. APPLICATION BY **SPENCE CONCRETE CO** for renewal and amendment of Air Quality Permit No. 5990. If approved the permit would allow Spence Concrete to continue operation of a portable concrete batch plant at 3420 West Ash in **McAllen, Hidalgo County**, Texas. The Commission will consider the application and hearing requests that have been filed on the application. (Margaret Hoffman/Chuck Lowary)

Several nearby residents wrote individual letters of protest and hearing requests, and approximately 170 people signed a letter from Golden Acres Retirement Community protesting the facility and requesting a hearing based on concerns about noise, dust problems, and respiratory ailments blamed on the dust and emissions from the plant.

The ED's response to the requests for hearing recommended that all requests be denied, stating that "all requests are unreasonable as a matter of law," under SB 1125 because the permit renewal would not allow any increase in or new emissions, and that there were no outstanding complaints or notices of violation against the

applicant. A letter from Golden Acres, Inc., withdrawing its request for a hearing was signed by many of those who signed the original protest. Not all requests were withdrawn.

Hearing requests denied; permit issued.

(**Comment:** This application included both a renewal and an amendment. The amendment would allow an increase in production rates from 30 cubic yards to 75 cubic yards per hour. Moreover, the staff agreed that this location is a highly sensitive area for nuisances - a problem that might be minimized with proper permit conditions. Still the ED recommended denial of all requests. Reliance on SB 1125 as the basis for denial was not appropriate under the circumstances.)

OLD BUSINESS
December 6, 1995

19 Item 3. Docket No. 95-1477-MWD. APPLICATION BY **CAMERON COUNTY FRESH WATER SUPPLY DISTRICT NO.** 1 for a permit (Proposed Permit No. 13772-01) to authorize a discharge of treated domestic wastewater effluent at a volume not to exceed an average flow of 1,500,000 gallons per day. The proposed permit would also authorize a variance to the buffer zone requirements. The wastewater treatment facilities are to be approximately 3.7 miles north of the Queen Isabela Causeway (Park Road 100) on the west side of South Padre Island near Andy Bowie Park in **Cameron County**, Texas. The effluent is to be discharged into the Laguna Madre in Segment No. 2491 of the Bays and Estuaries. The Commission will consider the application and hearing requests that have been filed on the application. (Bob Sweeney/Tom Weber)

Sierra Club, Audubon Society, Lower Laguna Madre Foundation, Texas Shrimp Association (TSA), an individual who lives and works near the plant and several others (without the assistance of an attorney) requested hearings based on their uses or their members' uses of the bay for scientific, recreational, fishing/shrimping purposes and working nearby. They alleged adverse impacts to sea grasses, shrimp production, recreation, and their enjoyment of the bay.

The ED initially recommended denial of all requests because no organization had plead the name of the specific person who would be the member with standing for the test of "organizational standing". The ED also argued that the individual members of the organizations were in the same position as the general public. After TSA sent in additional information, the ED apparently withdrew the objection to TSA's request.

Initially, sent for ADR, then, to SOAH for a hearing on the request for hearing (i.e. standing and reasonableness) of Texas Shrimp Association only. All other requests were denied.

(**Comment:** This is another example of the ED arguing that lay people should know enough about the law to file a detailed hearing request that satisfies the complex requirements of organizational standing, even as the Commission's interpretations of the law are in transition. This case is also a good example of the change in the law. Sierra Club and the other such organizations have requested and have always been granted hearings in many similar cases before the new laws were enacted in 1995. (For other cases involving denials of hearing requests that cite recreation as one of their concerns, see also case #'s 28 and 34.)

On the issue of ADR, the Commissioners should encourage and are encouraging mediation as a way to avoid costly hearings. Unfortunately, the Commissioners often put concerned citizens in a very difficult situation by requiring early mediation. By sending matters to ADR before determining if a hearing request will be granted in a case like this, the Commission gives the applicant little incentive to agree to solutions that might restrict its operation. Applicants can and do simply refuse to negotiate in good faith, hoping the Commission will then deny the hearing request. If a hearing is denied, the applicant wins. If a hearing is granted, the applicant can ask for ADR again. The Applicants' incentives to settle are small. Moreover, ADR often will only work after a concerned citizen has had a chance to gather information, a process that often requires the discovery process of a hearing. Finally, too often the Commissioners have sent disputes to ADR in the hopes that they can avoid making a decision on the hearing request.)

22 Item 7. Docket No. 95-1193-UIC. The Commission will consider **motions for rehearing** filed on International Energy Corporation, Incorporated. An application by **INTERCONTINENTAL ENERGY CORPORATION** for an amendment to the production area authorization for Production Area No. 1 under existing Permit No. UR02108-011 at its Zamzow in situ uranium mine site. The proposed amendment would revise restoration values for sodium, carbonate, bicarbonate, fluorite, pH, conductivity, alkalinity, arsenic, uranium, molybdenum, ammonia and radium-226. The proposed values will not change the use category of the water. Prior to mining, the water in the production area was used for livestock. Intercontinental Energy Corporation has met the following criteria set forth in 30 TAC 331.107(f)(2) for an amendment to restoration table values: a) reasonable efforts have been taken by the company to restore the aquifer; b) the formation water in the aquifer is suitable for any use to which it was suitable prior to mining; and c) further restoration efforts would consume energy, water, or other natural resources of the state without providing a corresponding benefit to the state. The Zamzow site is approximately eight (8) miles east of Three Rivers, Texas in southern Live Oak County. The production zone is in the Oakville Sand at a depth of 135 to 225 feet or approximately 65 to 130 feet below sea level. Request for hearing. (John Santos) **The commission originally issued amendment to the production area authorization for Production Area No. 1 under existing Permit No. UR02108-01 at its Zamzow in situ uranium mine site on the agenda of September 27, 1995.**

CAPIT, a citizen group made up of adjacent and nearby landowners, Live Oak County, and the Live Oak County Underground Water Conservation District requested hearings based on concerns that groundwater contamination higher than background levels would migrate off the mine property and contaminate others' well water.

The ED recommended denial, pointing out that TNRCC had never granted a hearing on this type of amendment, and that TNRCC rules allowed TNRCC to deny the hearing request regardless of whether the opponents could meet the test of SB 1546.

Commission denied request for hearing and issued the permit. The Commission later granted requestors' Motion for Rehearing and sent the matter to SOAH for a hearing on the merits.

(**Comment:** The ED does not explain why SB 1546 does not apply to this matter. The law does not exclude any type of permit matters. Instead, it appears that the ED took the position in this and other cases that SB 1546 applies to all requests for hearings except those where the TNRCC rules that are more

restrictive than SB 1546. The ED apparently read SB 1546 as applicable only in order to reduce public participation, not to expand it.)

25 Item 5. Docket No. 95-1556-IWD. APPLICATION BY **DON HINTON** for an amendment to Permit No. 02521 to construct additional facilities and to add a term of five years. The permit authorizes the disposal of waste and wastewater from a dairy. The dairy consists of a maximum of 270 dairy cows on an average daily basis. The waste treatment facilities include 3 waste storage ponds (WSP) for washdown water, flushwater and stormwater retention. Wastewater from the ponds is disposed of by irrigation on 79 acres of agricultural land. Manure and solids are applied as fertilizer on agricultural land. No discharge of pollutants into the waters of the State is authorized by this permit. The dairy is on the east side of State Highway 154, approximately 2 miles south of the intersection of State Highway 11 and State Highway 154 in **Hopkins County**, Texas. The Commission will consider the application and hearing requests which have been filed on the application.

Adjacent landowner Dick Poque requested a hearing on the proposed amendment, citing concerns about the applicant's previous violations, pollution of a creek, and groundwater contamination. Richard and Alice Francis wrote a letter of protest, citing concerns about the applicant's wastewater draining onto their property, but did not explicitly request a hearing.

The ED recommended denying Poque's request because he did not identify his property in the request or because the property is too far away. The applicant's landowner map indicated that the property is 1000 feet away from the center of the applicant's property and wastewater lagoons. Moreover, while there is a creek near the application of solids that flows from the applicant's property through Poque's property, the ED argued that Poque did not allege any impacts from the application of solids. The ED also noted that Poque did not locate his groundwater wells. Thus, the ED recommended denial of the groundwater issues based on the grounds that the distance between the applicant's lagoons and Poque's wells cannot be determined. The ED also recommended that, since the protest by Francis did not explicitly request a hearing, this letter should not be viewed as a request for hearing.

Sent to SOAH for hearing on validity of requests; parties did not show at hearing; permit issued.

(**Comment:** There is no indication in the files to show that any attempt was made to contact Mr. Pogue to gain additional information needed to determine the extent of his or the Francis' concerns. The Francis' letter clearly indicated opposition to the permit. Not using the words "I request a hearing" should not invalidate it as a hearing request. This is one of a number of cases where the ED suggests that the requestor must use "magic words" to qualify. (See also case #'s 6, 10, 12, and 30.))

26 Item 6. Docket No. 95-1554-IWD. **APPLICATION BY SMITH CRUSHED STONE, INC.** for a permit (Proposed Permit No. 03806) to authorize intermittent flow variable discharges of process wastewater (mine dewatering) and stormwater runoff. The permittee operates a limestone quarry and rock crushing operation. The plant site is at two sites near the City of Tehuacana, **Limestone County**, Texas. The rock crushing operation is adjacent to County Road (CR) 228 approximately 1/2 mile north of the intersection of CR 228 and CR 234. The mining operation is immediately south of the intersection of CR 228 and

CR 234. The effluent from Outfall 001 is discharged overland to a pond; thence to an unnamed tributary of Tehuacana Creek; thence to Tehuacana Creek; thence to the Trinity River Above Lake Livingston in Segment No. 0804 of the Trinity River Basin. The effluent from Outfall 002 is discharged into a ditch; thence to an unnamed tributary of Tehuacana Creek; thence to Tehuacana Creek; thence to the Trinity River Above Lake Livingston, in Segment No. 0804 of the Trinity River Basin. The Commission will consider the application and hearing requests which have been filed on the application.

Pamela Stuver notified the Commission on April 18, 1995 of her request for a public hearing, alleging that the information provided to TNRCC by Smith Crushed Stone regarding landowners adjacent to the site was incorrect. She resides 2/10 of a mile from the site, and she and several nearby landowners did not receive notice. She cited concerns about the effects of the applicant's activities on the nearest city water well and the applicant's disregard for historic archeological sites. She also alleged that the applicant was discharging water for a year prior to this time without a permit.

The ED recommended denying Mrs. Stuver a hearing because she is located away from the discharge drainage route and because her concerns about groundwater quantity and noise from the plant operation are not issues protected under the laws governing the permit.

Hearing request denied; permit issued.

(**Comment:** The ED claims that the protestant did not raise the issue of ground water quality. It was obvious that Mrs. Stuver had concerns over the potential impacts of the quality and quantity of ground water. Groundwater contamination is a relevant issue in a hearing on wastewater matters. She also argued that the applicant was in violation of the law, clearly an issue relevant to the application.)

27 Item 7. Docket No. 95-1552-IWD. APPLICATION BY **GERARD HOEKMAN** for a permit (Proposed Permit No. 03808) to authorize disposal of waste and wastewater from a dairy which consists of a maximum of 990 head on an average daily basis. Washdown water, flushwater and stormwater are retained in two waste storage ponds. Wastewater from the ponds is disposed of by irrigation on 47 acres of agricultural land. Manure and solids are disposed of as fertilizer on agricultural land. No discharge of pollutants into the waters of the State is authorized by this permit. The dairy is approximately eight miles east of Comanche, Texas, on the north side of Farm-to-Market Road 591; approximately 1.5 miles east of the intersection of Farm-to-Market Road 1476 and Farm-to-Market Road 591 in **Comanche County**, Texas. The Commission will consider the application and hearing requests which have been filed on the application.

Hearing requests from five individuals who live adjacent to or near the proposed dairy and irrigation fields were filed, citing concerns of groundwater contamination, stock pond pollution, odors, and contaminated runoff.

The ED recommended denial for two reasons. The ED noted that the permit calls for adequate wastewater retention ponds, runoff controls, and groundwater protection. Thus, the ED implied that the protestants did not trust the TNRCC staff to prepare a proper

permit. The ED also argued that no requestor qualified as an "affected person."

Sent to SOAH for a hearing on the validity of requests.

(**Comment:** The ED's arguments that the opponents were wrong and that the permit was adequate indicate the ED's failure to understand why the Legislature provides for public participation. The staff of TNRCC does make mistakes. The staff often does not have all the available information. Instead of encouraging public participation that could bring new information or analysis to the process, the ED argues in effect that TNRCC is infallible. In this case and others, the ED has taken the position that the public can add nothing of value to the decision-making process.)

28 Item 8. Docket No. 95-1550-IWD. APPLICATION BY **EVEREST EXPLORATION, INC.** for renewal of Permit No. 02945 which authorizes the disposal of wastewater (restoration fluids) effluent at a volume not to exceed 288,000 gallons per day average. The effluent is disposed by spray irrigation on 76 acre tract of 105 total acres of land. Application rates for the irrigated land shall not exceed 1.8 acre-feet/acre/year. No discharge of pollutants into the waters of the State is authorized by this permit. The Mount Lucas Project is an in-situ uranium mining facility. The facility which is currently in the post-mining period is required to restore the aquifer to defined conditions. The plant site is approximately 3 miles south of the town of Dinero, **Live Oak County**, Texas. The Commission will consider the application and requests for hearing which have been filed on the application.

Nita Lisenba claimed standing based on the fact that she has used the lake for recreation, has taken her drinking water from the lake, eats fish caught near the mine site and has family living on the lake. She claimed that Everest has a bad compliance history and has contaminated the lake from its irrigation with contaminated water. She provided a list of permit conditions she believed were inadequate. In her reply to the ED's recommendation of denial of her request, Ms. Lisenba also supplied a detailed summary of the files of TNRCC showing numerous violations, spills, and other such incidents.

The ED recommended denial of the hearing request, arguing that Ms. Lisenba lacks standing because her interests are the same as the general public. Without looking at the files to determine if the information presented by Ms. Lisenba was correct, and despite clear records of discharges, the ED advised the Commission that concerns over discharges were unreasonable because there could be no discharges. The permit prohibits discharges.

Hearing request denied; protestant filed Motion for Rehearing; sent to ADR and settled; revised permit issued.

(**Comment:** Here, the ED takes the position that if a permit prohibits an action, the applicant will not violate the permit! This case also indicates that the ED may not accept the argument that the recreational use of a water body can be sufficient for standing. (See also case #'s 19 and 34.) No recreational use satisfied the ED or the Commissioners standing test during the report period.) In addition, despite a very detailed hearing request and the identification of documents showing a history of violations and problems from TNRCC's files, the staff apparently never took the time to review the documents. As a result, the staff mislead the Commission regarding the facts on key issues raised by the protestant, such as the location of her home and the evidence of past discharges.)

30 Item 3. Docket No. 95-1486-MWD. APPLICATION BY **CITY OF WHITESBORO** for renewal of Permit No. 10464-01 which authorizes a discharge of treated domestic wastewater effluent at a volume not to exceed an average flow of 450,000 gallons per day from the Mineral Creek Wastewater Treatment Facility. The facility is on Mineral Creek, approximately 1,000 feet east of U.S. Highway 377 and approximately 0.8 mile north of the intersection of U.S. Highway 82 and 377 in the City of Whitesboro in **Grayson County**, Texas. The effluent is discharged into an unnamed tributary of Big Mineral Creek; thence into Lake Texoma in Segment No. 0203 of the Red River Basin. The Commission will consider the application and hearing requests that have been filed on the application.

Adjacent landowners Dick and Maureen Cain requested a hearing on April 3, 1995 on the amendment to the City's permit, citing worsening odor problems. Correspondence between the Cains and Joe West, Whitesboro City Administrator indicated that the City was working with the Cains to resolve the odor problem and a number of their other concerns.

The ED's response to requests for hearing recommended denial of the Cain's hearing request, stating that "ownership of adjacent property alone, does not suffice to support a claim of justiciable interest." The ED also argued that odor issues are not an issue relevant to the decision of the Commission on the application because the Cains did not live within the 150-foot buffer zone. Based on a settlement with the applicant, the Cains withdrew their request for hearing one day prior to the ED's response.

Hearing request withdrawn; permit issued.

(**Comment:** Here the ED knew that the Cain's had a number of concerns about more than just odors. Apparently, the ED was not willing to look beyond the written hearing request to determine if there were other concerns that were relevant to the permit decision and could be a valid basis for a hearing. (See also case #'s 6, 10, 12, 25, and 33.) The ED also seemed to take the position that a person living 151 feet away from sewage treatment facilities could not be affected by the smell of sewage.)

31 Item 4. Docket No. 95-1475-MWD. APPLICATION BY **JOHNSON COUNTY FRESH WATER SUPPLY DISTRICT NO. 1** for an amendment to Permit No. 10532-01 to authorize an increase in the discharge of treated domestic wastewater effluent from a volume not to exceed an average flow of 450,000 gallons per day to a volume not to exceed an average flow of 700,000 gallons per day. The wastewater treatment facilities are approximately 3.6 miles southeast of the City of Burleson, approximately one mile upstream of the crossing of Village Creek and Farm-to-Market Road 731 in **Johnson County**, Texas. The effluent is discharged into an unnamed tributary; thence to Village Creek; thence to Lake Arlington in Segment No. 0828 of the Trinity River Basin. The Commission will consider the application and hearing requests that have been filed on the application.

In July, August and September 1995, hearing requests were made by 1) Bill and Rosalee Fagan, through whose property the proposed increased discharge would flow; 2) Phil and Robin Waddell, whose property lies adjacent to the plant on the downstream side of the discharge flow; 3) the City of Burleson, within whose territorial jurisdiction the point of discharge is located; and 4) the City of

Arlington, whose water supply is Lake Arlington, the end point of the stream of discharge.

The ED recommended approval of the requests for hearing by the Fagans, Waddells, and the City of Burleson. The ED recommended denial for the City of Arlington because the point of discharge is not within the City's territorial jurisdiction and the ED did not believe that Arlington could present evidence that it is an affected person.

Arlington's hearing request denied; requests filed by three other protestants granted and sent to SOAH for hearing on the merits of the application.

(**Comment:** TNRCC's positions in this and the next case on the standing of a local government are very significant. The ED makes the first evaluation of the standing of a local government based on whether the government has authority over the facility in question. Thus, the ED recommended granting the request of the City of Burlington. The discharge, however was not within the city limits of Arlington. Arlington was not given the opportunity to present evidence of the possible impacts on something as critical as its water supply.)

32 Item 6. Docket No. 95-1470-MWD. APPLICATION BY **CITY OF SPRINGTOWN** for renewal of Permit No. 10649-01 which authorizes a discharge of treated domestic wastewater effluent at a volume not to exceed an average flow of 260,000 gallons per day. The wastewater treatment facilities are east of the City of Springtown, at a point approximately 4600 feet east of the intersection of Spring Branch Trail and 3rd Street in **Parker County**, Texas. The effluent is discharged into Walnut Creek; thence into Eagle Mountain Reservoir in Segment No. 0809 of the Trinity River Basin. The Commission will consider the application and hearing requests that have been filed on the application. (Bob Sweeney/Tom Weber)

Tarrant County Water Control and Improvement District #1 filed a hearing request on the permit renewal, citing concerns about numerous past violations of the City's treatment plant. It alleged that the City's effluent would impact Eagle Mountain Lake, from which the District is authorized to impound and use water.

The ED's response recommended denying the District's request because the discharge point of the City's effluent is in Parker County and out of the District's jurisdiction. The response also stated that since the point of discharge is 10 miles upstream from the Reservoir, significant impact from the City's discharge would be unlikely. The District withdrew its hearing request after an agreement was reached with the City, but was careful to state that such withdrawal did not mean it agreed with the ED's declaration that the District lacked standing.

Hearing request withdrawn; permit issued

(**Comment:** See the comment to Case #31.)

33 Item 7. Docket No. 95-1478-MWD. APPLICATION BY **CITY OF CRANDALL** for an amendment to Permit No. 10834-01 to authorize an increase in the discharge of treated domestic wastewater effluent from a volume not to exceed an average flow of 300,000 gallons per day to a volume not to exceed an average flow of 600,000 gallons per day. The wastewater treatment facilities are approximately 2,000 feet southwest of the intersection of Buffalo Creek and Farm-to-Market Road 148 in **Kaufman County**, Texas. The effluent is discharged

into an unnamed tributary; thence to Buffalo Creek; thence to the East Fork Trinity River in Segment No. 0819 of the Trinity River Basin. The Commission will consider the application and hearing requests that have been filed on the application. (Bob Sweeney/Tom Weber)

Approximately 18 families and individuals requested hearings on this matter, most citing concerns about odors and health issues due to the plant's proximity to residences, as well as the plant's detrimental effect on their property values. Some requestors also discussed concerns of discharge on lands downstream. One individual, Harold Cook, alleged in a letter to U.S. Rep. Ralph Hall that the TNRCC office in Duncanville had received numerous citizen complaints about odor over several years, but that this information had not been passed on to the permit office in Austin. He hired an expert to test soil and water samples from the discharge creek and found *E. coli* and other bacterial contamination.

The ED's response recommended denial of all of the requests because none of the requestors' property lines are within 150 feet of the proposed units (the distance that the ED apparently believes would be subject to odors.) The ED did acknowledge that a couple of protestants' allegations would qualify them as affected persons but that the 150-foot rule invalidated their interest. The ED also argued that odor and property value are not issues that could be considered in a hearing on the permit. The ED noted that some people who requested a hearing did not identify their land, so he could not determine if they were downstream. The ED apparently made no effort to determine if these or other requestors had concerns other than odors, such as water rights, or recreational uses on Buffalo Creek or the Trinity River.

Sent to SOAH for a hearing on the validity of all hearing requests.

(**Comment:** The ED's response to requests for hearing stated that the Commission's rules "protect against odors." Again, the ED took the position that the TNRCC has jurisdiction to deal with odors, but that a hearing can be denied using an arbitrary distance, regardless of the facts of the case. Moreover, failure to determine if the requestors own land or live downstream indicates that the ED is seeking to avoid hearings - not to encourage public participation. The requestors here are exactly the type of people who could bring new information to TNRCC about plant operation and impacts.)

34 Item 10. Docket No. 95-1469-MWD. **APPLICATION BY CITY OF THE COLONY** for a permit (Proposed Permit No. 13785-01) to authorize a discharge of treated domestic wastewater effluent at a volume not to exceed an average flow of 16,000 gallon per day. The wastewater treatment facilities are to be approximately 1.75 miles south of Farm-to-Market Road 720 and approximately 3 miles west of Farm-to-Market Road 423 in **Denton County, Texas.** The effluent is to be discharged through a six inch pipe into a natural draw of Lewisville Lake; thence into Lewisville Lake in Segment No. 0823 of the Trinity River Basin. The Commission will consider the application and hearing requests that have been filed on the application. (Bob Sweeney/Tom Weber)

Paula Laster, a nearby landowner, requested a hearing on the basis of her concerns about the discharge's effect on water quality and her recreational use of Lake Lewisville.

The ED's response recommended denying Mrs. Laster's request, stating that she lacked standing since her property is not near Lake Lewisville and her recreational concerns are common to members of the general public and not a basis for standing. The ED apparently made no effort to contact Mrs. Laster to determine the nature or extent of her use of Lake Lewisville.

Hearing request denied; permit issued

(**Comment:** The Commission refused to accept any recreational use claims as potential bases for standing during the period of this report. A Texas court would at least allow a person in Ms. Laster's position to present evidence of standing. (See also case #'s 19 and 28.))

35 Item 11. Docket No. 95-1473-MWD. APPLICATION BY **LAST DAYS EVANGELICAL ASSOCIATION** for a permit (Proposed Permit No. 13790-01) to authorize a discharge of treated domestic wastewater effluent at a volume not to exceed an average flow of 10,000 gallons per day. The proposed permit will be issued to expire May 1, 1998 in accordance with 30 TAC 305.71, Basin Permitting Rule. The plant site is approximately 1,150 feet west and 1,300 feet north of the intersection of Farm-to-Market Road 1253 and State Highway 16 in **Smith County**, Texas. The effluent is discharged into an unnamed tributary; thence to Rock Creek; thence to the Sabine River Below Lake Tawakoni in Segment No. 0506 of the Sabine River Basin. The Commission will consider the application and hearing requests that have been filed on the application. (Bob Sweeney/Tom Weber)

Fourteen letters from nearby landowners requesting a hearing were received. All of the protestants live around Garden Valley Club Lake (a 42-acre lake) which receives water from Rock Creek and thus the applicant's wastewater. The protestants cited concerns about degradation of the water quality of the lake, health hazards, and impacts to recreational use of the lake.

The ED recommended denying all protestants' requests on the basis that their lands were too far away (two miles) and their concerns were no different than those of the general public.

Hearing request denied; permit issued.

(**Comment:** The ED often applies an arbitrary distance (not found in any rule) as a cut-off for what TNRCC should accept for standing. The problem is that the requestors should have the right to present evidence of their standing and that the arbitrary cut-off distance is not correct under the circumstances. Discharge to a small lake by way of an intermittent stream could easily have an impact on the lake. There is a significant fact question regarding eutrophication of a small lake with significant nutrient loading. Because many members of the public do not know their legal rights and are not advised of their rights by TNRCC, the ED can often convince requestors that the arbitrary test is in fact the law. The requestors then may not question the arbitrary test is in fact the law. The requestors then may not question the ED's position. In effect, the ED can and has used this type of argument to convince requestors to drop their requests for hearing.)

36 Item 12. Docket No. 95-1543-IHW. APPLICATION BY **HEAT ENERGY ADVANCED TECHNOLOGY, INC. (HEAT)** for renewal of Permit No. HW50029 to authorize the continued operation of a hazardous waste storage and processing facility. Wastes managed at this facility are generated on-site at the HEAT fuels blending plant and received from off-site sources on a commercial basis. Wastes consist of hazardous, Class I non-hazardous and Class II non-hazardous industrial solid wastes. The facility is on approximately 2.409

acres, at 4460 Singleton Boulevard near Loop 12 and Interstate 30 in the City of Dallas, Dallas County, Texas. This location is in the drainage area of Segment No. 805 of the Trinity River Basin. The Commission will consider the application and hearing requests that have been filed on the application. (Angela Stepherson/Kari Bourland)

The West Dallas Coalition for Environmental Justice requested a hearing, citing concerns that HEAT's plans to double its size would create greater risks to the community, including risks of fugitive emissions from hazardous waste storage tanks and risks of accidents involving trucks transporting waste or during waste processing at the facility. A second letter, signed by approximately 100 citizens of West Dallas, protested the renewal of HEAT's permit and reiterated the same concerns. In addition, several nearby neighbors signed affidavits in support of the Protestant, also citing concerns about odors and possible accidents. In fact, while TNRCC was processing the hearing request, it was also assessing a penalty against HEAT for causing odors in the community.

The ED initially recommended denial of the request, stating that the Coalition had not shown that any of its members were "affected persons," or that its concerns were reasonable. At the agenda, the staff apparently supported the Commission's decision to send the matter to SOAH for presentation of evidence.

After a hearing was held on the request for hearing, SOAH recommended granting a hearing request and recommended that the Coalition be found to have met the test for a hearing. The ED responded to the SOAH recommendation by arguing that the Commission should overrule the SOAH recommendation on the basis that the Coalition had not supported the request with "competent evidence" with regard to standing of any of its members.

Hearing request denied; permit issued.

(**Comment:** The Commissioners never explained why the eyewitness testimony of a representative of the organization that included statements that the source of the odors was HEAT was not competent evidence. The witness apparently once said the direction was to the east rather than the west, but in his testimony there are many references to the HEAT facility as the source of the contaminants. This case may indicate an intention of the Commission and ED to apply a test for standing much more restrictive than that of Texas courts. If the test for standing at TNRCC is going to require that protestants prove the merits of the case, rather than presenting evidence to overcome a threshold burden, protestants will have to have discovery before a hearing can be held on the requests for hearing. Moreover, given that the ED was taking enforcement action against HEAT at the time for creating the very odors that the witness complained about, it is very difficult to understand why lay testimony on odors did not suffice for the ED.)

October 18, 1995

37 Item 9. Docket No. 95-1487-AIR. Consideration of a request for public hearing on the renewal of permit no. AQ 5717 FRISBY BELL GIN CO. LaVilla, Hidalgo County, Texas. (Ronnie Jones)

Although the requests for hearing were not present in the public file, a TNRCC interoffice memorandum from the Legal Division stated that the Texas Air Control Board received five citizen petitions requesting a hearing on the permit renewal for the

cotton gin. The requestors expressed strong concerns about the continuing adverse effects on their health and environment. One ED staff member says he contacted some of the petitioners about their concerns, but says that none of them could make clear causal connections between the operation of the cotton gin and the adverse health effects they alleged. The staff of the ED also refers to Senate Bill 1125 in declaring the protestants' requests unreasonable and recommending they be denied.

Hearing requests denied; permit issued.

(**Comment:** (See the comments for case # 8.) Here, the renewal of the permit included a significant amendment to add new pollution control equipment. TNRCC apparently determined that public input on those changes would be unreasonable and not in the public interest. More important, however, is the clear indication in the requests of allegations of continuing violations.)

38 Item 10. Docket No. 95-1484-AIR. Consideration of a request for public hearing from Donald and Cynthia Hellstern on renewal of permit No. 6426 **GIBSON-HOMANS COMPANY, Ennis, Texas.** (Maria Sanchez/Wesley Smith)

Donald and Cynthia Hellstern, whose residence is less than 2 miles from the asphalt roofing products facility, requested a hearing on the proposed renewal, saying they were adversely affected by the air contaminants' effect on their family's allergies. They also stated their concern about the company's compliance record.

The Legal Services Division issued an interoffice memorandum stating that the ED staff recommended that the request for hearing be dismissed because the renewal would not result in an increase in allowable emissions and no new contaminants would be emitted. The writer also addressed the issue of non-compliance by saying that the company had two violations in 1982, but that the enforcement action was settled in 1983.

Hearing request denied; permit issued.

(**Comment:** (See the comments for case # 8.) While this was simply a renewal, the requests again raise issues of violations, including nuisance conditions. Even without the TNRCC rules that state that the Commission has broad discretion to grant a hearing on any request, the requests in this case require consideration - not automatic denial. Given that TNRCC did not even allow the Hellsterns an opportunity to review the ED recommendation for denial and respond, the Commission based its ruling entirely on the ED's incorrect analysis and a one-page outline of the Hellsterns' concerns.

This and the previous case also raise the question of how the ED is interpreting SB 1125. It appears that the ED takes the very narrow view that SB 1125 allows a bad compliance history to justify the granting of a hearing request only if, at the time of the Commissioners' consideration of the hearing requests, there are "unresolved violations" that have been identified by the TNRCC.)

October 11, 1995

39 Item 34. Docket No. 95-1468-AIR. APPLICATION BY **RAINBOW MATERIALS, INC.** for a registration under Standard Exemption No. 71 (Standard Exemption Registration No. 29967). If granted, the registration will allow Rainbow Materials, Inc. to construct and operate a concrete batch plant located at 4756 FM 1431, Leander, **Williamson County**, Texas. The Commission will consider the hearing request submitted by a member of the legislature from the general area in which the proposed facility is located.

Several people, including Senator Jeff Wentworth, requested a hearing on the proposed permit. At a public meeting in September 1995, TNRCC staff acknowledged that 274 additional requests for hearing were made. Senator Wentworth's request was apparently filed after the deadline for filing in the original notice. Requestors argued that the notice did not comply with TNRCC rules since the notice was not published in the newspaper of the closest city to the proposed action, Leander. They also argued that two major amendments to the application were made after the original notice was issued and thus new notice was required.

The ED responded by recommending denial of all requests for hearing. The ED argued that Senator Wentworth's request was not timely and must be denied. The ED argued that none of the requestors was within 440 yards of the facility and that under Texas law they lacked standing. (Actually, one requestor was within 440 yards, but the applicant's second amendment, developed in cooperation with TNRCC staff, changed the boundaries of the facility so that the facility was farther than 440 yards from the requestor.) The ED advised the Commission that it had discretion to require a new notice for the amendments.

Hearing requests denied; permit issued.

(**Comment:** This is a very significant case where the ED did not even advise the Commissioners of the TNRCC rules granting them broad discretion, including the discretion to extend the deadline for hearing requests (30 TAC 305.105 (a). In the ED's response and at the agenda, the ED never advised the Commissioners of this discretion.

This is one example of the ED encouraging an applicant to revise its application or shift the location of a facility simply to avoid public participation. The change was made after notice of the opportunity for public participation was issued.)

September 13, 1995

42 Item 27. Docket No. 95-1189-AIR. Consideration of **NORTH TEXAS CEMENT COMPANY's** application for Air Quality Permit Nos. 4791A, 4791B, 4791C and hearing requests on the permits. (Bill Ehret)

Cynthia Fava, representing CAUSE, wrote a hearing request on North Texas Cement's application for amendment to allow tire burning at the facility. Approximately 15 people signed a petition to protest the amendment and protested the fact that the permit would increase emissions and no public notice was given. Downwinders at Risk (DAR) also wrote a hearing request on behalf of CAUSE. CAUSE's original hearing request had been denied in September 1995. CAUSE filed a Motion for Rehearing and Motion to Set Aside the Order approving the application. CAUSE's letter of Oct. 18, 1995 stated that TNRCC staff was not forthcoming with answers to

technical questions CAUSE had posed in February and August of 1995. Two days later, DAR requested a hearing for themselves on the renewal of the above-referenced permits, stating as their concerns the previously mentioned events and issues.

The ED recommended denial. The ED advised the Commission that TNRCC rules for this type of amendment did not require a hearing. The ED apparently then took the position that the hearing requests were, therefore, unreasonable.

Hearing requests denied; permits issued.

(Comment: The ED apparently took the basic position that TNRCC should simply deny requests for hearing on these types of amendments regardless of the concerns raised or the interest in the community. That is a very disturbing position on public participation. Here, the permit was one of the first in the state to allow the burning of tires. The ED knew that the community around this facility was very concerned and wanted to participate in the decision. This is an example of the TNRCC's efforts to discourage, rather than encourage, public participation.)

September 6, 1995

43 Item 16. Docket No. 95-1328-AIR. Consideration of **SANDERSON FARMS INC.**'s application for Air Quality Permit No. 29322 and hearing request on the permit. Rowland/Ehret

Mark O'Connor requested a hearing on behalf of the Corn family, of which several members live on and own land adjacent to and nearby the proposed feedmill. They cited concerns about dust, arsenic, and heavy metal emissions related to the production of chicken feed.

The ED recommended denial of the hearing request, based on the position that the modeling available showed that the emissions of concern to O'Connor and the Corns would have "no impact" on them. Thus, the ED argued that the hearing request was "unreasonable" and should be denied. The ED also made assumptions about who requested the hearing after not being able to contact all possible people by phone.

Hearing request denied; permit issued.

(Comment: The permit for the facility should have been the subject of a hearing. At the very least, one should have been held on the protestants' standing. The ED has argued that the Commission must deny a hearing request if the application proposes no increase in "allowable" emissions, even if there may be an increase in actual emissions. As discussed in prior cases, the Commission clearly has discretion to grant a hearing. In this case, serious health issues were raised.)

003/003
TNRCC COMMISSION
512 239 5533
05/16/96 10:55

DISPOSITION OF HEARING REQUESTS BY TNRCC COMMISSIONERS
(11/1/95 - 5/15/96 Agenda Meetings)

3/27/96	7	0	1	3	0	3
4/3/96	0	0	0	0	0	0
4/10/96	0	0	0	0	0	0
4/17/96	3	1	1	0	1	0
4/24/96	1	0	0	1	0	0
5/2/96	0	0	0	0	0	0
5/8/96	7	4	1	1	1	0
5/15/96	3	0	0	1	1	1
TOTAL	79	16	20*	27	11	5

Total Number of Hearing Requests - 79
Total Number of Hearing Requests Granted, Withdrawn, or Pending at SOAH/ADR - 59 (75%)
Total Number of Hearing Requests Denied - 20 (25%)

* This figure includes five (5) hearing requests relating to applications for renewal of air permits.

EXHIBIT B

DISPOSITION OF HEARING REQUESTS BY TNRCC COMMISSIONERS
(11/1/95 - 5/15/96 Agenda Meetings)

Agenda	Requests Made	Requests Granted	Requests Denied	Requests Withdrawn	Referred to SOAH	Referred to ADR
11/1/95	5	1	2	2	0	0
11/16/95	5	0	1	1	3	0
11/29/95	1	0	0	1	0	0
12/6/95	8	1	2	3	2	0
12/13/95	8	2	3	3	0	0
12/20/95	1	1	0	0	0	0
1/10/96	5	1	3	1	0	0
1/17/96	1	0	1	0	0	0
1/24/96	7	0	2	3	1	1
1/31/96	0	0	0	0	0	0
2/7/96	2	0	0	2	0	0
2/14/96	3	2	0	0	1	0
2/21/96	0	0	0	0	0	0
2/28/96	4	1	0	2	1	0
3/6/96	3	0	3	0	0	0
3/20/96	5	2	0	3	0	0

gopher://capitol.tlc.texas.gov/00/tlli/sl/sb/sb1500/SB1546/SB1546.INT

By: Bivins S.B. No. 1546

A BILL TO BE ENTITLED
AN ACT

Relating to persons affected by matters in hearings before the Texas Natural Resource Conservation Commission.

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

SECTION 1. Section 5.115, Water Code, is amended to read as follows:

Sec. 5.115. {{{PERSONS AFFECTED IN COMMISSION HEARINGS;}}} NOTICE OF APPLICATION. {{{(a) For the purpose of an administrative hearing held by or for the commission, including a contested case, "affected person" or "person affected" or "person who may be affected" means a person who has a personal justiciable interest related to a legal right, duty, or privilege affected by the administrative hearing other than an interest common to members of the general public. The commission is not required to hold a hearing if the commission determines that the basis of a person's request for a hearing as an affected person is not reasonable. The commission may adopt rules necessary to carry out this subsection.}}}

{{{(b)}}} [<<<(a)>>>] At the time an application for a permit or license under this code is filed with the executive director and is administratively complete, the commission shall give notice of the application to any person who may be affected by the granting of the permit or license.

{{{(c)}}} [<<<(b)>>>] At the time an application for any formal action by the commission that will affect lands dedicated to the permanent school fund is filed with the executive director or the commission and is administratively complete, the commission shall give notice of the application to the School Land Board. Notice shall be delivered by certified mail, return receipt requested, addressed to the deputy commissioner of the asset management division of the General Land Office. Delivery is not complete until the return receipt is signed by the deputy commissioner of the asset management division of the General Land Office and returned to the commission.

{{{(d)}}} [<<<(c)>>>] The commission shall adopt rules for the notice required by this section.

{{{(e)}}} [<<<(d)>>>] The notice must state:

(1) the identifying number given the application by the commission;

(2) the type of permit or license sought under the application;

(3) the name and address of the applicant;

(4) the date on which the application was submitted; and

(5) a brief summary of the information included in the permit application.

{{{(f)}}} [<<<(e)>>>] The notice to the School Land Board under this section shall additionally:

(1) state the location of the permanent school fund land to be affected; and

(2) describe any foreseeable impact or effect of the commission's action on permanent school fund land.

{{{(g)}}} [<<<(f)>>>] A formal action or ruling by the commission on an application affecting permanent school fund land that is made without the notice required by this section is voidable by the School Land Board as to any permanent school fund lands affected by the action or ruling.

SECTION 2. This Act takes effect September 1, 1995.

SECTION 3. 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.

By Nixon, Sims S.B. No. 1125

A BILL TO BE ENTITLED
AN ACT

relating to hearings on the renewal, amendment, or modification of certain emissions permits.

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

SECTION 1. Section 382.055(e), Health and Safety Code, is amended to read as follows:

(e) The board shall impose as a condition for renewal of a preconstruction permit {{{only}}} those requirements {{{the board determines}}} [<<<determined>>>] to {{{be necessary to avoid a condition of air pollution or to ensure compliance with otherwise applicable federal or state air quality control requirements. The requirements imposed must}}} be economically reasonable and technically practicable considering the age of the facility and the effect of its emissions on the surrounding area. The board may not impose requirements less stringent than those of the existing permit unless the board determines that a proposed change will meet the requirements of {{{Sections}}} [<<<Section>>>] 382.0518 {{{and 382.0541}}}.

SECTION 2. Section 382.056(d), Health and Safety Code, is amended to read as follows:

(d) Except as provided by Section 382.0561, the board or its delegate shall hold a public hearing on the permit application or permit review application before granting the permit or renewal if a person who may be affected by the emissions, or a member of the legislature from the general area in which the facility or proposed facility is located, requests a hearing within the period set by board rule. The board {{{may}}} [<<<is>>>] not [<<<required to>>>] hold a hearing if the basis of a request by a person who may be affected is determined to be unreasonable. {{{A request for a hearing on a permit amendment, modification, or renewal is unreasonable if the amendment, modification, or renewal would not result in:}}}

{{{(1) an increase in allowable emissions; or}}}

{{{(2) the emission of an air pollutant not previously emitted.}}}

SECTION 3. This Act takes effect September 1, 1995.

SECTION 4. 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.

EXHIBIT

(c) The commission may refer an application to SOAH if there is no hearing request complying with this subchapter, if the commission determines that a hearing would be in the public interest.

(d) The executive director shall determine the sufficiency of hearing requests on utility matters listed in this subsection. If a hearing request meets the requirements in this subsection, the executive director shall refer the hearing request to the chief clerk. The executive director shall review hearing requests concerning the following matters and shall use the specified standards for reviewing the requests.

(1) If a utility files a statement of intent to change rates under Texas Water Code, §13.187, the executive director shall evaluate any complaints or hearing requests received and determine if a hearing is required.

(2) If a person files an application or petition concerning a certificate of convenience and necessity under Texas Water Code, Chapter 13, Subchapter G, the executive director shall evaluate any complaints or hearing requests and determine if a hearing is required.

(3) If a person files an appeal under Texas Water Code, §13.043, invoking the commission's appellate jurisdiction over water, sewer, or drainage rates, the executive director shall evaluate the appeal and determine if a hearing is required.

(e) During a commission meeting, the commission may determine whether the application should be processed under the requirements of Chapter 80, Subchapter E of this title (relating to Freezing the Process). The commission may consider the number and sophistication of the parties or potential parties, the expected length of the hearing, and the complexity of the issues.

(f) A decision on a hearing request is an interlocutory decision on the validity of the request and is not binding on the issue of designation of parties under §80.109 of this title (relating to Designation of Parties). A person whose hearing request is denied may still seek to be admitted as a party under §80.109 of this title if any hearing request is granted on an application. Failure to seek party status shall be deemed a withdrawal of a person's hearing request.

(g) If a hearing request is denied, §80.271 of this title (relating to Motion for Rehearing) applies. A motion for rehearing in such a case must be filed no earlier than, and no more than 20 days after, the date the person or his attorney of record is notified of the commission's final decision or order on the application. If the motion is denied under §§80.271 and 80.273 of this title (relating to Motion for Rehearing and Decision Final and Appealable) the commission's decision is final and appealable.

Adopted: May 8, 1996 Effective June 6, 1996

§55.29. Determination of Affected Person.

(a) For 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) Governmental entities, including local governments and public agencies, with authority under state law over issues contemplated by the application may be considered affected persons.

EXHIBIT E

(c) All relevant factors shall be considered, including, but not limited to, 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 relationship exists between the interest claimed and the activity regulated;

(4) likely impact of the regulated activity on the health, safety, and use of property of the person;

(5) likely impact of the regulated activity on use of the impacted natural resource by the person; and

(6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

Adopted: May 8, 1996 Effective June 6, 1996

§55.31. Determination of Reasonableness of Hearing Request.

(a) The reasonableness of a hearing request shall be based on all relevant factors including the following:

(1) whether the request is based solely on concerns outside of the jurisdiction of the commission; and

(2) whether the request is based on concerns related to other media that cannot be addressed by the pending application, even though within the jurisdiction of the commission.

(b) For hearing requests on air quality applications:

(1) The following criteria shall also be considered in making a determination of reasonableness:

(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 noncompliance 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 hearing request 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.

(2) A request concerning an amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted is unreasonable.

(3) Notwithstanding paragraph (2) of this subsection, a request may be determined reasonable if the application involves a facility for which the applicant's compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.

Adopted: May 8, 1996 Effective June 6, 1996

Adoption of §§55.21, 55.23, 55.25, 55.27, 55.29, 55.31
Date Adopted: May 8, 1996
Date Filed with the Secretary of State: May 16, 1996
Date Published in the *Texas Register*: May 28, 1996
Date Effective: June 6, 1996

PROPOSAL FOR DECISION
to be presented to the
Texas Natural Resource Conservation Commission

On May 23, 1996, the Texas Natural Resource Conservation Commission (Commission) referred the application by Mitsui San Antonio Components, Inc. for Permit No. AQ-30979 to the State Office of Administrative Hearings (SOAH) for a limited hearing to consider the question of whether the request for hearing by San Antonio Coalition for Environmental Justice meets the requirements of Commission Rules 263.24, 263.25 and 263.26.[1]

After appropriate notice was given, Tommy L. Broyles, Administrative Law Judge (ALJ) with SOAH, conducted the limited scope hearing in San Antonio, Texas, on June 13 and 14, 1996. Parties to the proceeding were the San Antonio Coalition for Environmental Justice (Coalition) (represented by Richard Lowerre, Attorney), Mitsui San Antonio Components, Inc. (Mitsui) (represented by Gregg A. Cooke, Attorney), the Executive Director of the Commission (ED) (represented by Maria Sanchez, Staff Attorney) and the Public Interest Counsel of the Commission (represented by Tim Karczewski, Attorney).

APPLICABLE RULES

A determination of reasonableness of a hearing request on an air quality application is governed by 30 TAC §55.31. The most relevant portions for purposes of this proceeding are:

(a) The reasonableness of a hearing request shall be based on all relevant factors including the following:

. . .

(b) For hearing requests on air quality applications:

(1) The following criteria shall also be considered in making a determination of reasonableness:

. . .

(C) the location of the proposed project;

. . .

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

. . .

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[1] On June 6, 1996, new procedural rules were enacted by the Commission which changed the applicable rules to §§55.27, 55.29 and 55.31.

EXHIBIT F

ISSUE PRESENTED

1. **Whether Coalition's request for an evidentiary hearing on the merits of the application meets the requirements of applicable law, including Commission Rules §§55.29 and 55.31.**

The ALJ recommends the Commission find that Coalition's request for an evidentiary hearing on the merits be denied for failure to establish that the request is reasonable.

Subissue A: What level of review should be applied to Coalition's request for hearing to determine if a reasonable basis for a potential impact exist.

Coalition's Position

Coalition argues that the question of whether a hearing request should be granted has to be a very low threshold question, like standing to sue in court. To support this position, Coalition offers four "sources of legal precedent" on the issue of what the burden of persuasion is on a person requesting a hearing:

1. Coalition argues that turning the request for hearing into an additional hearing on the merits is clearly contrary to the public policy of expediting hearings. Coalition continues that the time necessary to conduct discovery and prepare for an evidentiary hearing on the merits simply delays the final permit decisions.

2. Coalition also argues that the Legislature has provided the burden of persuasion by stating in SB 1546 that the Commission may deny a hearing request if the basis for the request is not supported by "competent evidence." If the Legislature had intended the Commission to hold a hearing and allow all parties to present evidence, Coalition contends the Legislature would have required the request be supported by a preponderance of the evidence.

3. Coalition states that there are no TNRCC rules that define the burden of persuasion on the requestor of hearings and that precedent has established a competent evidence test of a low threshold but more than just allegations. Coalition cites the applications by Cameron County Freshwater Supply District No. 1 (SOAH Docket No. 582-95-1778) and the application of HEAT, Inc. (SOAH Docket No. 582-95-1635) as examples of similar cases where the orders were based solely on the evidence of the requestor.

4. Finally, Coalition maintains that just as in Federal and Texas courts, where there is a factual issue in dispute about the justiciable interest of a party, the Commission should look to the pleadings of the moving party and accept them as true for purposes of the threshold decision.

Coalition concludes that the threshold determination could be achieved with the filing of affidavits by protestants. Coalition insists that protestants must simply allege facts in affidavits that affirmatively demonstrates the Commission's jurisdiction and that the Commission must construe the facts in favor of the protestants.

Mitsui's Position

Mitsui argues that evidence offered by all parties should be weighed to determine if Coalition has met its burden of proving by a preponderance of the evidence that there are some likely impacts associated with the air emissions from the Mitsui facility. Mitsui contends that if the Commission determines Coalition has introduced credible evidence of likely impacts, it still must evaluate the extent of those impacts to determine the reasonableness of the request for hearing.

Mitsui argues that the action by the Commission of sending the matter to SOAH for hearing indicates that the standard insisted by Coalition is incorrect. Mitsui maintains that there was no reason for the Commission to send the matter to SOAH for hearing if the Commission did not intend for SOAH to consider evidence offered by all parties.

During the hearing, the ALJ raised the possibility of a standard for establishing reasonableness of the hearing request by less than a preponderance of the evidence. Mitsui insists that there is no legal standard less than a preponderance of the evidence by which one can prove a fact in an administrative hearing. Mitsui urges that any legal standard less than a preponderance of the evidence in which all evidence is reviewed only has meaning in the context of judicial review.

Executive Director's Position

The Executive Director argues that he must be allowed to participate in the determination of whether a request for hearing is reasonable. He further argues that the Commission rule establishing a general burden of proof for Commission hearings is applicable to this proceeding. That rule, 30 TAC §80.17(a) provides in part, "the burden of proof is on the moving party by a preponderance of the evidence."

Recommendation

The ALJ concludes that protestants must prove by a preponderance of the evidence that it is reasonable to grant their hearing request, with consideration given to all relevant factors found in §55.31 of Commission rules, including the extent of likely impacts shown.[2]

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[2] Most of the evidence presented during the hearing and, therefore, most of the discussion in this PFD concern §55.31(b)(1)(F) of Commission rules, "the extent to which the person requesting a hearing is likely to be impacted by the emissions."

The ALJ agrees with Coalition that the decision on whether to grant a hearing is a threshold decision. Therefore, the ALJ's focus during his inquiry is not whether it is more likely than not there will be impacts but rather whether the evidence offered by Coalition suggesting the potential for impacts establishes that the hearing request is reasonable.

For example, it is possible that evidence offered by protestants will prove less than a 51 percent likelihood of impacts and that this potential for impacts, while not establishing by a preponderance of the evidence that impacts are likely, will establish a reasonable basis for an evidentiary hearing. The ALJ believes that only those hearing requests that fail to show any reasonable likelihood of impacts should be rejected.

Mitsui's proposed standard focuses on whether impacts are likely. The ALJ submits that such a determination is precisely that which must be made during an evidentiary hearing on the merits of the application. During the hearing on the merits of the application, Mitsui bears the burden of showing by a preponderance of the evidence that no impacts will harm human health or the environment. To require protestants to prove impacts are likely when requesting a hearing reverses the ultimate burden of proof and is too high a standard at this early stage in the process.

The ALJ agrees with Mitsui and the ED that evidence offered by all parties should be considered. The ALJ finds no indication in the statute or rules that evidence should be limited to that only of the protestants. If such a limitation was intended by the Legislature or the Commission, it could easily have been included in clear and specific language. To the contrary, in the special air provisions found in § 55.31(b), Commission rules state that the Commission shall consider "the extent to which the person requesting a hearing is likely to be impacted by the emissions. . ."[3] These qualifying words indicate that something more than a mere showing of any possibility of impact based solely on the protestant's evidence is necessary to establish a reasonable basis. In order to determine the extent to which the person requesting a hearing is likely to be impacted by the emissions, the ALJ must consider the evidence offered by applicants and the ED.

In addition, relevant statutes do not indicate that evidence should be limited to only that offered by Coalition. Section 5.115 of the Texas Water Code states in part, "The commission is not required to hold a hearing if the commission determines that the basis of a person's request for a hearing as an affected person is not reasonable or is not supported by competent evidence.[4]" The inclusion of "is not reasonable" with "or is not supported by competent evidence" indicates the Commission may look at more than just whether protestants are offering competent evidence. Likewise, in Section 382.056(d) of the Health & Safety Code, the Commission is instructed, in part, to ". . . not hold a

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[2] Emphasis added.

[4] See Tex. Water Code Ann. § 5.115 (Vernon 1996).

hearing if the basis of a request by a person who may be affected is determined to be unreasonable."[5] Obviously, protestants are not going to offer evidence that their request is unreasonable. Therefore, the ALJ concludes that the Legislature intended the Commission to consider all relevant evidence available.

However, the procedural aspects of how to consider all relevant evidence, while at the same time conducting a limited inquiry, remains problematic. In the present hearing, which lasted two days with eight witnesses testifying, the ALJ found that once Mitsui and the ED were allowed to present evidence, the process started down a slippery slope into the complexities of a hearing on the merits of the application.[6] To illustrate this problem, the ALJ offers two examples.

The first example concerns the modeling data offered by Mitsui and relied upon by the ED. Modeling data supported with expert testimony carries significant weight in most hearings. Because of this, when using a level of review that weighs the evidence, it is very difficult for protestants to prove a reasonable basis without challenging the underlying data of unfavorable modeling results or by presenting modeling of their own. In order to present such evidence, protestants would likely need time to conduct discovery, hire experts, have experts review the data and possibly perform their own modeling.[7] In addition, applicant may then need time to discover data from protestants' modeling and the facts and opinions of protestants' experts. Such extensive discovery and intensive evidence takes a great deal of time to review and develop and is precisely what is performed during an evidentiary hearing on the merits of an application.

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[5] See Tex. Health & Safety Code Ann. §382.056 (Vernon 1996).

[6] The hearing could have been shortened to one day had the ALJ excluded evidence regarding Coalition's assertion that the lack of necessary permit terms is a reasonable basis for requesting a hearing. This issue is discussed further as Subissue D.

[7] The ALJ was not given the opportunity to rule on a motion for continuance and formal discovery in this proceeding. From the statements made by Counsel for Coalition during the hearing, the ALJ believes Coalition made a tactical decision not to request formal discovery for fear it would give credence to Mitsui's contention that all evidence be considered. Because of this and because of the length of time Coalition had to review the evidence offered by the E.D. and Mitsui, the ALJ does not find formal discovery was necessary in this proceeding.

The second example regards an issue raised by Coalition: whether the application meets best available control technology (BACT).[8] Dr. Carman testified on behalf of Coalition that the application considered the monitoring of flux as it is put into the facility as BACT. He continued that he believed a similar facility in Texas used only pure aluminum and, therefore, did not need to add flux to purify the product. Coalition contends that using pure aluminum and no flux is BACT.

The ALJ then listed BACT as an issue and asked several questions about the applicable standard for control technology in this proceeding and how BACT is determined. Clearly, if BACT were not the standard for this case, or if Coalition's determination of BACT failed to follow appropriate procedure, such an issue would not be reasonable.[9]

The Executive Director and Mitsui presented testimony regarding how BACT is determined and assessed BACT for this facility. Again, it appeared that this hearing had slipped into the evidentiary hearing on the merits.

Subissue B: Whether Coalition's evidence regarding hydrogen chloride established a reasonable basis for the hearing request.

Coalition's Position

Coalition contends that emission of hydrogen chloride (HCl) and hydrogen fluoride (HF) from the Mitsui facility will significantly impact its members. In support this contention, Dr. Neil Carman, Botanist and former Texas Air Control Board (TACB) inspector, testified that emissions of HCl at the rates allowed by the permit will impact people who live within a quarter of a mile by damaging vegetation. He continued that he based his opinion on eight years of field experience while working for the TACB on the Permian chemical facility in Odessa during the 1980s.

Dr. Carman testified that during his years of inspection my the Permian facility he observed impacts on vegetation at a level "he believes" was below the ESL for HCl at that time. Therefore, Dr. Carman concludes that ESLs are not protective of human health and the environment.

Coalition argues that the opinions of Mr. David Cabe, Engineer for Mitsui, and Dr. Jane Anne Bond, TNRCC Toxicologist, are based on assumptions that Dr. Carman is unwilling to accept. Coalition urges that there are numerous scenarios where more HCl than currently anticipated could be emitted. As examples, Coalition argues that if larger charges of flux were periodically added, if the flux had

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[8] This issue is discussed further in Other Findings No. 1.

[9] After a review of this issue, the ALJ determined that BACT is not relevant to whether Coalition's request for hearing is reasonable.

higher concentrations of chlorides, or if the furnace was not always operated at the ideal temperature, the amount of HCl released would be greater than anticipated.
Coalition argues that the conditions modeled by Mitsui are neither reasonable worst-case conditions nor reasonable conditions. Coalition insists that its request for hearing is not unreasonable given 1) the nature and effect of chemicals that may be released, 2) the proximity of residences, and 3) the uncertainties inherent in the nature of predicting human health effects. Finally, Coalition urges that it be given an opportunity during an evidentiary hearing on the merits of the application to hire experts (such as a toxicologist or metal corrosion specialist) to evaluate 1) the assumptions used by Mitsui, 2) the type of model used by Mitsui, and 3) the range of uncertainties that result from the use of such predictive tools.

Mitsui's Position

Mitsui contends that Dr. Carman's testimony contained several different, and sometimes conflicting, opinions. Mitsui submits that while Dr. Carman was willing to offer an opinion that the Effects Screening Level (ESL) for HCl was not protective of human health and vegetation, on cross examination it became evident that Dr. Carman did not actually know the ESL for HCl. Mitsui points out that the lowest safe emission level for HCl agreed to by Dr. Carman, 0.3 parts per million (ppm), is six times the level of the short-term ESL.

In addition, Mitsui charges that the air modeling performed by Mr. Cabe established the maximum ground-level concentration of HCl at the nearest house to the Mitsui facility as only eight to ten percent of the ESL, almost 60-times lower than the safe level established by Dr. Carman. Mitsui adds that Mr. Cabe testified that this modeled level of HCl emission is a conservative estimate of actual impacts that could be expected, even at the receptor of the closest resident.

Executive Director's Position

The ED states the evidence is undisputed that the flux materials used by Mitsui's facility will produce emissions of HCl and HF, that the refined dispersion modeling was performed correctly, and that the ground level concentrations predicted by this modeling are accurate. The ED further asserts that the uncontroverted testimony in the record indicates the predicted ground level concentrations from the proposed facility will not adversely impact the members of Coalition.

Dr. Bond testified on behalf of the ED that ESLs are established at a level well below levels where one would see an effect. She continued that ESLs are based upon the most sensitive end points. For HCl, Dr. Bond explained that the most sensitive end point is corrosion and, more precisely, corrosion along the coastal areas of the state where salt in the environment renders corrosion more likely. Because the San Antonio area does not have the same exposure to salt as coastal regions, Dr. Bond concluded that an annual average ground level concentration of HCl four to five times higher than the published ESL is acceptable for the Mitsui facility.

Dr. Bond continued that the short-term ESL for HCl is 75 micrograms per cubic meter or 50 parts per billion (ppb), and that it is protective of human health. The ED charges that the lowest levels at which Dr. Carman testified he had seen effects, 0.3 parts per million (300 ppb), is six-times greater than the short-term ESL for HCl. Furthermore, the ED maintains that the short-term ground level concentrations predicted by the refined-dispersion modeling (0.73 micrograms per cubic meter or 0.486 ppb) is approximately 100-times less than the short-term ESL for HCl and approximately 600-times less than the level at which Dr. Carman testified he saw adverse effects.

Recommendation

The ALJ concludes that Coalition's evidence regarding HCl, when considered with the other evidence, does not establish a reasonable basis for a potential impact. The ALJ bases this conclusion on the inadequacies in Dr. Carman's testimony, the modeling data offered by Mitsui, and the testimony of Dr. Bond.

The ALJ limited the testimony of Dr. Carman to the effects HCl might have on vegetation due to the limitations of his qualifications. Despite his lack of experience with air impact analysis, the ALJ found Dr. Carman qualified to testify regarding possible impacts of HCl emission on vegetation because of his formal training in botany and his experience with Permian Chemical while employed with the TACB. Based on his experiences at Permian Chemical, Dr. Carman testified that emissions of HCl from the Mitsui facility would impact vegetation.[10]

When asked if he intended to indicate by his testimony that the HCl emissions from the Permian facility are in any way representative of the HCl emission from Mitsui's proposed facility, Dr. Carman stated "at times - potentially, yes." However, the evidence indicates that the lowest levels of emissions from the Permian facility observed to cause effects by Dr. Carman were far above the emissions modeled for Mitsui's facility. Dr. Carman testified that he found effects at very low levels while inspecting the Permian facility and described these levels as between 0.3 and 1.0 ppm. However, the evidence indicates that Dr. Carman never observed effects at levels comparable to the far lower levels conservatively modeled by the refined-dispersion modeling performed for the Mitsui plant.

The ALJ agrees with Mitsui that additional questions regarding Dr. Carman's qualifications were raised by his testimony indicating a lack of knowledge regarding the current ESL for HCl. This is particularly true regarding the portion of Dr. Carman's testimony which questioned whether the ESL

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[10] In its closing statement, Coalition mistakenly asserts that Dr. Carman testified that emissions of HCl and HF, assuming the levels predicted by Mitsui's modeling, would adversely impact vegetation. The record reflects that Dr. Carman's testimony assumed the maximum allowable emission levels in the permit.

for HCl is protective of human health and the environment. When asked to identify his basis for this opinion, Dr. Carman stated that in the 1980's he was taking low samples that "he believes" were below the short-term ESL for HCl that the agency was using at that time. However, Dr. Carman could not identify the ESL for HCl in the 1980s and was even uncertain as to what levels he observed effects from the HCl emissions at Permian Chemical.

In addition to the comparison of the modeling data to the ESL and the questions regarding Dr. Carman's qualifications, the ALJ is persuaded by Dr. Bond's testimony that the testimony offered by Dr. Carman does not establish a reasonable basis for a hearing. Dr. Bond testified that emissions from this facility will result in ground-level concentrations no higher than those she would expect to find in ambient background levels. She continued that she could not think of a scenario in which the emissions in the Mitsui permit would adversely affect the general public.

Finally, the ALJ concludes that Coalition failed to offer reasonable evidence that the levels of HCl to be emitted from this facility are above insignificant levels. The impacts predicted by modeling with conservative assumptions at the residential area for emissions of HCl from the Mitsui facility are less than 10% of usually accepted levels which are derived from an ESL that is developed for protection of the most sensitive end point, i.e. corrosion, and therefore more protective of human health and vegetation, with a built in margin of safety factor of times 10.

The ALJ does not believe that in order to maintain a reasonable hearing request Coalition must present evidence challenging the ESL for HCl or offer modeling which suggest a violation of same. However, the overwhelming evidence offered by Mitsui and the ED, the extremely low levels of HCl to be emitted by this plant, and the concerns over the extent of the qualifications and knowledge of Coalition's testifying expert lead the ALJ to conclude that the evidence offered by coalition suggesting that HCl emissions from Mitsui's plant could potentially impact its members does not establish a reasonable basis for a hearing on the merits of the application.

Subissue C: Whether Coalition's evidence regarding hydrogen fluoride established a reasonable basis for hearing request.

Coalition's Position

Coalition bases its assertion on Dr. Carman's testimony that he believes HF emitted from the Mitsui facility will have impacts on vegetation within a quarter-mile area around the plant. He continued that the amount of HF that Mitsui wants to emit is a fairly large quantity with people and vegetation just a stone's throw away. Dr. Carman is concerned that even a few pounds per year of this highly toxic material is undesirable.

Coalition argues that, just as for HCl, Dr. Carman is unwilling to accept the opinions of Mr. Cabe and Dr. Bond regarding HF as their opinions are based on assumptions. Coalition further argues that, just as with HCl, there are numerous scenarios where more HF than currently anticipated may be emitted.

Mitsui's Position

Mitsui asserts that the unchallenged modeling data introduced into evidence by Mr. Cabe establishes the maximum level of HF at the property line of the nearest residence at 20 % or less of the standard established by Regulation III.

Mitsui argues that Dr. Carman's testimony must be questioned since the witness was not aware of the levels set by Regulation III which was designed to protect vegetation - the very area of Dr. Carman's stated expertise. In spite of his lack of knowledge regarding the Regulation, Mitsui points out that even Dr. Carman admitted the levels of HF coming from Mitsui are below the standard of Regulation III.

Mitsui continues that Dr. Carman began his testimony on this subject by stating that he could not determine the extent or nature of the potential impacts from HF coming from the Mitsui facility. Mitsui argues that Dr. Carman never explained what these "potential impacts" could be or whether any adverse effects were likely to occur. Finally, Mitsui questions Dr. Carman's credibility in testifying that a safe level of HF had to be less than the proposed Mitsui emissions while at the same time declining to establish an overall safe level of HF for comparison.

Executive Director's Position

The ED argues that no impacts from HF emissions are likely as the refined dispersion-modeling performed by applicant indicates ground level concentrations of HF at approximately 5-times less than the Regulation III standard. The ED contends that Coalition did not present any evidence that concentrations at this level will result in any adverse impacts.

Recommendation

The ALJ concludes that Coalition's evidence regarding HF, when considered with the other evidence, does not establish a reasonable basis for a potential impact. The ALJ bases this conclusion on the inadequacies in Dr. Carman's testimony, the modeling data offered by Mitsui, and the testimony of Dr. Bond.

The ALJ has difficulty finding the conclusory statements made by Dr. Carman reasonable. As argued by Mitsui, Dr. Carman never explained a reasonable basis for his statements challenging Regulation III. In fact, Dr. Carman was unaware of the acceptable levels of HF established by Regulation III and testified that he did not have sufficient experience with HF to establish an acceptable level. The ALJ questions then how Dr. Carman was certain that the levels of HF emissions allowed by the draft permit would impact vegetation within a quarter mile of the Mitsui facility. His testimony is particularly troublesome since Dr. Carman testified that the levels of HF found in the draft permit were below acceptable Regulation III levels and Regulation III was specifically implemented to protect vegetation.[11]

Dr. Bond reviewed the modeling performed by Mitsui and determined that the level of HF emissions was "insignificant". She stated that the predicted concentration levels will not have any adverse impacts and explained that the Regulation III levels are set to protect nearby residents' grandchildren, not only from inhalation of HF but also from eating dirt or plants exposed to HF.

The ALJ does not believe that in order to maintain a reasonable hearing request Coalition must present evidence challenging Regulation III, nor must Coalition offer modeling which suggest a violation of same. However, without a reasonable basis for challenging Regulation III, Coalition must present some evidence of predicted concentration levels above insignificant levels. At the levels predicted for this facility, and with consideration given to the inadequacies of Dr. Carman's testimony, the ALJ concludes that Coalition's evidence regarding HF does not establish a reasonable basis for an evidentiary hearing on the merits.

Subissue D: Whether Coalition's evidence regarding the lack of necessary permit terms established a reasonable basis for the hearing request.

When the Commission excluded consideration of "other facilities" in its order referring the matter to SOAH, the ALJ assumed the Commission was excluding consideration of other facilities in and around the Mitsui site and the potential for cumulative effects. Because this is a case of first impression, the ALJ allowed Coalition to create a record for the Commission to review regarding its contention that the permit terms are inadequate to protect its members who live in close proximity

[11] The regulation states that the concentration level at which inorganic fluoride compounds adversely affect humans appears to be considerably higher than the level at which vegetation and foraging animals are adversely affected. Therefore, the regulation is set to protect vegetation but is even more protective of humans.

to the proposed facility.[12] Specifically, Coalition argued that Texas facilities similar to Mitsui's have had problems with emissions and violations, that those types of incidents could occur at the Mitsui facility, and that the draft permit does not contain monitoring and other necessary terms. Therefore, Coalition alleges that whether additional permit terms are necessary is a reasonable basis for a hearing request.

A review of the evidence on this issue is not necessary as the ALJ believes all parties would agree that Coalition proved some facilities in Texas have had problems with emissions and violations. Also, the ALJ believes that all parties would agree similar problems could occur at the Mitsui facility. However, the ALJ finds that consideration of other facilities in this manner is nothing more than the conveyance of the compliance histories of these facilities to Mitsui. The ALJ further finds that concerns over whether these types of problems could occur at the Mitsui facility is mere speculation. Finally, the ALJ agrees with Mitsui that this issue is beyond the scope of the Commission's Order for this hearing. As such, the ALJ concludes this basis for requesting a hearing is unreasonable.

OTHER FINDINGS

1. Coalition did not establish a reasonable basis for asserting Mitsui's facility fails to meet BACT. In addition, the ALJ finds that this issue is not relevant to whether members of Coalition are affected and whether their request for hearing is reasonable.[13]

2. Coalition's assertion that they must only present evidence of the potential for an impact with impact defined as any contact with pollutants is contrary to §55.31(F) of Commission rules. The ALJ finds that Coalition must offer evidence regarding the extent of potential impact and that the potential for mere contact with a few molecules is not a reasonable basis for requesting an evidentiary hearing on the merits.

3. Coalition failed to establish a reasonable basis for asserting that aluminum dust from Mitsui's facility has any potential to impact nearby residents. Evidence in the record indicates that the potential for impact from aluminum dust is negligible and therefore, Coalition's request for hearing based on this issue is unreasonable.

4. Coalition failed to establish a reasonable basis for asserting that dioxins could be created by

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[12] In retrospect, the ALJ believes this evidence should have been excluded from the record.

[13] As long as members of the Coalition will not be adversely impacted, their concern regarding BACT does not establish a reasonable basis for a hearing

Mitsui's facility. Coalition also failed to establish that dioxins from the facility have any potential to impact nearby residents, therefore, Coalition's request for hearing based on this issue is unreasonable.

5. Coalition failed to establish a reasonable basis for asserting there is the potential for impacts to nearby residents from cooling tower emissions. The application and evidence in the record indicate that cooling tower water will not come into contact with the surface of the metal on the dies; therefore, there is no potential for possible impact and Coalition's request for hearing based on this issue is unreasonable.

6. Coalition failed to establish a reasonable basis for asserting there is the potential for impact to nearby residents because of the possibility that Mitsui will change the chemical compounds in the flux. The evidence indicates that any change in the flux that will result in an exceedance of the maximum allowable emissions must be approved by the Commission. Therefore, Coalition's request for hearing based on this issue is unreasonable.

CONCLUSION

The ALJ concludes that, because emissions of HCl and HF from Mitsui's facility are extremely low and because of inadequacies in the testimony of Dr. Carman, Coalition's evidence regarding potential impacts from HCl and HF does not establish a reasonable basis for a hearing on the merits of the application. The ALJ further concludes that Coalition's concerns regarding the rewriting of Mitsui's permit in order to protect its members against hypothetical upsets, accidents, and other unanticipated events are based upon mere speculation regarding the operation of this facility and are not within the scope of this limited hearing. Therefore, the ALJ recommends that Coalition's request for evidentiary hearing on the merits of the application be denied.

Tommy L. Broyles
Administrative Law Judge

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

AN ORDER denying the request for hearing by San Antonio Coalition For Environmental and Economic Justice concerning the application by Mitsui, San Antonio Components, Inc. for Permit No. 30979; SOAH Docket No. 582-96-0956

On July 24, 1996, the Texas Natural Resource Conservation Commission (Commission) evaluated the request for party status by San Antonio Coalition For Environmental and Economic Justice (Coalition) concerning the application by Mitsui, San Antonio Components, Inc. (Mitsui) for air quality Permit No. 30979. The request for hearing was evaluated under the requirements in Commission Rules, 30 TAC Chapter 55, subchapter B.

After considering the written and oral comments made by interested persons, the Commission determined that the matter should be referred to the State Office of Administrative Hearings (SOAH) with instructions for SOAH to take evidence on the limited question of whether the request for hearing by Coalition meets the requirements of Commission rules and whether Coalition should be granted a hearing on the application. On May 23, 1996, the Commission signed an interim order referring the matter to SOAH for the above-described purposes.

Tommy L. Broyles, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings, conducted the limited scope hearing in San Antonio, Texas on June 13 and 14, 1996, after appropriate notice was given.

The following were participants in the proceeding: Mitsui, San Antonio Components, Inc.; San Antonio Coalition For Environmental and Economic Justice; the Executive Director of the

Texas Natural Resource Conservation Commission; and the Public Interest Counsel of the Commission.

On July 24, 1996, the Commission considered the Administrative Law Judge's Proposal for Decision and the evidence and arguments presented by the parties. In accordance herewith, the Commission makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Mitsui applied to the Commission for Permit No. AQ-30979.
2. Coalition timely requested an evidentiary hearing on the merits of the application regarding Permit No. AQ-30979.
3. By order dated May 23, 1996, the Commission referred this matter to SOAH for an evidentiary hearing to determine if the request by Coalition met applicable rules.
4. Proper notice of the public hearing was given on May 31, 1996.
5. A public hearing on the issue of whether Coalition should be granted an evidentiary hearing on the merits of the application was held on June 13 and 14, 1996, in San Antonio, Texas.
6. Coalition presented testimony of two of its members who claimed they would be personally affected by the operations of the proposed Mitsui facility.
   a. Dorotha Dotson lives within .2 of one mile to the proposed Mitsui facility;
   b. Ms. Dotson is concerned about emissions from the proposed facility potentially impacting her and her grandchildren's health as well as plants in her garden;
   c. Ms. Dotson is also concerned about increased traffic congestion caused by the facility;

d. Reverend Clayton Bouldin is the pastor for a church that is within one mile from the proposed facility;

e. Reverend Bouldin is concerned that his church may lose members if the proposed facility is permitted.

7. Coalition offered the expert testimony of Dr. Neil Carman, Botanist, as evidence that Coalition's request for hearing is reasonable.

8. Dr. Carman was qualified to testify as an expert upon only the potential impacts of emissions on vegetation.

9. Dr. Carman's testimony, that emissions of hydrogen chloride (HCl) at the rates allowed by the draft permit will impact Ms. Dotson who lives within a quarter mile of the proposed facility by damaging vegetation in her garden, did not establish a reasonable basis for potential damage to vegetation:

a. Dr. Carman does not know the current Effects Screening Level(ESL) for HCl.

b. Dr. Carman's testimony regarding the effects of HCl on vegetation was based on his experiences as a Texas Air Control Board inspector of the Permian Chemical facilities in the 1980s and his formal training in botany;

c. Dr. Carman testified the HCl emissions from the Permian facility are representative of the HCl emissions from Mitsui's proposed facility; however, the lowest levels of HCl emissions from the Permian facility in which Dr. Carman observed effects were six-times the current short-term ESL for HCl;

d. The lowest levels of HCl emissions from the Permian facility in which Dr. Carman observed effects were 600-times greater than the short-term ground level concentrations predicted by the refined-dispersion modeling for the Mitsui facility;

e. The predicted maximum ground-level concentration of HCl at the nearest house to the Mitsui facility is 8-10% of the ESL for HCl.

10. The insufficiences and inaccuracies in Dr. Carman's testimony were further demonstrated by the credible testimony of Dr. Jane Bond, Toxicologist for the Commision:

a. ESLs are established at levels well below where one would see an effect;

b. because the San Antonio area is not as sensitive as the most sensitive end point upon which the ESL for HCl was established, an annual average ground level concentration of HCl four to five times higher than the published ESL would be acceptable for the Mitsui facility;

c. the emissions in this case will result in ground-level concentrations that are no higher than what would be expected at the ambient background levesl for these compounds;

d. there is no scenario in which the emissions in the Mitsui permit would adversely affect the general public.

11. Dr. Carman's testimony that HF emissions at the level allowed in the draft permit will have impacts on vegetation within a quarter mile area around Mitsui's proposed facility did not establish a reasonable basis for a potential impact upon vegetation:

a. Dr. Carman could not determine the extent or nature of potential impacts from HF coming from the Mitsui facility;

b. Dr. Carman did not have sufficient experience with HF to establish an acceptable level;

c. Dr. Carman was unaware of the acceptable levels of HF established by Regulation III, although, he testified that the levels of HF allowed by the draft permit are below Regulation III;

d. Regulation III was set to protect vegetation;

e. modeling data indicates the maximum level of HF at the property line of the nearest residence at 20% or less of the standard established by Regulation III.

12. The insufficiencies and inaccuracies in the testimony of Dr. Carman were further demonstrated by the following credible testimony of Dr. Bond:

a. regulation III is not a human health standard; therefore, it is not necessary to meet the 10 percent limit to conclude that these emissions are insignificant;

b. the HF emission levels modeled for the Mitsui plant are insignificant.

i. the emissions in this case will result in ground-level concentrations that are no higher than those expected in the ambient background levels for these compounds.

j. there is no scenario in which the emissions in the Mitsui permit would adversely affect the general public.

13. Coalition's evidence regarding the lack of necessary permit terms is beyond the scope of this limited hearing.

14. Evidence regarding the compliance history of companies other than Mitsui is not relevant to this limited scope proceeding.

15. Dr. Carman's testimony regarding BACT did not establish a reasonable basis for granting Coalition's request for a hearing on the merits of the application:

a. Dr. Carman appeared uncertain regarding the BACT used by facilities similar to Mitsui's proposed facility;

b. BACT is not a relevant issue in this limited scope proceeding.

16. Other evidence failed to establish a reasonable basis for granting Coalition's request for a hearing on the merits of the application:

a. The potential for impact from aluminum dust is negligible.

b. Coalition failed to establish that any aluminum dust emissions from the proposed facility have any potential to impact nearby residents.

c. Coalition failed to establish that dioxin emissions were possible from the facility.

d. Coalition failed to establish that any possible dioxin emissions from the proposed facility have any potential to impact nearby residents.

e. The cooling tower water will not come into contact with the surface of the metal on the dies; therefore, there is no potential for possible impact.

f. Any change in the contents of the flux that will result in an exceedance of the maximum allowable emissions must be approved by the Commission.

17. As shown in the Findings of Fact 8-16, the evidence in this hearing fails to establish a reasonable basis for a hearing on the merits of the application.

CONCLUSIONS OF LAW

1. The public hearing regarding this permit application was held under the authority of and in accordance with applicable provisions of the Texas Water Code, as amended, the Texas Health & Safety Code, as amended, and the rules of the Texas Natural Resource Conservation Commission.

2. The Texas Natural Resource Conservation Commission has jurisdiction to consider the request for hearing on the merits of the application and is authorized to grant or deny that request based upon the evidence presented.

3. The basis of Coalition's request for evidentiary hearing on the merits of Mitsui's application is unreasonable as defined by Section 55.31 of Commission rules; therefore, Coalition's request for evidentiary hearing should be denied in accordance with Section 5.115 of the Texas Water Code and Section 382.056(d) of the Texas Health & Safety Code.

4. The findings of fact and conclusions of law contained herein relate only to the adequacy of the hearing requests pursuant to applicable law. The findings and conclusions do not address the legal adequacy of the City of Crandall's application.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS NATURAL RESOURCE CONSERVATION COMMISSION THAT:

1. The request for hearing of Coalition be denied.

2. The Chief Clerk of the Texas Natural Resource Conservation Commission shall forward a copy of this Order to all parties.

3. If any provision, sentence, clause or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

Issue Date:

TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION

_____
Barry R. McBee, Chairman

ATTEST:

_____
Gloria A. Vasquez, Chief Clerk

32--299*

RE: Yost - NRCC permitting procedures

A BILL TO BE ENTITLED

AN ACT

relating to certain environmental permitting procedures of the Texas Natural Resource Conservation Commission.

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

SECTION 1. Chapter 5, Water Code, is amended by adding Subchapter J to read as follows:

SUBCHAPTER J. ENVIRONMENTAL PERMITTING PROCEDURES

Sec. 5.371. GENERAL PERMITTING PROCEDURES. (a) This subchapter applies to commission procedures for an application to issue, amend, or renew a permit for which public notice and an opportunity for public hearing is required by Chapter 26 or 27 of this code or Chapter 361 or 382, Health and Safety Code.

(b) The commission shall provide for permits-by-rule under the chapters listed in Subsection (a) to the greatest extent practicable and consistent with the requirements for United States Environmental Protection Agency authorization of a state permit program.

(c) The commission by rule shall identify categories of applications related to permits for which notice or opportunity for public hearing is not required. The commission shall exempt from notice and public hearing requirements an application to:

(1) maintain or improve the permitted quality or method of disposal of waste, control of air emissions, or injection of fluid if there is not:

EXHIBIT

(A) a significant increase in the quantity of waste, air contaminants, or fluid to be discharged, emitted, or injected; or

(B) a material change in the place of discharge, injection, emission, control, treatment, storage, or disposal;

(2) amend a permit in a manner that will not:

(A) cause a potential deterioration of water quality in the state; or

(B) relax a standard or criterion in a manner that raises a potential for deterioration of water quality in the state;

(3) amend a permit in a manner that will not:

(A) result in a significant net increase in permitted allowable emissions; or

(B) allow a significant emission of air contaminants not previously emitted under the permit;

(4) increase air emissions that are incidental to the installation of an emission control device; or

(5) change a facility in a manner within the scope and limitations of a flexible permit.

(d) For an application described by Subsection (c), the commission by rule may provide for the action on the application to be taken by the executive director after notice of the application is given to persons as required by law and at least 10 days before the action is taken.

Sec. 5.372. INITIAL DETERMINATION BY EXECUTIVE DIRECTOR. (a) When an application related to a permit is complete, the

executive director shall prepare and issue:

(1) a draft permit; or

(2) a notice of intent to deny.

(b) The executive director shall include a record of proposed decision prepared in accordance with Section 5.373 with a draft permit or notice of intent to deny.

(c) The commission shall send a copy of the record of the proposed decision to:

(1) the applicant;

(2) a state or federal agency, as required or as appropriate; and

(3) any other person on request of that person.

(d) Unless precluded by a requirement of the United States Environmental Protection Agency related to state program authorization, an applicant may give public notice of the application before the initial determination of the executive director is completed. If all requests for a public hearing the commission receives under the notice are unreasonable or the commission receives no requests for a public hearing, the executive director may take final action on the application notwithstanding this section and Sections 5.373 through 5.375.

(e) A notice of intent to deny shall state the executive director's reasons for the intended denial.

(f) A draft permit shall contain all appropriate conditions, compliance schedules, monitoring requirements, and technical standards consistent with applicable commission rules.

Sec. 5.373. RECORD OF PROPOSED DECISION FOR DRAFT PERMIT.

(a) A record of proposed decision prepared for a draft permit must:

(1) briefly show the principal facts and significant factual, legal, methodological, and policy issues considered in preparing the draft permit; and

(2) be based on the administrative record.

(b) The record of proposed decision must include, as applicable:

(1) a brief description of the type of facility or activity that is the subject of the draft permit;

(2) the type and quantity of wastes proposed to be or that are being treated, stored, disposed of, injected, emitted, or discharged;

(3) a brief summary of the reasons for the draft permit conditions, including references to applicable statutes or rules;

(4) the reasons a requested variance or alternative to a required standard is or is not justified;

(5) the procedures for reaching a final decision on the draft permit, including:

(A) the dates the comment period begins and ends;

(B) the address where comments will be received; and

(C) a description of:

(i) procedures for requesting a hearing;

(ii) the nature of the hearing; and

(iii) any other procedures by which the public may participate in the final decision process; and

(6) the name and telephone number of a person to contact for additional information.

(c) The commission shall make the record of proposed decision available when the public notice is published.

Sec. 5.374. NOTICE OF INITIAL DETERMINATION; COMMENTS AND REQUESTS FOR HEARING. (a) The executive director shall give public notice that a draft permit or notice of intent to deny has been prepared. The executive director shall provide for a 30-day period for public review, comments, and requests for public hearing. The period for public review and comments must be extended until the close of the public hearing, if one is held.

(b) Notice required under this section is in addition to the requirements of Section 26.028 of this code and Sections 361.081 and 361.082, Health and Safety Code.

(c) If the commission receives a timely written notice of opposition to a draft permit issued by the executive director and a request for a public hearing on the draft permit, the executive director shall respond to the request and attempt to resolve the issues that create the opposition. The opponent may withdraw the request for a public hearing following the executive director's response.

(d) The commission by rule may require additional public notice necessary to satisfy requirements of the United States Environmental Protection Agency for state permit program authorization.

Sec. 5.375. PUBLIC HEARINGS. (a) A ruling on a permit issuance or denial may not be made without an opportunity for a public hearing.

(b) At a public hearing, each interested person shall be given a reasonable opportunity to:

(1) orally or in writing, present significant information, views, or arguments; and

(2) examine testifying witnesses.

(c) The executive director shall hold the public hearing if the executive director determines:

(1) after examining requests for a public hearing, that there is a significant degree of public interest in the draft permit or notice of intent to deny; or

(2) that a public hearing should be held in order to clarify one or more issues in the permit decision, regardless of whether the commission receives a timely request for a public hearing.

(d) When a draft permit or notice of intent to deny for a hazardous waste management permit is at issue, the executive director shall hold a public hearing in any case in which the commission receives a notice of opposition to the permit decision and a request for a public hearing on or before the 30th day after the date of public notice under Section 5.374. The executive director shall hold the public hearing under this subsection at a location convenient to the population center nearest the proposed facility whenever it is possible to do so.

(e) The executive director may designate a hearings officer

or panel to take evidence at the hearing. A hearing panel may include technical experts on the staff of the executive director.

(f) Chapter 2001, Government Code, does not apply to a public hearing held under this section. A hearing held under this section shall be conducted so that all relevant information, views, arguments, and testimony are sufficiently and fairly received without undue repetition.

(g) A hearing held under this section shall be recorded. On request, a hearing shall be transcribed. The person who requests a hearing transcript must bear the cost of the transcript.

(h) The commission shall provide the record and, if prepared, the transcript of a hearing for review of any person at the commission's main office.

(i) A person who requests a copy of the record or of a transcript must bear the cost of the copy.

Sec. 5.376. COSTS FOR INFORMATION REGARDING NEW HAZARDOUS WASTE PERMIT. (a) On request of an affected person, the applicant for a permit for a new hazardous waste management facility shall furnish a bond or other financial assurance authorized by the commission to guarantee payment of nonlegal costs of the affected person incurred in providing to the commission information related to the issuance of the permit.

(b) For an application for a new commercial hazardous waste management facility, the bond or assurance must be in the amount of $100,000.

(c) For an application for a new noncommercial hazardous waste management facility, the bond or assurance must be in the

amount of $20,000.

(d) In determining whether the affected person is entitled to reimbursement under this section, the executive director shall apply the considerations provided by Section 361.0833(e), Health and Safety Code.

(e) Nonlegal costs subject to reimbursement under this section include the cost of a copy of the administrative record in the case.

(f) The commission may not award in a case costs to one or more persons that total an amount greater than the amount of financial assurance required by this section.

(g) Subject to the limitations of Subsections (d) and (f), the commission may award to a unit of local government legal costs in addition to other costs.

Sec. 5.377. FINAL DECISION OF EXECUTIVE DIRECTOR. (a) The executive director shall consider all comments received during the public comment period and during any public hearing in determining:

(1) whether to issue the permit; and

(2) conditions on the permit if a permit is issued.

(b) In ruling on a permit application, the executive director may deny the permit in whole or in part and may provide reasonable conditions to a permit if:

(1) it appears that the permit applied for does not meet applicable requirements; or

(2) the applicant refuses to agree to a permit condition the executive director determines is necessary after reviewing comments the commission receives.

(c) When the executive director issues a final decision on an application, the executive director shall issue a response to comments the commission receives. The response must:

(1) identify provisions of the draft permit that have been changed for the final permit, if any, and state the reasons for the change; and

(2) briefly describe and respond to all significant comments the commission receives on the draft permit or permit application.

(d) The response must be available to the public.

(e) The executive director shall mail notice of the final decision on the application to the applicant and to each person who commented during the public comment period or participated in the public hearing. The notice must:

(1) include the response issued under Subsection (c);

(2) state that any person affected by the decision may petition the commission as provided by Section 5.378;

(3) explain the petition process;

(4) identify the location and availability of the administrative record; and

(5) state that limited copies of the administrative record may be made available under Section 5.376, with costs of the copies borne by the applicant.

(f) A final decision on a permit application becomes effective 30 days after the date notice of the decision is mailed, unless a petition for review is filed in accordance with Section 5.738, or at a later time specified by the executive director in

the decision.

Sec. 5.378. PETITION FOR COMMISSION REVIEW. (a) The commission shall review the executive director's decision on a permit application as provided by this section.

(b) Any person affected by the decision of the executive director may file a petition for review with the commission. A petition for review must be filed on or before the 30th day after the date the executive director's notice of final decision is mailed.

(c) The petition must include a statement of the reasons that support commission review of the decision, demonstrate that the issue raised by the petition was raised during the public comment period or public hearing, identify all provisions of the draft permit or order of denial of the application with which the appellant disagrees, and show that the decision or a permit condition is based on:

(1) a finding of fact or a conclusion of law that is clearly in error; or

(2) an important policy consideration or an exercise of discretion that the commission should review.

(d) The commission shall determine if the petitioner is an affected person not later than the 60th day after the notice of final decision is mailed. Any valid petition granted by the commission shall be referred by the commission to the State Office of Administrative Hearings for a hearing in accordance with Section 2003.047, Government Code. If the commission does not act on or before that date, the petition is automatically referred as

provided in this subsection.

(e) At all stages of the petition to the commission and the hearing at the State Office of Administrative Hearings, each factual representation contained in the draft permit prepared by the executive director and in the application, to the extent not inconsistent with the draft permit, shall be deemed to be true and correct, unless specifically controverted by sworn testimony or other competent evidence in accordance with the requirements of Subsection (f).

(f) An applicant in a permitting procedure established by this subchapter shall bear the burdens of production and persuasion with respect to the specification, condition, provisions, or facts at issue in a draft permit prepared by the executive director.

(g) The filing of a petition under this section stays the effect of a permit issued by the executive director until the commission approves, modifies, or rejects the executive director's permit decision.

Sec. 5.379. COMMISSION ACTION. (a) After the administrative law judge of the State Office of Administrative Hearings submits a proposal for decision to the commission, the commission shall proceed as provided in Section 2003.047(i), Government Code.

(b) The commission decision is final as provided in Section 2001.144, Government Code.

(c) Any motions for commission rehearing shall be governed by Sections 2001.145 and 2001.146, Government Code.

Sec. 5.380. JUDICIAL REVIEW OF COMMISSION PERMIT DECISIONS.

(a) A person affected by the commission's final decision on a permit application may petition for judicial review. The petition must be filed on or before the 30th day after the date the commission mails its final decision on the application.

(b) Failure to timely petition for commission review of the executive director's decision is a bar to judicial review of the decision.

(c) Judicial review of decisions of the commission under this subchapter shall be under the substantial evidence rules as provided by Section 2001.174, Government Code.

(d) The filing of an appeal does not stay any action required by the commission's decision.

(e) The record of appeal shall include the record of proceedings of the contested case hearing at the State Office of Administrative Hearings.

SECTION 2. Subchapter I, Chapter 2001, Government Code, is amended by adding Section 2001.226 to read as follows:

Sec. 2001.226. CERTAIN ENVIRONMENTAL PERMITS. Subchapters C through H do not apply to a permit application required to be filed with the Texas Natural Resource Conservation Commission for an authorization under Chapter 26 or 27, Water Code, or Chapter 361 or 382, Health and Safety Code, if tne application is subject to Subchapter J, Water Code.

SECTION 3. 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.

TEXAS LEGISLATIVE SERVICE
5/25/95

SENATE COMMITTEE AMENDMENT
TO HB 2491

32-299*

RE: Yost - NRCC permitting procedures

AMENDMENT # 1

Amend H.B. 2491 in SECTION 1 as follows:

(1) In Sec. 5.372(d) (page 3, line 21), delete "5.375" at the end of the subsection and substitute "5.378".

(2) In Sec. 5.377(a) (page 8, line 15), delete "The" at the beginning of the subsection and substitute "For decisions on applications processed under Sections 5.373 through 5.375, the"

(3) In Sec. 5.377(e)(5) (page 9, line 21), between "(5)" and "state" insert "for applications for new hazardous waste management facilities."

AMENDMENT # 2

Amend H.B. 2491 in SECTION 1, by deleting Subsection 5.378(d) (page 10, line 21 through page 11, line 1), and inserting in lieu thereof the following:

(d) The commission shall determine if the petitioner is an affected person. Not later than the 60th day after the notice of final decision is mailed, a petition based on subsection (c)(1) shall be referred by the commission to the State Office of Administrative Hearings for a hearing in

accordance with Section 2003.047, Government Code, unless the commission has determined that the petitioner is not an affected person or that the petition is unreasonable. If the commission does not act on or before that date, the petition is automatically referred as provided in this subsection. For a petition based on subsection (c)(2) of this section, the commission shall give notice to the petitioner and each other person who commented during the public comment period or who participated in the public hearing not later than the 60th day after the notice of final decision is mailed that the petition has been granted or denied. If the petition is granted, the notice must provide a briefing schedule for the review and state that any person affected may file an amicus brief.

AMENDMENT # 3

Amend H.B. 2491 in SECTION 1 as follows:

(1) In Subsection 5.378(e) (page 11, lines 8-9) strike "in accordance with the requirements of subsection (f)." and insert in lieu thereof "which either the commission or the administrative law judge recognizes as being sufficient to render the factual matter controverted. At the commencement of the hearing at the State Office of Administrative Hearings, the draft permit prepared by the executive director, as well as the application and any amendments or supplements thereto, shall be received into the evidentiary record.

(2) In Subsection 5.378(f) (page 11, line 13) insert "which are recognized as controverted under subsection (e)" between "director" and the period at the end of the subsection.

AMENDMENT # 4

Amend H.B. 2491 in SECTION 2, in the proposed Sec. 2001.226, Government Code, by inserting before "Subchapters" at the beginning of the Section "(a) Except as provided by Subsection (b)," and by adding a new Subsection (b) to read as follows:

(b) Subchapters C through H apply to a proceeding transferred to the State Office of Administrative Hearings under Section 5.378, Water Code.

Sensible Regulation

"It's a Mad Mad Mad Mad World"

Ralph Marquez

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

FOR YOUR INFORMATION

COMMISSIONER RALPH MARQUEZ

Ralph Marquez of Texas City was appointed by Gov. George W. Bush to the Texas Natural Resource Conservation Commission (TNRCC) on May 1, 1995, and was confirmed by the Texas Senate on May 5, 1995. His term expires Aug. 31, 1999.

Prior to his appointment, Commissioner Marquez served on several TNRCC advisory committees and task forces. He is a registered professional engineer and has been a vice-chair of the Texas Chemical Council environmental committee, a board member of the Gulf Coast Water Authority, and served on the State of Texas Waste Reduction Advisory Committee. He also served as chairman of the City of Texas City Environmental Advisory Board.

From 1963 to 1993, Commissioner Marquez worked for the Monsanto Company in various capacities, including internal company consultant for technical, regulatory and legislative environmental issues. He has a bachelor's degree in Chemical Engineering from the University of Texas and a master's degree from the University of Houston-Clear Lake.

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NOTES

TNRCC Enforcement Guidelines

"Hang 'Em High"

John Riley

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 Litigation Support Division. The forty-three division staff consist of attorneys, legal assistants, technical advisors, support staff and a special investigations unit. The Litigation Support Division works in a cooperative effort with other divisions to ensure timely and appropriate handling of all agency enforcement cases.

NOTES



January 1996
RG-205

TNRCC EXECUTIVE DIRECTOR ENFORCEMENT GUIDANCE DOCUMENT

IMPLEMENTING SB 1660

Relating to Agreed Orders of the Texas Natural Resource Conservation Commission

printed on recycled paper

Litigation Support Division

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

TNRCC EXECUTIVE DIRECTOR ENFORCEMENT GUIDANCE DOCUMENT

IMPLEMENTING SB 1660

Relating to Agreed Orders of the Texas Natural Resource Conservation Commission

This Guidance Document is intended to assist persons in negotiating agreed orders with the Executive Director's staff of the Texas Natural Resource Conservation Commission. This guidance is not regulation and should not be used as such.

Prepared by
Litigation Support Division

RG-205
January 1996



Barry R. McBee, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
John M. Baker, *Commissioner*

Dan Pearson, *Executive Director*

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GUIDANCE DOCUMENT
SB 1660

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GUIDANCE DOCUMENT
SB 1660

I. INTRODUCTION

SB 1660 adds several subsections to the administrative penalty sections of the Texas Water Quality Control Act, the Texas Solid Waste Disposal Act, and the Texas Clean Air Act. Generally, the law states that the Texas Natural Resource Conservation Commission ("TNRCC") is not required to make findings of fact and conclusions of law other than those which give the agency jurisdiction. The law also allows agreed orders entered by the TNRCC to contain some or all of the following provisions: the order is not an admission of a violation; the occurrence of the violation is in dispute; and the order is not intended to become a part of a party's compliance history. Additionally, all agreed orders are explicitly made inadmissible in third party litigation. SB 1660 became effective on September 1, 1995. This guidance document is intended to assist personnel representing the Executive Director and outside parties involved in the negotiation of an agreed order in an enforcement action.

Notwithstanding that the application of much of the statute is discretionary, the Executive Director of the TNRCC plans to make routine use of SB 1660 language. SB 1660 benefits the TNRCC by helping it to streamline many enforcement cases and allowing it to concentrate on enforcement actions deserving of the highest level of attention and, potentially, litigation. Industry should also benefit from the contemplated streamlining, predictability and associated cost savings provided by SB 1660. Most important, the environment will benefit from the swift resolution of appropriate enforcement matters by expediting the implementation of technical recommendations and remedial actions.

The Executive Director anticipates that all of the provisions offered by SB 1660 will be incorporated into the great majority of enforcement cases. The remaining matters will include cases that the Executive Director is preparing for litigation and feels that SB 1660 language should not be offered. Cases involving injury to human health, off-site environmental harm or prior violations, including instances where an SB 1660 order or orders have been entered previously, will be considered for the latter category.

A. PURPOSE

S.B. 1660 authorizes the Texas Natural Resource Conservation Commission to limit its findings of fact and conclusions of law in agreed orders to jurisdictional findings. The bill also authorizes an agreed order to include a reservation that the order is not an admission of wrongdoing or intended for consideration in the compliance history of the alleged violating entity. As stated above, the bill specifically exempts agreed orders from use in private litigation, thereby reducing or eliminating collateral considerations from the negotiation process.

B. RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, department, agency or institution.

II. SB 1660 ANALYSIS

A. INTRODUCTION

The bill contains six sections and became effective on September 1, 1995. The bill amends four sections of various Texas environmental laws: Texas Water Quality Control Act §26.136, adding subsections (p) and (q); Solid Waste Disposal Act §361.251, adding subsections (v) and (w) and §361.252, adding subsections (r) and (s); and Texas Clean Air Act §382.088 adding subsections (k) and (l). Each of the amended subsections contains the same language.

B. SECTION BY SECTION ANALYSIS

SECTION 1. amends Section 26.136, Water Code, by adding Subsections (p) and (q), as follows:

(p) declares that the commission (TNRCC) is not required to make findings of fact or conclusions of law, other than an uncontested finding that the commission has jurisdiction in an agreed order compromising or settling an alleged violation of this chapter. It authorizes an agreed order to include a reservation that the order is not an admission of a violation of this chapter or a rule adopted under this chapter, the occurrence of a violation is in dispute, or the order is not intended to become part of a party's or a facility's compliance history.

(q) provides that an agreed order issued by the commission shall not be admissible against a party to that order in a civil proceeding, unless the proceeding is brought by the attorney general's office to (1) enforce the terms of that order, or (2) pursue violations of the Water Code or Health and Safety Code.

SECTION 2. amends Section 361.251, Health and Safety Code, by adding Subsections (v) and (w), to make a conforming change.

SECTION 3. amends Section 361.252, Health and Safety Code, by adding Subsections (r) and (s), to make a conforming change.

SECTION 4. amends Section 382.088, Health and Safety Code, by adding Subsections (k) and (l), to make a conforming change.

SECTION 5. Effective date: September 1, 1995.

SECTION 6. Emergency clause.

III. GUIDANCE

A. CRITERIA TO BE CONSIDERED BY THE TNRCC WHEN NEGOTIATING AN AGREED ORDER AS RELATING TO SB 1660.

SB 1660 provides for alternative agreed order language ranging from the full use of SB 1660 provisions to a "hard" order reflecting admissions of violations and none of the permissive language from SB 1660. The Executive Director anticipates that all of the provisions supplied by SB 1660 will be incorporated into most enforcement cases. The Executive Director speculates that as much as 90% of TNRCC's enforcement actions may be appropriately settled in this fashion. The remaining matters will include cases which the Executive Director is prepared to litigate. Arguably, some of these cases may settle prior to hearing resulting in an agreed order without SB 1660 terms. Although the Executive Director may review each enforcement action from a litigation standpoint, some guidance is offered to aid in understanding the Executive Director's process for choosing cases appropriate for "hard" orders or litigation.

The Executive Director may consider the following when considering which cases will be considered for litigation:

(1) the nature, circumstances, extent, duration, and gravity of the prohibited act with special emphasis on the hazard or potential hazard created to the health or safety of the public;

(2) the impact of the violation upon a receiving stream or underground water reservoir, on the property owners along a receiving stream or underground water reservoir, and on water users of a receiving stream or underground water reservoir;

(3) the impact of the violation on other property owners adjacent to or in the vicinity of the violation;

(4) with respect to the alleged violator:

(A) the history and extent of previous violations;

(B) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;

(C) the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation;

(D) economic benefit gained by the violation;

(5) any other matters that justice may require; and

(6) the chances of prevailing at hearing.

The Executive Director will only consider negotiating an agreed order of any type if: (1) all violations are corrected through actions to ensure future compliance; (2) any pollution resulting from such violations has been remediated or will be remediated by the implementation of the terms of the agreed order; and (3) both general and specific deterrence objectives are served.

B. FORM OF THE ENFORCEMENT ORDER.

Generally agreed orders will begin with a shell document. (Refer to sample order, Appendix F)

1. Form of the Order:

a. Jurisdiction and Stipulations.
b. Allegations of Violations
c. Denial of Violations
d. Order/Technical Requirements

2. Jurisdiction and Stipulations:

a. Recitation of the commission's statutory authority for bringing and resolving the case.
b. Description of the nature of the facility's operation and location.
c. Jurisdictional issue.
d. A recitation that the Commission and respondent agree that the Commission has jurisdiction to enter the agreed order, and that the respondent is subject to the Commission's jurisdiction.
e. A recitation that the respondent has been properly notified of the occurrence of the alleged violations.
f. A recitation that the occurrence of any violation is in dispute and the entry of the agreed order shall not constitute an admission by the respondent of any violation alleged in the agreed order.
g. A recitation that an administrative penalty should be recovered by the Commission in settlement of the violations alleged in the agreed order.

h. A recitation that any procedures which might otherwise be authorized or required in this action are waived in the interest of a more timely resolution of the matter.

I. A recitation that the Executive Director of the TNRCC and the respondent have agreed on a settlement of the matters involved in this enforcement action, subject to the approval of the Commission.

j. A recitation that pursuant to Section _____ (the appropriate section of the statute) the Executive Director may, without further notice or hearing, refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings, if the Executive Director determines that the respondent is noncompliant with or in violation of any of the terms and conditions set forth in the agreed order.

k. A recitation that the provisions of the agreed order shall apply to and be binding upon the respondent, its successors, assigns and upon those persons in active concert or participation with them who receive actual notice of the agreed order by personal service or otherwise.

l. A recitation that the agreed order is not intended to become a part of the respondent's compliance history.

m. A recitation that the agreed administrative order, issued by the Commission, shall not be admissible against the respondent in a civil proceeding, unless the proceeding is brought by the attorney general's office to: (1) enforce the terms of this order; or (2) pursue violations of the Water Code or Health and Safety Code.

n. Termination Clause.

3. Allegations:

The allegation section shall contain: (1) the factual nature of the alleged violation and (2) the specific statute or rule allegedly violated. This section of the agreed order shall contain the following language, "In settlement of this enforcement action and solely for the purpose of this Agreed Order, the parties have agreed and stipulated as follows:" followed by a recitation of the alleged violation(s). The alleged violation section will describe each violation with adequate specificity to determine the nature and extent of the alleged violations.

4. Denials

This section will contain denial language which may be drafted by and obtained from opposing counsel. In the alternative, the Executive Director will offer the following:

1. That _____ should not be deemed, by agreeing to this Agreed Order, to admit the allegations contained in Section II ("Allegations") above.

2. That disputes exist between _____ and the TNRCC Executive Director both as to the liability of _____ and the amount of liability, if any, for the allegations contained in Section II above or set forth in the Executive Director's file regarding this enforcement action. That by reason of such disputes, _____ and the Executive Director settle and compromise these disputed matters without litigation and, as part of the settlement and compromise, _____ agrees to pay the administrative penalty set forth in this Order.

5. Order Provisions/Technical Requirements

This section shall contain a recitation of the monetary penalty, if any, to be assessed and any provisions required by the TNRCC to bring the respondent into compliance with the environmental laws.

This section shall also contain reference to: The Chief Clerk shall provide a copy of this Order to each of the parties. By law, the effective date of this Order is the mailing date, as provided by Section 337.57 of the Commission's rules.

IV.
APPENDICES

A. Timetable
B. Fiscal Note
C. Fiscal Note
D. Summary of Committee Action
E. Text of SB 1660
F. Order Shell

APPENDIX A.

BILL NUMBER: SB 1660
AUTHOR: Ratliff
SPONSOR: Yost

S Received by the Secretary of the Senate		04/19/95
S Permission to introduce		04/20/95
S Read first time		04/20/95
S Referred to Natural Resources		04/20/95
S Scheduled for public hearing on		04/27/95
S Considered in public hearing		04/27/95
S Testimony taken in committee		04/27/95
S Reported favorably w/o amendments		04/27/95
S Placed on Reg. Order of Business Calendar		04/28/95
S Placed on intent calendar		05/01/95
S Rules suspended		05/02/95
S Record vote		05/02/95
S Read 2nd time		05/02/95
S Amended	Ratliff	05/02/95
S Passed to engrossment as amended		05/02/95
S Nonrecord vote recorded in Journal		05/02/95
S Rules suspended		05/02/95
S Record vote		05/02/95
S Read 3rd time		05/02/95
S Passed		05/02/95
S Nonrecord vote recorded in Journal		05/02/95
S Reported engrossed		05/02/95
H Received from the Senate		05/02/95
H Read first time		05/03/95
H Referred to Natural Resources		05/03/95
H Considered in formal meeting		05/11/95
H Reported favorably w/o amendment(s)		05/11/95
H Committee report printed and distributed	10:08AM	05/12/95
H Committee report sent to Calendars		05/12/95
H Considered in Calendars		05/16/95
H Placed on General State Calendar		05/18/95
H Read 2nd time		05/19/95
H Amendment tabled	1-Bosse	05/19/95
H Passed to 3rd reading		05/19/95
H Nonrecord vote recorded in Journal		05/19/95
H Read 3rd time		05/24/95
H Passed		05/24/95

H Nonrecord vote recorded in Journal	05/24/95
S House passage reported	05/25/95
S Reported enrolled	05/25/95
S Signed in the Senate	05/26/95
H Signed in the House	05/26/95
E Sent to the Governor	05/27/95

APPENDIX B.

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE
74th Regular Session

April 27, 1995

TO: Honorable Bill Sims, Chair
Committee on Natural Resources
Senate
Austin, Texas

IN RE: Senate Bill No. 1660 By: Ratliff

FROM: John Keel, Director

In response to your request for a Fiscal Note on Senate Bill No. 1660 (Relating to agreed orders of the Texas Natural Resource Conservation Commission) this office has determined the following:

No significant fiscal implication to the State or units of local government is anticipated.

Source: LBB Staff: JK, DF

APPENDIX C.

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE
74th Regular Session

May 11, 1995

TO: Honorable David Counts, Chair
Committee on Natural Resources
House of Representatives

IN RE: Senate Bill No. 1660 By: Ratliff

FROM: John Keel, Director

In response to your request for a Fiscal Note on Senate Bill No. 1660 (Relating to agreed orders of the Texas Natural Resource Conservation Commission) this office has determined the following:

No significant fiscal implication to the State or units of local government is anticipated.

Source: Natural Resource Conservation Commission
LBB Staff: JK, JB, DF

APPENDIX D.

SUMMARY OF COMMITTEE ACTION

S.B.1660 was considered by the committee in a formal meeting on May 11, 1995. No testimony was received.
The bill was reported favorably without amendment, with the recommendation that it do pass and be printed, by a record vote of 7 ayes, 0 nays, 0 pnv, 2 absent.

E.BILL NUMBER: SB 1660
AUTHOR: Ratliff
SPONSOR: Yost
COAUTHORS:
COSPONSORS:

LAST ACTION: 05/27/95 E Sent to the Governor

CAPTION: Relating to agreed orders of the Texas Natural Resource Conservation Commission.

SENATE COMM: Natural Resources
VOTES: AYES = 8 NAYS = 0 PRESENT NOT VOTING = 0 ABSENT = 3

HOUSE COMM: Natural Resources
VOTES: AYES = 7 NAYS = 0 PRESENT NOT VOTING = 0 ABSENT = 2.

APPENDIX E.

AN ACT

relating to agreed orders of the Texas Natural Resource Conservation Commission.

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

SECTION 1. Section 26.136, Water Code, is amended by adding Subsections (p) and (q) to read as follows:

(p) Notwithstanding any other provision to the contrary, the commission is not required to make findings of fact or conclusions of law, other than an uncontested finding that the commission has jurisdiction, in an agreed order compromising or settling an alleged violation of this chapter.

An agreed order may include a reservation that:

(1) the order is not an admission of a violation of this chapter or a rule adopted under this chapter;

(2) the occurrence of a violation is in dispute; or

(3) the order is not intended to become a part of a party's or a facility's compliance history.

(q) An agreed administrative order issued by the commission shall not be admissible against a party to that order in a civil proceeding, unless the proceeding is brought by the attorney general's office to:

(1) enforce the terms of that order; or

(2) pursue violations of this code or the Health and Safety Code.

SECTION 2. Section 361.251, Health and Safety Code, is amended by adding Subsections (v) and (w) to read as follows:

(v) Notwithstanding any other provision to the contrary, the commission is not required to make findings of fact or conclusions of law, other than an uncontested finding that the commission has jurisdiction, in an agreed order compromising or settling an alleged violation of this chapter.

An agreed order may include a reservation that:

(1) the order is not an admission of a violation of this chapter or a rule adopted under this chapter;

(2) the occurrence of a violation is in dispute; or

(3) the order is not intended to become a part of a party's or a facility's compliance history.

(w) An agreed administrative order issued by the commission shall not be admissible against a party to that order in a civil proceeding, unless the proceeding is brought by the attorney general's office to:

(1) enforce the terms of that order; or

(2) pursue violations of the Water Code or this code.

SECTION 3. Section 361.252, Health and Safety Code, is amended by adding Subsections (r) and (s) to read as follows:

(r) Notwithstanding any other provision to the contrary, the commission is not required to make findings of fact or conclusions of law, other than an uncontested finding that the commission has jurisdiction, in an agreed order compromising or settling an alleged violation of this chapter.

An agreed order may include a reservation that:

(1) the order is not an admission of a violation of this chapter or a rule adopted under this chapter;

(2) the occurrence of a violation is in dispute; or

(3) the order is not intended to become a part of a party's or a facility's compliance history.

(s) An agreed administrative order issued by the commission shall not be admissible against a party to that order in a civil proceeding, unless the proceeding is brought by the attorney general's office to:

(1) enforce the terms of that order; or

(2) pursue violations of the Water Code or this code.

SECTION 4. Section 382.088, Health and Safety Code, is amended by adding Subsections (k) and (l) to read as follows:

(k) Notwithstanding any other provision to the contrary, the commission is not required to make findings of fact or conclusions of law, other than an uncontested finding that the commission has jurisdiction, in an agreed order compromising or settling an alleged violation of this chapter.

An agreed order may include a reservation that:

(1) the order is not an admission of a violation of this chapter or a rule adopted under this chapter;

(2) the occurrence of a violation is in dispute; or

(3) the order is not intended to become a part of a party's or a facility's compliance history.

(l) An agreed administrative order issued by the commission shall not be admissible against a party to that order in a civil proceeding, unless the proceeding is brought by the attorney general's office to:

(1) enforce the terms of that order; or

(2) pursue violations of the Water Code or this code.

SECTION 5. This Act takes effect September 1, 1995.

SECTION 6. 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.

APPENDIX F
SHELL ORDER

IN THE MATTER OF AN	§	BEFORE THE
ENFORCEMENT ACTION CONCERNING	§	
RESPONDENT FULL NAME	§	TEXAS NATURAL RESOURCE
(ACCOUNT NO., ENFORCEMENT	§	
ID NO., PERMIT NO., as approp)	§	CONSERVATION COMMISSION

AGREED ORDER
DOCKET NO.

I. JURISDICTION & STIPULATIONS

On _____, came on to be considered by the Texas Natural Resource Conservation Commission ("the Commission" or "TNRCC") the Agreement of the Parties, resolving an enforcement action regarding *Respondent Name* ("*Short Name*") in the form of an Agreed Order pursuant to *Statutory Provisions*. The Executive Director of the TNRCC, represented by the _____ Division, and *Short Name*, [*add, if appropriate:* represented by _____ of the law firm of _____], appear before the Commission and together stipulate that:

1. *Short Name* owns and operates a _____ facility [*for Air orders substitute:* plant] on _____ in _____ Texas.

2. The Facility [*for Air orders substitute:* Plant] [*Statement of Jurisdiction; for example*: consists of one or more sources as defined in Section 382.003(12) of the Act].

3. The Commission and *Short Name* agree that the Commission has jurisdiction to enter this Agreed Order, and that *Short Name* is subject to the Commission's jurisdiction.

4. Notice of violations alleged in Section II ("Allegations"), below, were received by *Short Name* on or about _____, 1995. [*Required only for Air violations.*]

5. The occurrence of any violation is in dispute and the entry of this Agreed Order shall not constitute an admission by *Short Name* of any violation alleged below.

6. This order is not an admission by *Short Name* of a violation of [*cite appropriate statute*] or a rule adopted under that chapter.

7. Administrative penalties in the amount of [*SPELL OUT IN ALL CAPS THE DOLLAR AMOUNT*] ($X,XXX.XX) should be recovered by the Commission in settlement of the violations alleged in Section II ("Allegations"), below.

8. Any notice and procedures which might otherwise be authorized or required in this action are waived in the interest of a more timely resolution of the matter.

9. The Executive Director of the TNRCC and *Short Name* have agreed on a settlement of the matters involved in this enforcement action, subject to the approval of the Commission.

10. The Executive Director may, without further notice or hearing, refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings if the Executive Director determines that the *Short Name* is noncompliant with or in violation of any of the terms and conditions set forth in this Agreed Order.

11. The provisions of this Agreed Order shall apply to and be binding upon *Short Name*. *Short Name* is ordered to give notice of the Agreed Order to outside contractors who have control over any facet of operations at the facility, and to any successor in interest prior to transfer of ownership of all or part of the facility, and within ten days of any such transfer provide the TNRCC [*City*] Regional Office with written confirmation that such notice has been given. *Short Name* is further ordered to provide a copy of this Agreed Order to supervisory personnel at the facility for distribution to facility operational staff.

12. This Agreed Order is not intended to become a part of *Short Name*'s compliance history.

13. This Agreed Order shall terminate five years from its effective date or upon compliance with all terms and conditions set forth in the order, whichever is later.

II. ALLEGATIONS

In settlement of this enforcement action and solely for the purpose of this Agreed Order, the parties have agreed and stipulated that:

1. *Short Name*, as owner and operator of the Facility [*for Air orders substitute:* Plant], is alleged to have violated the following: [*cite alleged violations; for example:* TNRCC Rule 30 Tex. Admin. Code Sections 101.20(1) and 116.115, Section 382.085(b) of the Act, TNRCC Permit Nos. _____, and TNRCC Agreed Order No. _____] by ....

2. *Short Name* and the Executive Director agree that the violations alleged in this section are hereby settled and compromised.

III. DENIALS

(to be obtained from the entity representative or include the following)

1. *Short Name* should not be deemed, by agreeing to this Agreed Order, to admit the allegations contained in Section II ("Allegations") above.

2. Disputes exist between *Short Name* and the TNRCC Executive Director both as to the liability of *Short Name* and the amount of liability, if any, for the allegations contained in Section II above or set forth in the Executive Director's file regarding this enforcement action. By reason of such disputes, *Short Name* and the Executive Director settle and compromise these disputed matters without litigation and, as part of the settlement and compromise, *Short Name* agrees to pay the administrative penalty set forth in this Order.

IV. ORDER

It is, therefore, ordered by the TNRCC that *Short Name Company* pay administrative penalties in the amount of [*SPELL OUT IN ALL CAPS THE DOLLAR AMOUNT*] ($X,XXX.XX). The imposition of this administrative penalty resolves only those matters described here. The Commission shall not be constrained in any manner from considering penalties for violations which are not raised here. All checks rendered to pay penalties shall be made out to "The State of Texas - General Revenue Fund." This penalty shall be paid within thirty (30) days of the effective date of this Agreed Order, and mailed to:

Financial Administration Division, Revenues
Attention: Cashier, MC 214
Texas Natural Resource Conservation Commission
P.O. Box 13088
Austin, Texas 78711-3088

with the notation; "Re: *Respondent Full Name*, [*Account No., Enforcement ID No., Permit No., as appropriate*].

This Agreed Order, issued by the Commission, shall not be admissible against *Short Name* in a civil proceeding, unless the proceeding is brought by the attorney general's office to: (1) enforce the terms of this order; or (2) pursue violations of this code.

It is further ordered that *Short Name Company* shall undertake certain actions as follows:

Technical Requirements [*insert here*]

If *Short Name* fails to comply with any of the technical ordering provisions in this Agreed Order within the prescribed schedules, and that failure is caused by an Act of God, war, riot, or other catastrophe beyond the control of *Short Name*, that failure shall not be construed as a violation of this Agreed Order. *Short Name* has the burden of establishing to the Executive Director's satisfaction that such an event has occurred. *Short Name* shall notify the Executive Director within seven (7) days after *Short Name* becomes aware of a delaying event and shall take all reasonable measures to mitigate and minimize the delay.

The Executive Director may grant an extension of any deadline in this Agreed Order or in any plan, report, or other document submitted pursuant to this Agreed Order, upon a written and substantiated showing of good cause. All requests for extensions by *Short Name* shall be made in writing to the Executive Director and shall not extend any deadlines contained in this Agreed Order until it has received written approval for extension from the Executive Director. The determination of what constitutes good cause rests solely with the Executive Director.

The Chief Clerk shall provide a copy of this Order to each of the parties. By law, the effective date of this Order is the mailing date, as provided by

section 337.57 of the Commission's rules.

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Barry R. McBee, Chairman

ATTEST:

Gloria A. Vasquez, Chief Clerk

S E A L

I, the undersigned, have read and understand the attached Agreed Order. I am authorized to agree to the attached Agreed Order on behalf of the entity, if any, indicated below my signature, and I do agree to the terms and conditions specified therein.

Jim Phillips
Deputy Director
Office of Legal Services
Texas Natural Resource Conservation Commission

Date

Signature

Date

Name (Printed or typed)
Authorized representative of
Respondent Full Name

Title



October 1995
RG-173

House Bill 2473
Texas Environmental, Health, and Safety Audit Privilege Act

printed on
recycled paper

Litigation Support Division

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

House Bill 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.

October 1995
RG-173



Barry R. McBee, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
John M. Baker, *Commissioner*

Dan Pearson, *Executive Director*

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TNRCC GUIDANCE DOCUMENT
HB 2473

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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 Deputy Director, Office of Compliance & Enforcement, 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 they are included in the scope of the environmental audit. They may also be immune from penalties if violations found in this manner are voluntarily disclosed. However, reports, tests, etc. that are required, collected, maintained, or reported by law are not privileged.***

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

October 4, 1995

Deputy Director
Office of Compliance & Enforcement
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 Deputy Director:

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

TNRCC Enforcement Guidelines

"Hang 'Em High"

Joe Vogel

BIOGRAPHICAL SKETCH

Joe Vogel

EDUCATION

Lamar University, Beaumont, Texas, 1969, BBA

PROFESSIONAL CAREER

U.S. Navy, Budget Analyst
Pensacola, Florida
1969 through 1972

Comptroller of Public Accounts
1973 to February 1995 (22 years)

Served as Audit and Enforcement Regional Director in Beaumont. Began career as a Taxpayer Compliance Officer in Beaumont in 1973.

Other positions with the Comptroller included Associate Deputy Comptroller for Audit Division. Responsible for the Tax Audit Operations which included 19 Field Audit Offices and 2 Regional Processing Centers. Offices are located in all major Texas cities with out-of-state offices located in New York, Los Angeles, Chicago, and Tulsa. The Audit Division is staffed with over 700 employees of which 525 are auditors.

Also served as Director of Property Tax Division from June 1994 until February 1995.

Texas Natural Resource Conservation Commission (TNRCC)
February 19, 1995 to Present

Executive Assistant to the Executive Director of the TNRCC, February 1995 to April 1995.

Deputy Director, Office of Compliance & Enforcement (formerly Office of Regulatory Services) beginning April 1995. The Office of Compliance & Enforcement is responsible for management of Field Operations Division, Compliance Support Division, and Enforcement Division. The Field Operations Division consists of 15 regional offices and a laboratory in Houston. Regional offices are responsible for conducting compliance monitoring in air, water, and waste programs; responding to citizen complaints; responding to spills and accidental releases; and providing public outreach and technical assistance. The Compliance Support Division is responsible for providing educational outreach to the regulated community, and managing occupational certification and local government assistance programs. The Enforcement Division was created on September 1, 1995 through the consolidation of separate enforcement functions in the water, waste and air programs of the agency. The Enforcement Division is responsible for assuring clear, consistent and fair application of environmental laws.

NOTES

Water Quality

"Crimson Tide"

Water Quality at TNRCC

Bob Sweeney

Robert D. Sweeney, Jr. ("Bob") is the Senior Attorney for water quality in the Legal Division of TNRCC. Bob is a 1985 graduate of Case Western Reserve University Law School in Cleveland, Ohio, magna cum laude and Order of the Coif, and was Research Editor of the Law Review. He is a 1981 graduate of Wesleyan University in Middletown, Connecticut.

From 1985 to 1990, Bob practiced in Washington, D.C., first with Jones, Day, Reavis & Pogue and later with McKenna & Cuneo, and focused on federal court litigation, products liability, government contracts, and environmental law. For family reasons, Bob relocated to San Antonio in 1990, and was general counsel to a manufacturing company there from 1990-1992. Bob joined the Legal Division of TNRCC in 1993. He is a member of the bars of the U.S. Supreme Court, the U.S. Fourth Circuit Court of Appeals, Texas, Ohio, and the District of Columbia. He has published articles on environmental law, criminal law, and tax law.

WATER QUALITY AT TNRCC

THE VIEWS IN THIS PAPER ARE THOSE OF THE AUTHOR AND NOT NECESSARILY THOSE OF THE TNRCC, ITS COMMISSIONERS, OR THE EXECUTIVE DIRECTOR.

Change, in personnel and regulations, is the constant in the recent history of water quality protection programs at TNRCC. Dean Robbins has left his position as Deputy Director for the Office of Water Resource Management, and Warren Davis left in May as the Director of the Agriculture and Watershed Management Division. In the past fourteen months, moreover, almost all of the TNRCC's water quality protection regulations have undergone substantial change or are in the process of being changed: Chapters 279 (certification of federal actions), 285 (on-site sewage), 307 (surface water quality standards), 310 (reclaimed water), 312 (sludge), 313 (Edwards Aquifer rules), 316 (new chapter implementing SB1017), 317 (design standards for municipal WWTP's), and 321 (CAFOs and several other new permit-by-rule subchapters).

I. TOPIC OF THIS PAPER

This paper addresses what TNRCC considers its "water quality" protection program, with particular emphasis on the parts of the program that are legally controversial at present. When we say "water quality" in the agency, we are generally talking about the pollution level of surface (and to a certain extent ground) waters. Drinking water protection programs and water allocation issues are handled by other areas of the agency.

The divisions within TNRCC that have "line" responsibility for protecting water quality are Agriculture and Watershed Management, Water Planning and Assessment, and Field Operations. The Legal Division supports the efforts of these divisions. I am leaving out any discussion of the role of the Litigation Support Division or the Enforcement Division.

Agriculture & Watershed Management and Water Planning and Assessment are in the Office of Water Resource Management. The Acting Deputy Director of OWRM as of this writing

is Sally Gutierrez. The Acting Division Director of A&WM is Tom Weber. The Division Director of WP&A is Randy Wilburn. Field Operations is in the Office of Compliance and Enforcement under Deputy Director Joe Vogel; John Young is the Division Director of Field Operations.

II. AGRICULTURE & WATERSHED MANAGEMENT

A. Agriculture.

The Agriculture Section of A&WM is headed by Darrell Williams. This section administers permitting and registration of CAFOs, that is, Confined Animal Feeding Operations. Statewide, CAFOs are changing from being regulated under 30 TAC ch. 321 subch. B to becoming largely regulated under 30 TAC ch. 321 subch. K. The subch. K rules were adopted in mid-1995, and have resulted in virtual elimination of contested case hearings for CAFOs by replacing the permitting process with a registration process. Contested cases now occur in those few instances where existing facilities choose to continue to be regulated under ch. 321 subch. B. Legal Division involvement with CAFOs has, accordingly, decreased overall.

TNRCC has been sued over these rules as a result of approval of registrations for several large-scale swine raising operations in the Texas Panhandle. Plaintiffs have filed on behalf of ACCORD Agriculture, a citizens group in that region. Plaintiffs claim that the "authorization-by-rule"[1] approach for CAFO operations is invalid because it denies

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[1] §26.040--Control of Certain Waste Discharges by Rule--provides that when ...requiring individual permits in unnecessarily burdensome both to the waste discharger and the commission, the commission may by rule regulate and set the requirements and conditions for the discharge of waste."

adjacent landowners a right to a contested case hearing under Texas Water Code §26.028[2]. ACCORD asserts that the rules are not authorized by §26.040 because "individual non-ministerial evaluations of individual applications" are conducted and the rules "unlawfully delegate to the Executive Director broad discretionary authority to grant or deny applications for CAFOs". The argument is that such approval can only be given by the Commission itself. ACCORD also complains that the new rules allow a CAFO applicant to have a contested case hearing if the Executive Director recommends denial but deny the same opportunity to neighboring landowners.

ACCORD alleges numerous procedural failures when the rules were adopted (no "reasoned justification", failure to respond to comments, "biased and secretive" procedures, etc.). They raise one additional substantive challenge -- that the new rules "authorize standard permits for air emissions" without requiring BACT, thus contravening §382.0518, the preconstruction permit requirement in the Clean Air Act.

The suits challenge individual swine farms applications for failure to comply with the new rules on two technical issues (lagoon size and BACT) and failure to afford the right to a contested case hearing. The claimed right to a contested case hearing is based not only on the Water Code provision but also on "vested property rights" of ACCORD members which allegedly will be adversely affected; ACCORD asserts that the 5th and 11th amendments to the U.S. Constitution require a contested case proceeding.

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[2] §26.028(a) provides that "...The commission, on the motion of a commissioner, or on the request of the executive director or any affected person, shall hold a public hearing on the application for a permit, permit amendment, or renewal of a permit."

The suits challenge the Right to Farm Act as unconstitutionally shielding CAFOs "permitted by the TNRCC from suit for nuisance and recovery of damages by ACCORD members". The suits argue that the "open courts" provision of the Texas Constitution prevents such shielding.

Instead of using the Property Rights Act to directly argue another avenue into a contested case hearing, ACCORD challenges the constitutionality of the Act. The argument is that TNRCC's interpretation -- that a right to a hearing is limited to a landowner whose property is the "subject of the governmental action"[3] -- renders the Act unconstitutional. The constitutionality argument is apparently that to give an applicant a "takings" hearing upon denial of an application but not one to an adjoining landowner who alleges adverse impact from the granting of the "permit" violates the "open courts" guarantee. The relief requested is to strike down the entire Act as unconstitutional, not to force TNRCC to grant ACCORD a contested case hearing. The suit appear to concede that TNRCC's interpretation of the act is correct.

If the court does not require a contested case hearing at TNRCC, ACCORD asks the court for a jury trial on whether the applications meet the substantive requirements of the new rules and whether the new rules, or the application of the new rules, constitutes a "taking" under the Property Rights Act.

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[3] §2007.0012(5)(B)(I) defines "taking" as a "governmental action" that "affects an owner's private real property that is the subject of the governmental action..." §2007.0012(a)provides that "A private real property owner may file a contested case with a state agency to determine whether a governmental action of the state agency results in a taking under this chapter." Under .22(b), the contested case must be filed within 180 days after the private real property owner knew "...that the governmental action restricted or limited the owner's right in the private real property."

B. Sludge.

The Sludge & Transporter Review Section of A&WM is headed by Paul Curtis. One of its primary responsibilities is review of applications for beneficial use site registration under 30 TAC ch. 312. These rules are promulgated under the authority of both the Water Code and the Health & Safety Code. The chapter 312 rules were revised in October 1995, and in their present form are closer to the EPA's 40 CFR Part 503 regulations for sludge than previous versions of TNRCC sludge rules.

Most sludge registrations are noncontroversial, but there have been several cases in the past year that were appealed to the Commission, including the Yarborough and City of Cameron applications. In the Yarborough case, which was handled under the rules that were in place prior to adoption of the current ch. 312, the Commission ordered that a contested case hearing be held on the registration. The applicant elected to withdraw the application rather than go to hearing, but this case suggests that the Commissioners will exercise authority to order contested case hearings on registrations. The procedure for seeking reconsideration of Executive Director decisions on registrations also changed in October 1995; it is now based on Water Code §5.122.

C. Wastewater Discharge & Disposal Permitting.

The permitting section of Agriculture & Watershed Management, of which Patricia (Pat) Radloff is the acting head, drafts permits for municipal and industrial wastewater discharge and disposal. Dale White heads the municipal permits team.

1. Rule Changes

Several rulemaking matters are underway at present that may affect wastewater discharge permit holders and applicants. Back in June 1995, TNRCC

adopted its triennial revisions to the ch. 307 Surface Water Quality Standards. Water quality standards are subject to EPA approval, and if EPA disapproves, the state must revise its standards or EPA will promulgate standards for the state.

One aspect of the TNRCC changes that drew considerable interest was the lowering of the presumption of aquatic life use from "high" to "intermediate" in unclassified perennial streams in east and southeast Texas. East Texas cities strongly supported this change, while environmental and sportsmen's groups in that area opposed it. Both sides made their case to EPA. Ultimately, EPA disapproved the change. Rather than await EPA promulgation of revised water quality standards, TNRCC chose to pursue restoring the high-quality presumption. This proposal was published in the Texas Register about a month ago. At the same time, TNRCC has committed to doing additional receiving water assessments so that the actual conditions in these streams, rather than a presumption, will be the basis for permitting.

The Commission adopted at the July 10 Agenda emergency rules governing use of reclaimed water (30 TAC ch. 310), that is, treated municipal effluent. The emergency rules, which were also proposed to be adopted in permanent form, liberalize the use of treated effluent in place of potable water for landscaping, agriculture, and other appropriate uses. Emergency adoption stems from Commission concern over the statewide drought.

Also underway are revisions to 30 TAC ch. 317, which establishes design criteria for municipal wastewater treatment plants. As part of the project to rework the design specifications in ch. 317, Commission staff is considering revisions to

ch. 309, the rules for location of municipal WWTP's. In particular, staff is looking at the buffer zone rules in §309.13. No proposed rule has yet made it to the Commission Agenda, but staff is regularly meeting with interested persons outside the agency. A proposed rule is expected next year.

The Commission recently adopted four new permit-by-rule subchapters, 30 TAC ch. 321, subchs. J, L, M, N. These new subchapters streamline the current process by eliminating the need for a commission permit for specific wastewater discharge and waste handling activities. The affected industries are: ready mixed concrete plants and/or concrete products plants or associated facilities (subch. J); motor vehicle cleaning facilities (subch. L); petroleum bulk stations and terminals (such. M); and commercial livestock trailer cleaning facilities (subch. N).

For another industry, aquaculture, staff is re-examining the appropriate scope of a permit-by-rule. Considerable controversy surrounds coastal shrimp farms. At present, two applications are in hearing: Austwell Aqua Farm near Austwell in Aransas County, and St. Martin's Seafood Partnership near Palacios in Calhoun County. A third facility that was expected to be in hearing, Man Tai, withdrew its application -- apparently Man Tai plans to recirculate its water rather than discharge.

The growth of these coastal shrimp farms has drawn legislative attention. A Senate Interim Committee has been studying the issue. Senator Armbrister attended the Austwell hearing last month and spoke in opposition to that permit. Texas Parks & Wildlife is a party in both the Austwell and St. Martin's hearings,

and has been working with TNRCC staff in re-examining the aquaculture permit-by-rule proposal.

Parks & Wildlife has an important regulatory role of its own in the realm of exotic species and diseases. See, e.g., Parks & Wildife Code ch. 66. The large coastal farms usually raise pacific white shrimp, an exotic, which is the only shrimp species that has been proven to grow large enough in the Texas growing season. Many Texas shrimp farms were stricken last summer by a disease called "Taura Syndrome Virus" (TSV). This summer, only one facility (so far) is known to have the virus, and TP&W has quarantined it. I anticipate additional regulatory actions from TP&W in this area.

2. Significant Permit Issues.

a. "Speculative Permitting"

The Commission denied Billy Sylvester's application for a dairy permit earlier this year, consistent with the SOAH judge's Proposal for Decision ("PFD"). During the hearing, Mr. Sylvester stated that his intent in applying for a permit was to enhance the value of his property. He did not, however, intend to own or operate the proposed dairy himself. The Commission ruled that Mr. Sylvester would not be the "owner" of the facility within the meaning of 30 TAC §305.43.

This case will be remembered as the "speculative permitting" case, even though the Commission's decision rested on more narrow grounds. The Commission considered the issue of

"speculative permitting" in a work session subsequent to the Sylvester case. The conclusion that can be drawn is that different rules will govern this issue in different media.

b. Need and Regionalization

In the Dallas County WCID #6 case, staff advocated denial of the permit on the basis that the applicant should remain "tied in" to the City of Dallas facility. Staff's recommendation was based upon, inter alia, Water Code §26.0282. The PFD recommended that the permit be granted. Just prior to the scheduled agenda consideration of this case, the permit application was withdrawn, due to defeat of the WCID's board members at a May 4 election who favored the new plant. Had the Commission heard this case, there would have been an opportunity for guidance on need and regionalization. This case does exemplify how the political process, rather than the hearing process, can be effectively used to defeat an application.

The Commission denied the application of Lawrence Homan on May 4, 1996 on the need issue. Mr. Homan's intended service area had been taken by a nearby authority that had a CCN for this area. Accordingly, the possibility exists that a future case may turn on Water Code §26.0282 and the Commission's regionalization policy.

3. NPDES Delegation.

As of this writing, TNRCC had not submitted an application for NPDES delegation. It appears that there will be active opposition to NPDES delegation from certain Texas interests. A preview of the theories on which defeat of delegation will be pursued may perhaps be found in the petition filed with EPA (June 17, 1996) by the Environmental Defense Fund that requests EPA to withdraw delegation for TNRCC's UIC program (attached). The petition argues that TNRCC's UIC program is deficient for the following reasons:

- inadequate enforcement authority resulting from the passage of the new audit-privilege and taking laws;
- inadequate programs for public participation in enforcement;
- inadequate opportunities for public participation in the TNRCC permit decisions; and
- inadequate opportunities for judicial review of permit decisions.

It appears that these theories would apply equally to NPDES delegation. They are not specific to the UIC program. As the Petition acknowledges: "the deficiencies in the Texas UIC program are found in Texas programs under the Resource Conservation Recovery Act and the Clean Air Act."

III. FIELD OPERATIONS

A. Edwards Aquifer, Ch.313.

This program is administered by TNRCC's Austin and San Antonio regional offices. After extensive public comment, revised rules have been drafted and proposed (renumbered as ch. 213). The key features of the proposed revisions are:

- New or revised definitions for: regulated activity, aboveground and underground storage tank facilities, commencement of construction, geologic or manmade feature, sensitive feature, and site;

- Consolidation into one section requirements for filing and processing an Edwards Aquifer protection plan and how the plan will be processed by the agency. This section also prohibits the commencement of construction of all regulated activities until a plan has been approved by the Executive Director and provides that the term of approval will expire two years after the initial issuance unless construction has commenced;

- Consolidation into one section the description of activities that require an Edwards Aquifer protection plan, contents of various plans, notification and inspection requirements, and exemptions from submitting a plan. Different plans are required based upon the type of activity being regulated. A water pollution abatement plan (WPAP) is required for all regulated activities on the recharge zone not covered by any other plan. An organized sewage collection system plan (OSCSP) is required for repair, replacement, or construction of existing or new systems on the recharge zone. An underground storage tank facility plan (USTFP) is required for the construction, repair, or replacement of an underground storage tank system

on the recharge or transition zone. An aboveground storage tank facility plan (ASTFP) is required for the construction, repair, or replacement of an aboveground storage tank system on the recharge or transition zone;

- Any new UST system that is within 150 feet of a domestic, industrial, irrigation, or public water supply well or other sensitive feature will require tertiary containment;

- New temporary AST facilities will be constructed within a controlled drainage area that directs any spill to a collection point for recovery. The controlled drainage area will be sized to capture one and one-half (1½) times the storage capacity of the facility and will be constructed of a material impervious to the substance(s) being stored. Any spill from a storage tank facility will be required to be removed from the controlled drainage area for disposal within twenty-four (24) hours. A description of measures that will be taken to contain any spill of hydrocarbons or hazardous substances from temporary storage of 250 gallons or more will be required. Any new temporary AST system will be required to be located a minimum horizontal distance of 150 feet from any domestic, industrial, irrigation, public water supply well, or other sensitive feature;

- Provision for exemptions from the requirements of submitting an ASTFP for equipment used to transmit electricity. The proposed rules would decrease the exemption from submitting an ASTFP for permanent AST facilities with a cumulative storage capacity of less than 1000 gallons to 500 gallons;

- Clarification that the installation of natural gas, telephone or electric lines, water lines, or other such utility lines which are not designed to carry and will not carry pollutants, stormwater runoff, or sewage effluent are exempt from the Edwards Aquifer protection plan submittal requirements. However, the construction of these facilities on the recharge zone would be a regulated activity requiring the installation and maintenance of appropriate temporary erosion and sedimentation controls;

- Prohibition of the construction of new municipal solid waste landfill facilities required to meet and comply with Type I standards under 30 TAC §330.41 (b), (c), and (d), located on either the recharge or transition zone.

B. Senate Bill 1017 (Water Code §26.179) Implementation--New 30 TAC Ch. 316.

The 74th Legislature vested in TNRCC authority to approve water quality protection plans in Austin's extraterritorial jurisdiction (ETJ). Rules implementing this statute were proposed April 4, 1996 (Tex. Nat. Res. Cons. Comm., 21 Tex. Reg. 3779 (1996) (prop. Rules to be codified at 30 TAC §§216.1-216.11). This program, by statute, is administered by the Austin regional office of TNRCC. Water Code §26.179(g).

C. On-Site Sewage Disposal, 30 TAC Ch. 285.

Regulation of septic tanks and other systems for on-site disposal of domestic sewage with less than 5000 gallons per day capacity is also directed by the TNRCC's Field Operations Division. In some jurisdictions, a local governmental entity (usually a city, county, or river authority) has become an authorized agent of the TNRCC for administration of this program, pursuant to Health & Safety Code ch. 366. The delegated entity must

enforce standards equivalent to or stricter than ch. 366 and 30 TAC ch. 285. In areas of the state where there is no authorized agent, TNRCC regional offices manage the program.

TNRCC recently proposed extensive revisions to the rules in 30 TAC ch. 285 as follows:

- Eliminate the duplication of provisions in ch. 285 and ch. 317 (Design Criteria for Sewerage Systems);

- Update the technical standards and criteria to reflect the changes in the On-Site Sewage Facilities (OSSF) industry since the existing rules were developed;

- Improve the site evaluation process and criteria to assure the proper OSSFs are being installed;

- Implement the provisions of Senate Bill (SB) 1042, passed during the 73rd Legislative Session (1993), which allows the Commission to establish a certification program for designated representatives and to pursue civil and administrative penalties against persons who violate the provisions of ch. 366 of the Health and Safety Code or the commission rules;

- Clarify agency operating procedures;

- Better define the agency's relationship with authorized agents; and

- Establish better training, certification, and educational requirements for persons who install, inspect, and administer OSSFs.

The comment period for these rules expires August 12, 1996.

Robert D. Sweeney, Jr.

WATER QUALITY AT TNRCC

Attachment

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June 17, 1996

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By Certified Mail

and

Ms. Jane Saginaw
Regional Administrator, Region VI
Environmental Protection Agency
1445 Ross Ave.
Dallas, Texas 75202-2733

By Certified Mail

Re: Petition for Partial Withdrawal of Program Approval for Texas UIC Program

Dear Administrators Browner and Saginaw:

Enclosed for filing is the petition of the Environmental Defense Fund seeking the withdrawal of EPA's approval of the Underground Injection Control (UIC) Programs of the Texas Natural Resource Conservation Commission (TNRCC) under the Safe Drinking Water Act.[1] Due to the changes made by the Texas Legislature in 1995 to weaken environmental and public health laws and due to the interpretations made by TNRCC to implement those changes, the TNRCC UIC program no longer meets the minimum standards of the Safe Drinking Water Act for "primacy" - primary enforcement and permitting authority. Moreover, these changes in State laws and

[1]EDF is not seeking withdrawal of approval of the Class 2 Well programs administered by the Railroad Commission of Texas.

programs. In essence, EPA has already determined that the parallel limitation in the Texas UIC programs disqualify Texas UIC programs under EPA rules. Since there is no real legal or factual dispute, EPA should take immediate action to advise Texas that its UIC program no longer meets the minimum requirements.

EPA should notify Texas that it has 30 days to present its case against program withdrawal. After that 30 day period, EPA should initiate rulemaking or other formal action to withdraw the federal approval of the TNRCC UIC program. A public hearing should be held to allow for public comments, after which EPA should withdraw program approval pursuant to § 145.34(b)(3) of the Safe Drinking Water Act.

Immediate action is needed to avoid rewarding Texas for the delays it has already caused. Since the initial approval of the Texas UIC program, Texas has repeatedly violated EPA's requirements to report changes in the program. This is a continuing problem. Since 1995, Texas has failed to notify EPA of the new statutory and regulatory changes that create the most serious problems for primacy. Texans should not continue to suffer the risks of an inadequate program under these circumstances. EPA should treat violations by Texas of its "permit" to run the federal program the same as it would treat violations of a permit by a regulated industry.

We are aware that TNRCC cannot correct all of the deficiencies in the UIC program by itself. Legislative action is required. EDF would not, however, seek withdrawal of the

TNRCC rules prohibit consideration of comments by the final decision makers for the UIC permits that go through that the adjudicatory hearing process. Now with the limitations in laws enacted in 1995 on public participation in that adjudicatory hearing process, there are often no opportunities for public participation in permit decisions under the UIC program.

Inadequate Opportunities for Judicial Review of Permit Decisions: The general test in Texas law for standing to seek judicial review of a permit decision is significantly more restrictive than that allowed under federal law. EPA has been advised of this in the past by the Texas Attorney General. In the past, however, Texas has argued that there is an exception to the general standing test that allows judicial review of TNRCC permit decision by the same people who could appeal under federal law. The laws passed in 1995 by the Texas Legislature, as interpreted by TNRCC, eliminate any such exception, leaving judicial review limited to those who can meet the stricter Texas test of standing. TNRCC's interpretation often eliminates any possibility of judicial review except by the applicant. EPA has already rejected such limitations on judicial review in other states.

EDF petitions EPA to act quickly based on these clear deficiencies in the Texas UIC program.

There are a number of other deficiencies and potential problems with the TNRCC UIC program. Nevertheless, EDF is not now seeking withdrawal of the UIC program approval based on these additional problems. The problems identified above are more than sufficient for EPA to initiate rulemaking for withdrawal of Texas' primacy. Thus, these additional deficiencies are not identified in the attached petition.

EDF supports the Congressional goal of allowing states to implement all federal environmental programs. States, however, must have adequate laws to protect the public health and the environment. The legal basis for TNRCC's UIC program is no longer adequate to meet EPA's minimum requirements.

continues to violate the requirements of the SDWA for adequate state programs. In addition, EPA has failed to complete its non-discretionary duties to act when it has determined that a state UIC program no longer meets the minimum standards for program approval.

Should you need any additional information from EDF regarding this letter or wish to pursue any discussion on these matters please let me know.

Sincerely,

Richard Lowerre

XC: Ms. Janet Reno, U.S. Attorney General
The Honorable George Bush, Governor of Texas
The Honorable Dan Morales, Attorney General of Texas
Mr. Barry McBee, Chairman, TNRCC
Mr. Dan Pearson, Executive Director, TNRCC

2. Congress enacted a statutory framework in which states could seek to have the primary enforcement responsibility for the UIC program, and Congress directed EPA to promulgate rules establishing the "minimum requirements" for state programs (42 U.S.C. § 300h (a)&(b)). EPA promulgated such rules at 40 CFR § 145. Texas was identified by EPA as the state with the highest need of any state for a UIC program. (43 Fed. Reg. 43420-1, September 25, 1978.) Texas remains the leading state in the nation for risks of contamination of ground and surface waters from the use of injection wells.

3. In 1981, the State of Texas applied for approval of its UIC program for Class I, III, IV and V injection wells. Pursuant to EPA rules, the Texas application includes a description of the Texas program, a certification from the Texas Attorney General that the Texas program adequately meets the minimum requirements of federal law, and a "Memorandum of Agreement," (MOA).

4. EPA approved the Texas UIC program for Class I, III, IV and V wells in 1982. (40 CFR § 147.2200, 47 Fed. Reg. 618, January 6, 1982.) That program is currently administered by the Texas Natural Resource Conservation Commission (TNRCC). With the approval of a state program, EPA is directed by the SDWA to provide federal funds to assist the state with the cost of implementation of the UIC program. (42 U.S.C. § 300j-2.)

5. In exchange for program approval and federal funding, the State of Texas made certain commitments to EPA in

II. LEGAL BASES FOR PETITION

7. This Petition is filed pursuant to the 42 U.S.C. § 300h-1 (b) (3) authorizing EPA to withdrawal approval of a state program.

8. This Petition is also filed as notice of EDF's intent to sue 1) the State of Texas pursuant to 42 U.S.C. § 300j-8(a)(1) for violations by the State of Texas described in Sections V through X below and 2) the Administrator of EPA pursuant to 42 U.S.C. § 300j-8(a)(2) for failure of the Administrator to perform certain non-discretionary duties as described in Section XI below.

III. INTERESTS OF EDF

9. EDF is a non-profit corporation, which seeks to combine science, economics and law to solve environmental problems. EDF is incorporated in New York and has offices in a number of States, including Texas. EDF's National Headquarters is located at 257 Park Avenue South, New York, NY 10010. EDF's Texas Office is located at 44 East Ave. Suite 304, Austin, Texas 78701.

10. Prior to the passage of the SDWA, EDF took an active role in the national debate on the need for this law. Since the passage of the SDWA, EDF has continued its activities and sought to assist in the development of regulations to protect sources of drinking water, including underground sources.

11. EDF has over 300,000 members nationally and over 11,000 members in Texas. EDF's members in Texas will be

14. As part of the requirements for approval of a state UIC program, the state must enter into a "Memorandum of Agreement" (MOA) which includes, among other commitments, an agreement by the state to specific reporting to EPA on any proposed changes in the State program. (40 CFR § 145.25(b)(3).)

15. The MOA between the State of Texas and EPA provides:

> The [Texas agency] shall within 30 days inform EPA of any proposed or pending modification to laws, regulations, rules or guidelines and any judicial decisions or administrative actions which might affect the state program and the [agency's] authority to administer the program.

Texas has repeatedly violated this agreement and the underlying reporting requirements of the Federal law and EPA regulations.

16. In the Spring of 1995, a number of bills were introduced in the Texas Legislature that would have significantly undermined the health and environmental protection of the TNRCC UIC program. In violation of EPA's reporting rule and TNRCC commitments in the MOA, TNRCC did not keep EPA informed of these bills. To EDF's knowledge, TNRCC has never complied with the reporting requirements for these bills.

17. By May 1995, a number of bills had passed the Texas Legislature with effective dates on or before September 1, 1995. Among the laws enacted were:

> a. House Bill 2473, which establishes a broad immunity from prosecution for certain violations of environmental and health laws administered by TNRCC. This law limits the ability of TNRCC to assess or seek civil or criminal penalties for violations of the injection well laws and UIC program of the TNRCC. The law also interferes with the public's right to know about contamination and the affected person's right to

19. TNRCC has issued guidelines to implement HB 2473, SB 1660 and a number of other laws passed in 1995. In violation of EPA rules and TNRCC's commitments in the MOA, TNRCC has not informed to EPA of the proposal or adoption of those guidelines. EPA was not given the opportunity to comment on the guidelines. TNRCC has still not informed EPA fully of these changes.

VI. TNRCC'S UIC PROGRAM IN NOT IN COMPLIANCE WITH MINIMUM REQUIREMENTS FOR ENFORCEMENT AUTHORITY: THE TEXAS AUDIT-PRIVILEGE LAW

20. EPA rules establish the minimum requirements for compliance and enforcement authority of qualifying state programs. (40 CFR §§ 145.12 and 145.13 (a)-(c)). These rules require that a state have the authority:

> 1. to restrain immediately and effectively any person ... for engaging in <u>any</u> unauthorized activity which is endangering or causing damage to public health or environment;
>
> 2. to sue in courts ... to enjoin <u>any</u> threatened or continuing violation ....
>
> 4. to assess or sue to recover in court civil penalties and to seek criminal remedies, including fines as follows:
>
> > (i) for all wells except Class II wells, civil penalties <u>shall</u> be recoverable for <u>any</u> program violation in at least the amount of $2500 <u>per day</u> ...
> >
> > (ii) criminal fines <u>shall</u> be recoverable in at least the amount of $5000 <u>per day</u> against <u>any</u> person who willfully violates <u>any</u> program requirement ....[1]

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[1] EPA rules also require that a state have the authority and resources to investigate and enforce against violations. (See 40 CFR § 145.12.) As will be discussed in Sections VI and VII, there are serious limitations on TNRCC's ability to enforce its programs. One recently, self-imposed limitation is TNRCC new policy against unannounced inspections.

enforcement requirements. EPA applied this policy in its review of the Idaho Title V program and found that

> [The Idaho law] which grants a source immunity from civil or criminal prosecution for violations discovered during an environmental audit ... does impermissibly interfere with Idaho's enforcement requirements ... Part 70 requires a state to have authority to recover penalties for each day of violation. By granting a source absolute immunity for certain voluntarily disclosed violations, the state has restricted its authority ....

22. The Texas Audit Privilege Law, House Bill 2473, enacted by the Texas Legislature in 1995, likewise restricts TNRCC enforcement authority. The Texas law violates virtually every aspect of EPA's policies and past determinations that identify privilege and immunity provisions that are inconsistent with the EPA approval of state program. The Texas law bars TNRCC from gaining access to significant information on violation. The law even creates sanctions to punish whistle blowers, both private citizens and public employees. EPA has determined that a state cannot comply with EPA's minimum enforcement and compliance requirements for approval of federal programs, if the state has the type of broad privilege and immunity provisions found in the Texas law.

VII. TNRCC'S UIC PROGRAM IS NOT IN COMPLIANCE WITH MINIMUM REQUIREMENTS FOR ENFORCEMENT AUTHORITY: THE TEXAS TAKINGS LAW

23. In addition to the requirements for state enforcement programs set forth in paragraph 21 above, EPA's rules require that the burden of proof for enforcement by a state be no greater than the burden on EPA under the SDWA. (40 CFR § 145.13(b)(2).) In brief, a state enforcement program must not

27. Thus, the statute often presents an agency with two bad choices when confronted with takings claims. This dilemma will be faced by TNRCC when it tries to enforce its the UIC standards. The state agency can enforce the law to protect drinking water and risk having to pay for a takings claim out of its budget. The alternative is to withdraw the enforcement action. Since the costs of defending a taking challenge necessarily would come from its existing budget, TNRCC's limited enforcement resources would be put at risk. Inspectors' jobs might have to be eliminated. Thus, the easier option for an agency may be to drop or reduce the enforcement action. Several sponsors of the Takings bill actually expressly stated that their goal was to have a chilling effect on government action. The law is having that effect at TNRCC.

VIII. TNRCC'S UIC PROGRAM IS NOT IN COMPLIANCE WITH EPA'S REQUIREMENTS FOR PUBLIC PARTICIPATION IN THE STATE'S ENFORCEMENT ACTIVITIES

28. EPA rules establish the minimum requirements for state programs for public participation in state enforcement processes. (40 CFR § 145.13(d).) These rules require:

> (d) Any State administering a program shall provide for public participation in the State enforcement process by providing either:
>
> > (1) Authority which allows intervention as a right in any civil or administrative action ... by any citizen having an interest which is or may be adversely affected or;
> >
> > (2) Assurance that the State agency or enforcement authority will
> >
> > > i. investigate and provide written responses to all citizen complaints...

opportunity to seek intervention in enforcement actions at the agency or in court.

c. Texas has no statutory or regulatory requirements or agency procedures to assure that neither TNRCC nor the Attorney General will oppose intervention by affected persons in UIC enforcement actions at the agency or in court. Moreover, TNRCC does oppose intervention of affected citizens in administrative enforcement actions.

d. Texas has no statutory or regulatory requirements or agency procedures to provide the any members of public with the opportunity to comment on settlements of agency enforcement actions or enforcement actions in court. Neither TNRCC nor the Attorney General provides effective public notice of or an opportunity to comment on settlements of UIC enforcement actions at the agency or in court. To the extent TNRCC or the Attorney General provide any "notice," it is only in the Texas Register, and this publication does not provide the type of notice required in EPA rules to advise the public of proposed state action.

32. Moreover, with the passage of SB 1546 in 1995, the opportunities for public participation have been further reduced. Under TNRCC's interpretation of the law, public participation and any opportunity to intervene in agency adjudicatory hearings on enforcement matters (if any) will now be limited to those individuals and organizations that can prove a special injury under the strict Texas standing test.

IX. TNRCC'S UIC PROGRAM IS NOT IN COMPLIANCE WITH EPA'S REQUIREMENTS FOR PUBLIC PARTICIPATION IN PERMIT DECISIONS

33. EPA rules establish the minimum requirements for public participation in permit proceedings for state programs. EPA rules at 40 CFR § 145.11 incorporate the requirements for public participation common to a number of EPA programs. (40 CFR §§ 124.1 - 124.17) At a minimum, these rules require public participation through a public notice and comment process. The

37. The report attached as Exhibit 3 to this Petition provides numerous examples of the problems with the TNRCC hearing process. It explains how the adjudicatory hearing process is no longer broadly available. In brief, because of the changes that have resulted from the passage of SB 1546, the Texas UIC program can no longer meet the minimum requirements of EPA rules under the SDWA.

38. Unless TNRCC were to return to the historic scope of the State's adjudicatory hearing process, an adequate notice and comment process would be required. TNRCC has no real notice and comment process for the UIC program. As discussed in Section X, the limitations on who can seek judicial review of a permit decision after a notice and comment process in Texas, currently prohibits Texas from creating an adequate notice and comment process.

39. In addition to the problems discussed above, such as the legal prohibition on consideration of comments when an adjudicatory hearing is held, the current TNRCC process has many other deficiencies including:

a. Inadequate Notices: Many of the types of TNRCC notices used for draft UIC permits do not advise the public that an effective public comment process is available. (See Exhibit 4 for several examples of recent notices under the TNRCC UIC program.) In a notice like that used for Sterling Chemicals, TNRCC does advise the public that it can comment. However the notices also say very clearly that "The Executive Director will issue the permits [as drafted] unless a written hearing request is filed...." The notice then adds significant requirements for requesting a hearing, including proof of being a person "adversely affected in a way not common to the general public."

X. TNRCC'S UIC PROGRAM IS NOT IN COMPLIANCE WITH EPA'S REQUIREMENTS FOR JUDICIAL REVIEW OF PERMIT DECISIONS

40. EPA requires state programs to provide for effective public participation involving permits. In both EPA rules and judicial decisions on EPA's position, the requirement for public participation has been tied to the right for judicial review.[2] In brief, to assure that an agency cannot simply ignore comments, judicial review must be provided. State programs must allow judicial review of state decisions on permits by persons or organizations that would qualify to appeal the permit to federal courts, if EPA were the permitting agency.

41. The general test for standing under Texas courts is much more limited than in federal courts under Article III of the U.S. Constitution. In effect, in Texas a person must prove a special injury, one not common to the general public. This is considerably narrower than the standing test under Article VIII of the U.S. Constitution. The Attorney General of Texas has, in fact, advised EPA of the differences in Texas and federal law and the implications of the differences for EPA approval of Texas programs. (See, for example, Exhibit 6, excerpts from the opinion of the Attorney General of Texas submitted in 1993 to EPA with the TNRCC application for approval of its Title V program under the Clean Air Act.)

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[2]See, the discussion in the preamble to EPA's new rule on the judicial review requirements for state NPDES programs, 40 CFR 123.30 at 61 Fed. Reg. 20971, May 8 1996. See, also Virginia v. Browner, 80 F. 3d 869, 4th Cir. 1996.

which, as interpreted by TNRCC, prohibits TNRCC from construing "liberally" "the right to participate in administrative hearings." TNRCC interprets SB 1546 to limit standing in adjudicatory hearings to those people and organizations that meet the traditional and limited Texas standing test of special injury. In some cases, Texas law limits who could appeal a TNRCC permit decision to the applicant. Thus, any exception to the general Texas standing test for judicial review of permits that may have existed before the passage of SB 1546 has now been eliminated under TNRCC's interpretation of the law. The TNRCC UIC program no longer complies with EPA requirements for state programs for any permit that involved an adjudicatory hearing.

45. Moreover, the process for judicial review of the public comment process has the same legal deficiency. Judicial review of a UIC permit by an interested person who submits comments must be taken under the general provision for appeal of a TNRCC decision, Section 5.351 of the TEXAS WATER CODE. That section states that an "affected person" may appeal any final TNRCC decisions. Even before the Texas Legislature has defined "affected person" very narrowly in SB 1546, Texas court required a showing of "special injury" for standing to appeal any type of TNRCC decision under Section 5.351. In fact, before the passage of SB 1546, the Texas Attorney General took that position in appeals of TNRCC decision on rules. With the passage of SB 1546, there is little doubt that how the Texas courts and the Texas Attorney General will view standing to appeal a TNRCC permit

49. With regard to Sections IX and X above, EPA has been aware of the new problems created by SB 1546 since at least January 11, 1996, when EDF advised the agency of the statutory changes and effects. EPA, however, had already determined that limitations like those in Texas keep a state program from being consistent with EPA rules. For example, EPA rejected the Virginia application for approval of its Title V program under the Clean Air Act because of similar legal limitations.

XII. CONCLUSION

50. WHEREFORE: EDF petitions EPA to take immediate action to withdraw the approval of the TNRCC UIC program and to take such other actions as necessary and appropriate for the violations of compliance with the SDWA by the State of Texas.

Respectfully submitted,

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WATER QUALITY AT TNRCC

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June 17, 1996

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By Certified Mail

and

Ms. Jane Saginaw
Regional Administrator, Region VI
Environmental Protection Agency
1445 Ross Ave.
Dallas, Texas 75202-2733

By Certified Mail

Re: Petition for Partial Withdrawal of Program Approval for Texas UIC Program

Dear Administrators Browner and Saginaw:

Enclosed for filing is the petition of the Environmental Defense Fund seeking the withdrawal of EPA's approval of the Underground Injection Control (UIC) Programs of the Texas Natural Resource Conservation Commission (TNRCC) under the Safe Drinking Water Act.[1] Due to the changes made by the Texas Legislature in 1995 to weaken environmental and public health laws and due to the interpretations made by TNRCC to implement those changes, the TNRCC UIC program no longer meets the minimum standards of the Safe Drinking Water Act for "primacy" - primary enforcement and permitting authority. Moreover, these changes in State laws and

[1]EDF is not seeking withdrawal of approval of the Class 2 Well programs administered by the Railroad Commission of Texas.

regulations are contrary to the covenant that the State of Texas made with EPA when seeking primacy to protect the drinking waters of the State.

As was discussed at our meeting on January 11, 1996 with Administrator Saginaw and her staff in Dallas, we would prefer that programs be administered by the State. The new laws (and rules promulgated by TNRCC), however, reduce dramatically the authority and the ability of the State to protect the drinking water supplies of the State. The changes also create new barriers to the public's ability to assist in enforcement of Texas' environmental and public health laws, including those intended to protect drinking water supplies.

At Administrator Saginaw's urging, we have sought to work with TNRCC to find ways to eliminate or reduce these barriers through TNRCC' action. We have submitted specific recommendations to cure the problems. TNRCC has not been willing or able to initiate the actions needed to do so. Given the serious risks that the changes to Texas law create for the health and welfare of the citizens of Texas, EDF cannot wait any longer for TNRCC to act.

The minimum requirements for UIC programs are similar - and in many cases identical - to the requirements for approval under other federal environmental programs. EPA has identified limitations in other programs in Texas and in other states associated with these minimum requirements that disqualify

programs. In essence, EPA has already determined that the parallel limitation in the Texas UIC programs disqualify Texas UIC programs under EPA rules. Since there is no real legal or factual dispute, EPA should take immediate action to advise Texas that its UIC program no longer meets the minimum requirements.

EPA should notify Texas that it has 30 days to present its case against program withdrawal. After that 30 day period, EPA should initiate rulemaking or other formal action to withdraw the federal approval of the TNRCC UIC program. A public hearing should be held to allow for public comments, after which EPA should withdraw program approval pursuant to § 145.34(b)(3) of the Safe Drinking Water Act.

Immediate action is needed to avoid rewarding Texas for the delays it has already caused. Since the initial approval of the Texas UIC program, Texas has repeatedly violated EPA's requirements to report changes in the program. This is a continuing problem. Since 1995, Texas has failed to notify EPA of the new statutory and regulatory changes that create the most serious problems for primacy. Texans should not continue to suffer the risks of an inadequate program under these circumstances. EPA should treat violations by Texas of its "permit" to run the federal program the same as it would treat violations of a permit by a regulated industry.

We are aware that TNRCC cannot correct all of the deficiencies in the UIC program by itself. Legislative action is required. EDF would not, however, seek withdrawal of the

approval of the TNRCC program at this time if TNRCC had corrected the deficiencies that it could correct without Legislative action and had promised to seek the needed changes in Texas law in 1997. TNRCC's refusal to do either is evidence of the need for EPA action to initiate withdrawal of the program.

As EPA is aware, the TNRCC UIC program is now deficient in a number of ways, including:

Inadequate Enforcement Authority Resulting from the passage of the New Audit-Privilege and Taking laws: In its past policy statements and its recent memorandum regarding state Title V programs, EPA has determined what type of audit-privilege laws restrict state enforcement programs such that states cannot qualify for program approval. The Texas audit-privilege law not only disqualifies the Texas UIC program, but it also may be the most restrictive such law in the nation. Added to the audit-privilege law are several other revisions to the Texas UIC program that unreasonably restrict TNRCC enforcement, of which the best example is the new "Takings" law.

Inadequate Programs for Public Participation in Enforcement: EPA has also already determined that Texas laws do not provide adequate opportunities for public participation in Texas enforcement decisions at the agency or in court. This determination is stated in a letter from the Regional Counsel of EPA Region VI Office to the Office of the Texas Attorney General on May 5, 1993 regarding a past Texas application for EPA approval of the NPDES program for TNRCC. Since the requirements of the injection well program are the same as those for the NPDES program, there is no question that the Texas UIC program is also seriously out of compliance with EPA's requirements. TNRCC has been notified of the deficiency since at least 1993. The Texas Legislature has not corrected the problems. In fact, the new limits of public participation enacted by the Texas Legislature in 1995 exacerbate the problems.

Inadequate Opportunities for Public Participation in the TNRCC Permit Decisions: Even before the changes in Texas laws and TNRCC rules became effective in September of 1995, EPA was aware that Texas was not meeting the minimum requirements for effective public participation on draft UIC permits. Texas has traditionally relied on an adjudicatory hearing process for most public participation. In fact,

TNRCC rules prohibit consideration of comments by the final decision makers for the UIC permits that go through that the adjudicatory hearing process. Now with the limitations in laws enacted in 1995 on public participation in that adjudicatory hearing process, there are often no opportunities for public participation in permit decisions under the UIC program.

Inadequate Opportunities for Judicial Review of Permit Decisions: The general test in Texas law for standing to seek judicial review of a permit decision is significantly more restrictive than that allowed under federal law. EPA has been advised of this in the past by the Texas Attorney General. In the past, however, Texas has argued that there is an exception to the general standing test that allows judicial review of TNRCC permit decision by the same people who could appeal under federal law. The laws passed in 1995 by the Texas Legislature, as interpreted by TNRCC, eliminate any such exception, leaving judicial review limited to those who can meet the stricter Texas test of standing. TNRCC's interpretation often eliminates any possibility of judicial review except by the applicant. EPA has already rejected such limitations on judicial review in other states.

EDF petitions EPA to act quickly based on these clear deficiencies in the Texas UIC program.

There are a number of other deficiencies and potential problems with the TNRCC UIC program. Nevertheless, EDF is not now seeking withdrawal of the UIC program approval based on these additional problems. The problems identified above are more than sufficient for EPA to initiate rulemaking for withdrawal of Texas' primacy. Thus, these additional deficiencies are not identified in the attached petition.

EDF supports the Congressional goal of allowing states to implement all federal environmental programs. States, however, must have adequate laws to protect the public health and the environment. The legal basis for TNRCC's UIC program is no longer adequate to meet EPA's minimum requirements.

Moreover, the deficiencies in the Texas UIC program are found in Texas programs under the Resource Conservation and Recovery Act and the Clean Air Act. EDF is now seeking withdrawal of only the UIC program approval. EDF has set its priority on the UIC program because of EDF's long-term interests in the adequate protection of the nations drinking water supplies. In additions, the Texas UIC program deserves priority, since Texas has more injection wells than any other state, possibly 20% of all injection wells in the country. Texas serves as the disposal site for much of the nations hazardous wastes since Texas has two-thirds of all commercial hazardous waste injections wells in the nation. Texas, more than any other state, needs to be held to the full requirements of the Safe Drinking Water Act.

If the deficiencies in the other Texas programs that have been approved by EPA, are not corrected, EDF may petition for withdrawal of the federal approvals for the other environmental programs in Texas. EPA believe that the decisions EPA makes on the Texas UIC program will affect all other EPA delegated programs in Texas.

Please accept this letter and attached Petition as EDF's notice of its intent to sue under Section 1449 of the Safe Drinking Water Act and EPA rules at 40 CFR Part 135, Subpart B. Texas has violated and continues to violate EPA reporting rules and the Memorandum of Agreement between EPA and the State of Texas on TNRCC's UIC program. Texas also has violated and

continues to violate the requirements of the SDWA for adequate state programs. In addition, EPA has failed to complete its non-discretionary duties to act when it has determined that a state UIC program no longer meets the minimum standards for program approval.

Should you need any additional information from EDF regarding this letter or wish to pursue any discussion on these matters please let me know.

Sincerely,

Richard Lowerre

XC: Ms. Janet Reno, U.S. Attorney General
The Honorable George Bush, Governor of Texas
The Honorable Dan Morales, Attorney General of Texas
Mr. Barry McBee, Chairman, TNRCC
Mr. Dan Pearson, Executive Director, TNRCC

PETITION
OF
THE ENVIRONMENTAL DEFENSE FUND

TO
THE U.S. ENVIRONMENTAL PROTECTION AGENCY

FOR PARTIAL WITHDRAWAL
OF APPROVAL OF THE UIC PROGRAM
OF THE STATE OF TEXAS

The ENVIRONMENTAL DEFENSE FUND (EDF) petitions the U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA) to initiate formal proceedings regarding 1) the violations by the State of Texas of the Safe Drinking Water Act and rules of EPA and 2) the failure of the State of Texas to maintain its Underground Injection Control (UIC) program for Class I, Class III, Class IV and Class V injection wells in compliance with the minimum standards of Federal law. EDF also notifies EPA of its intent to sue for the violations by the State of Texas and the failure of EPA to carry out its non-discretionary duty to withdraw approval of said UIC program. In support of this Petition, EDF would respectfully show the following:

I. INTRODUCTION

1. In 1974 Congress enacted the Safe Drinking Water Act (SDWA) (42 U.S.C. § 300f et. seq.) to protect the nations public drinking water supplies. Included in the law are provisions for "underground injection control" (UIC) for the regulation of injection wells used for the "subsurface emplacement of fluids" including hazardous wastes (42 U.S.C. § 300h et. seq.). The goal of the federal UIC program is to protect sources of drinking water.

2. Congress enacted a statutory framework in which states could seek to have the primary enforcement responsibility for the UIC program, and Congress directed EPA to promulgate rules establishing the "minimum requirements" for state programs (42 U.S.C. § 300h (a)&(b)). EPA promulgated such rules at 40 CFR § 145. Texas was identified by EPA as the state with the highest need of any state for a UIC program. (43 Fed. Reg. 43420-1, September 25, 1978.) Texas remains the leading state in the nation for risks of contamination of ground and surface waters from the use of injection wells.

3. In 1981, the State of Texas applied for approval of its UIC program for Class I, III, IV and V injection wells. Pursuant to EPA rules, the Texas application includes a description of the Texas program, a certification from the Texas Attorney General that the Texas program adequately meets the minimum requirements of federal law, and a "Memorandum of Agreement," (MOA).

4. EPA approved the Texas UIC program for Class I, III, IV and V wells in 1982. (40 CFR § 147.2200, 47 Fed. Reg. 618, January 6, 1982.) That program is currently administered by the Texas Natural Resource Conservation Commission (TNRCC). With the approval of a state program, EPA is directed by the SDWA to provide federal funds to assist the state with the cost of implementation of the UIC program. (42 U.S.C. § 300j-2.)

5. In exchange for program approval and federal funding, the State of Texas made certain commitments to EPA in

the MOA, including commitments 1) to maintain a UIC program that meets EPA's minimum standard and 2) to report to EPA any proposed or final changes to the relevant state laws and regulations. Since 1982, Texas has never submitted any request for revision to its approved program despite numerous significant changes in Texas law.

6. Because the recent changes to Texas law are so dramatic, the UIC program of the TNRCC clearly no longer meets the minimum requirements of federal law, including subsections (i) and (ii) of 42 U.S.C. § 300h-1(b)(1)(A). Texas does not have an adequate compliance and enforcement program and does not provide the required opportunities for public participation in State permit or enforcement decisions. As a result, EPA must withdraw its approval of TNRCC's UIC program. EPA is justified in taking immediate action to withdraw its approval because of the violations by the State of Texas of its commitments as described in Section V below and because of the risks to public health and the environment created by the deficiencies of the Texas program as described in Sections VI through X below.

II. LEGAL BASES FOR PETITION

7. This Petition is filed pursuant to the 42 U.S.C. § 300h-1 (b) (3) authorizing EPA to withdrawal approval of a state program.

8. This Petition is also filed as notice of EDF's intent to sue 1) the State of Texas pursuant to 42 U.S.C. § 300j-8(a)(1) for violations by the State of Texas described in Sections V through X below and 2) the Administrator of EPA pursuant to 42 U.S.C. § 300j-8(a)(2) for failure of the Administrator to perform certain non-discretionary duties as described in Section XI below.

III. INTERESTS OF EDF

9. EDF is a non-profit corporation, which seeks to combine science, economics and law to solve environmental problems. EDF is incorporated in New York and has offices in a number of States, including Texas. EDF's National Headquarters is located at 257 Park Avenue South, New York, NY 10010. EDF's Texas Office is located at 44 East Ave. Suite 304, Austin, Texas 78701.

10. Prior to the passage of the SDWA, EDF took an active role in the national debate on the need for this law. Since the passage of the SDWA, EDF has continued its activities and sought to assist in the development of regulations to protect sources of drinking water, including underground sources.

11. EDF has over 300,000 members nationally and over 11,000 members in Texas. EDF's members in Texas will be

adversely affected unless the UIC program in Texas is brought into compliance with federal standards.

IV. REQUESTED ACTION

12. EDF petitions EPA to initiate a proceeding to withdraw approval of the UIC program of the State of Texas for Class I, III, IV and V wells. EDF petitions EPA to act pursuant to 40 CFR § 145(b) to:

a. give notice immediately to the State of Texas by registered mail that the UIC program administered by the TNRCC is not in compliance with the Safe Drinking Water Act and rules of EPA for the reasons set forth in Sections V through X below,

b. allow the State of Texas 30 days to respond to the notice,

c. notify the public of EPA's determination of deficiencies in the Texas UIC program, and provide the public with the opportunity to identify additional deficiencies at public hearing on the withdrawal of the approval the TNRCC program, and

d. withdraw approval of the TNRCC UIC program unless the State of Texas corrects the deficiencies within the 90 day period established in EPA rules.

V. TEXAS HAS VIOLATED THE SDWA, RULES OF EPA AND ITS COMMITMENTS TO EPA

13. The SDWA at 42 U.S.C. § 300h-1(b)(1)(A)(ii) directs EPA to require states to report to EPA on their actions affecting UIC programs approved by EPA. By rule, at 40 CFR § 145.32(a), EPA established requirements for states to "keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures or priorities."

14. As part of the requirements for approval of a state UIC program, the state must enter into a "Memorandum of Agreement" (MOA) which includes, among other commitments, an agreement by the state to specific reporting to EPA on any proposed changes in the State program. (40 CFR § 145.25(b)(3).)

15. The MOA between the State of Texas and EPA provides:

> The [Texas agency] shall within 30 days inform EPA of any proposed or pending modification to laws, regulations, rules or guidelines and any judicial decisions or administrative actions which might affect the state program and the [agency's] authority to administer the program.

Texas has repeatedly violated this agreement and the underlying reporting requirements of the Federal law and EPA regulations.

16. In the Spring of 1995, a number of bills were introduced in the Texas Legislature that would have significantly undermined the health and environmental protection of the TNRCC UIC program. In violation of EPA's reporting rule and TNRCC commitments in the MOA, TNRCC did not keep EPA informed of these bills. To EDF's knowledge, TNRCC has never complied with the reporting requirements for these bills.

17. By May 1995, a number of bills had passed the Texas Legislature with effective dates on or before September 1, 1995. Among the laws enacted were:

> a. House Bill 2473, which establishes a broad immunity from prosecution for certain violations of environmental and health laws administered by TNRCC. This law limits the ability of TNRCC to assess or seek civil or criminal penalties for violations of the injection well laws and UIC program of the TNRCC. The law also interferes with the public's right to know about contamination and the affected person's right to

bring enforcement actions. As interpreted by TNRCC, the bill allows regulated entities to hold as secret much of the information that they have on their violations and related injury to the public health and the State's natural resources.

b. Senate Bill 1546, which limits public participation in the permit and enforcement decisions of TNRCC, including those related to the Texas UIC program.

and

c. Senate Bill 14, which establishes a new right to compensation by sources of pollution for government actions including enforcement actions which allegedly reduce the value of real property in whole or in part, temporarily or permanently, by 25%. While creating a new cause of action against the state, the Legislature did not appropriate any funds for state agencies to pay for the cost of defense of such actions. Thus, state agencies are very reluctant to take enforcement action or deny permits or permit amendments even when the failure to act increases risks to public health and the environment. The threat of lawsuit has a chilling effect on the state's ability to act in a responsible fashion.

In violation of EPA rules and TNRCC's commitments in the MOA, TNRCC did not inform EPA of these and other statutory changes. EPA was not given an opportunity to comment on the legislation. To EDF's knowledge TNRCC has still not met its responsibilities to inform EPA fully of these changes under the UIC program.

18. In 1995 and 1996, TNRCC proposed and adopted rules to implement the new laws. In violation of EPA rules and TNRCC's commitments in MOA, TNRCC did not inform EPA of the proposed or promulgated rules. Again, EPA did not have the opportunity to comment on the proposed changes. To EDF's knowledge TNRCC has still not met its responsibilities to inform EPA fully of these changes.

19. TNRCC has issued guidelines to implement HB 2473, SB 1660 and a number of other laws passed in 1995. In violation of EPA rules and TNRCC's commitments in the MOA, TNRCC has not informed to EPA of the proposal or adoption of those guidelines. EPA was not given the opportunity to comment on the guidelines. TNRCC has still not informed EPA fully of these changes.

VI. TNRCC'S UIC PROGRAM IN NOT IN COMPLIANCE WITH MINIMUM REQUIREMENTS FOR ENFORCEMENT AUTHORITY: THE TEXAS AUDIT-PRIVILEGE LAW

20. EPA rules establish the minimum requirements for compliance and enforcement authority of qualifying state programs. (40 CFR §§ 145.12 and 145.13 (a)-(c)). These rules require that a state have the authority:

> 1. to restrain immediately and effectively any person ... for engaging in <u>any</u> unauthorized activity which is endangering or causing damage to public health or environment;
>
> 2. to sue in courts ... to enjoin <u>any</u> threatened or continuing violation ....
>
> 4. to assess or sue to recover in court civil penalties and to seek criminal remedies, including fines as follows:
>
> > (i) for all wells except Class II wells, civil penalties <u>shall</u> be recoverable for <u>any</u> program violation in at least the amount of $2500 <u>per day</u> ...
> >
> > (ii) criminal fines <u>shall</u> be recoverable in at least the amount of $5000 <u>per day</u> against <u>any</u> person who willfully violates <u>any</u> program requirement ....[1]

[1]EPA rules also require that a state have the authority and resources to investigate and enforce against violations. (See 40 CFR § 145.12.) As will be discussed in Sections VI and VII, there are serious limitations on TNRCC's ability to enforce its programs. One recently, self-imposed limitation is TNRCC new policy against unannounced inspections.

21. EPA has repeatedly evaluated proposals to grant immunity or privilege for self-auditing by regulated entities. On July 28, 1994, EPA published a policy memorandum on the subject. In this memorandum, EPA stated:

> Four States (Colorado, Indiana, Kentucky and Oregon) have recently enacted legislation which with some variations, creates a 'self-evaluative' privilege for audit reports. EPA has consistently opposed this approach, principally because of the risks of weakening State enforcement programs....and
>
> EPA encourages state and local authorities to consider the basic principles that guided the Agency in developing this policy:
>
> > Regulated entities must continue to report or record compliance information...Required information cannot be withheld merely because it is generated by an audit....
> >
> > Regulatory agencies cannot make promises to forgo or limit enforcement actions ...in exchange for the use of environmental auditing systems...
> >
> > Regulatory agencies must continue to meet minimum program requirements....(59 Fed. Reg. 38455 et. seq.)

This policy was to a large extent a repeat of a policy issued by EPA on November 8, 1985 (50 Fed. Reg. 46504, revised at 51 Fed. Reg. 25004, July 9, 1986.) Further, this policy has been reemphasized in a memorandum of April 5, 1996 related to State programs under the Clean Air Act. This memorandum provides:

> ...where a State adopts a very broad privilege law, specifically directed at evidence related to environmental violations, that privilege could go so far as to render the overall State enforcement program inadequate ....

The memorandum provides examples of provisions in state privilege laws that cause a state's program to conflict with EPA minimum

enforcement requirements. EPA applied this policy in its review of the Idaho Title V program and found that

> [The Idaho law] which grants a source immunity from civil or criminal prosecution for violations discovered during an environmental audit ... does impermissibly interfere with Idaho's enforcement requirements ... Part 70 requires a state to have authority to recover penalties for each day of violation. By granting a source absolute immunity for certain voluntarily disclosed violations, the state has restricted its authority ....

22. The Texas Audit Privilege Law, House Bill 2473, enacted by the Texas Legislature in 1995, likewise restricts TNRCC enforcement authority. The Texas law violates virtually every aspect of EPA's policies and past determinations that identify privilege and immunity provisions that are inconsistent with the EPA approval of state program. The Texas law bars TNRCC from gaining access to significant information on violation. The law even creates sanctions to punish whistle blowers, both private citizens and public employees. EPA has determined that a state cannot comply with EPA's minimum enforcement and compliance requirements for approval of federal programs, if the state has the type of broad privilege and immunity provisions found in the Texas law.

VII. TNRCC'S UIC PROGRAM IS NOT IN COMPLIANCE WITH MINIMUM REQUIREMENTS FOR ENFORCEMENT AUTHORITY: THE TEXAS TAKINGS LAW

23. In addition to the requirements for state enforcement programs set forth in paragraph 21 above, EPA's rules require that the burden of proof for enforcement by a state be no greater than the burden on EPA under the SDWA. (40 CFR § 145.13(b)(2).) In brief, a state enforcement program must not

be restricted by limitations that preclude as effective enforcement as possible if EPA were to run the program.

24. In 1995, the Texas Legislature not only enacted the audit-privilege law, it further restricted TNRCC's enforcement authority and capabilities for the UIC program with Senate Bill 14, the Texas Takings Law. This law allows claims for compensation when a government action (expressly including permitting and enforcement) allegedly reduces the value of a piece of real property, in whole or in part, temporarily or permanently by 25% or more.

25. The law has many unique provisions, including the placing of the burden of proof on the state for key issues, making every issue a jury question and creating the right to bring a claim to seek injunctive relief to prohibit the action of a state agency which allegedly to diminish the value of the property. Thus, TNRCC has new factors to consider as it determines whether it will enforce its regulatory requirements (as wells as when it determines if it will issues permits, renewals and amendments). If it takes enforcement action, it could have an added burden of proof that its action qualified for an exception to the "takings" limitation imposed by SB 14. This is a higher burden than proving the applicant violated the law.

26. Moreover, the Texas Legislature did not appropriate <u>any</u> money to pay for the defense or costs of these suits including attorneys fees. Instead, agencies must pay these costs from their own budgets.

27. Thus, the statute often presents an agency with two bad choices when confronted with takings claims. This dilemma will be faced by TNRCC when it tries to enforce its the UIC standards. The state agency can enforce the law to protect drinking water and risk having to pay for a takings claim out of its budget. The alternative is to withdraw the enforcement action. Since the costs of defending a taking challenge necessarily would come from its existing budget, TNRCC's limited enforcement resources would be put at risk. Inspectors' jobs might have to be eliminated. Thus, the easier option for an agency may be to drop or reduce the enforcement action. Several sponsors of the Takings bill actually expressly stated that their goal was to have a chilling effect on government action. The law is having that effect at TNRCC.

VIII. TNRCC'S UIC PROGRAM IS NOT IN COMPLIANCE WITH EPA'S REQUIREMENTS FOR PUBLIC PARTICIPATION IN THE STATE'S ENFORCEMENT ACTIVITIES

28. EPA rules establish the minimum requirements for state programs for public participation in state enforcement processes. (40 CFR § 145.13(d).) These rules require:

> (d) Any State administering a program shall provide for public participation in the State enforcement process by providing either:
>
> > (1) Authority which allows intervention as a right in any civil or administrative action ... by any citizen having an interest which is or may be adversely affected or;
> >
> > (2) Assurance that the State agency or enforcement authority will
> >
> > > i. investigate and provide written responses to all citizen complaints...

ii. Not oppose intervention by any citizen when permissive intervention may be authorized ... and
iii. Publish notice of and provide at least 30 days for public comment on any settlement of a state enforcement action.

The Texas program does not comply with either option in EPA's rules.

29. Texas has admitted to EPA that it does not have laws, rules or policies to provide the type of public participation in enforcement proceedings required by EPA. (See Exhibit 1.) EPA has determined, with regard to NPDES programs, that Texas law does not provide for adequate public participation in enforcement through either of the two procedures outlined in EPA's rules. (See Exhibit 2.)

30. Texas' limitations on public participation in enforcement for the UIC program are the same as those for the Texas NPDES program in 1993. Since EPA's requirements for public participation in enforcement for the UIC program are also identical to those for the NPDES program, EPA's determination that Texas cannot qualify for the NPDES program applies equally to the Texas UIC program.

31. In addition to the deficiencies in Texas law that EPA has identified, the TNRCC program also is not in compliance with EPA's requirements for a number of reasons:

a. While Texas has a law directing TNRCC to respond to citizen complaints, TNRCC does not have a practice established to do so.

b. Texas has no statutory or regulatory requirements or agency procedures for notifying affected citizens of an enforcement proceeding. Thus, citizens does not have the

opportunity to seek intervention in enforcement actions at the agency or in court.

c. Texas has no statutory or regulatory requirements or agency procedures to assure that neither TNRCC nor the Attorney General will oppose intervention by affected persons in UIC enforcement actions at the agency or in court. Moreover, TNRCC does oppose intervention of affected citizens in administrative enforcement actions.

d. Texas has no statutory or regulatory requirements or agency procedures to provide the any members of public with the opportunity to comment on settlements of agency enforcement actions or enforcement actions in court. Neither TNRCC nor the Attorney General provides effective public notice of or an opportunity to comment on settlements of UIC enforcement actions at the agency or in court. To the extent TNRCC or the Attorney General provide any "notice," it is only in the Texas Register, and this publication does not provide the type of notice required in EPA rules to advise the public of proposed state action.

32. Moreover, with the passage of SB 1546 in 1995, the opportunities for public participation have been further reduced. Under TNRCC's interpretation of the law, public participation and any opportunity to intervene in agency adjudicatory hearings on enforcement matters (if any) will now be limited to those individuals and organizations that can prove a special injury under the strict Texas standing test.

IX. TNRCC'S UIC PROGRAM IS NOT IN COMPLIANCE WITH EPA'S REQUIREMENTS FOR PUBLIC PARTICIPATION IN PERMIT DECISIONS

33. EPA rules establish the minimum requirements for public participation in permit proceedings for state programs. EPA rules at 40 CFR § 145.11 incorporate the requirements for public participation common to a number of EPA programs. (40 CFR §§ 124.1 - 124.17) At a minimum, these rules require public participation through a public notice and comment process. The

rules also require that comments be considered in the final decision and that the agency respond to those comments.

34. TNRCC has never implemented a notice and comment process like that required in EPA rules. Instead, TNRCC has historically used a process that allows "affected persons" to participate through adjudicatory hearings. Now Senate Bill 1546 has been interpreted by TNRCC to limit participation in such a hearing to only those people who can meet the strict Texas standing test. The result is that now there are tremendous barriers to any public participation - through either the hearing process and through a comment process. Texas does not allow the degree of public participation required by EPA's rules.

35. For example, when such an adjudicatory hearing is held, interested persons, including affected persons, can comment. Those comments cannot by law, however, be considered by the administrative law judge or anyone else in the final decision. (30 TAC § 265.62.) They could not be the basis of judicial review, so the agency is free to ignore the comments and does.

36. Until September of 1995, TNRCC used its broad discretion to provide for wide and effective public participation through the adjudicatory hearing process to balance the restriction on consideration of comments. EPA apparently determined that, despite the deficiencies in the comment process, Texas, on balance, had a public participation process that was sufficient to meet the minimum requirements of EPA's rules.

37. The report attached as Exhibit 3 to this Petition provides numerous examples of the problems with the TNRCC hearing process. It explains how the adjudicatory hearing process is no longer broadly available. In brief, because of the changes that have resulted from the passage of SB 1546, the Texas UIC program can no longer meet the minimum requirements of EPA rules under the SDWA.

38. Unless TNRCC were to return to the historic scope of the State's adjudicatory hearing process, an adequate notice and comment process would be required. TNRCC has no real notice and comment process for the UIC program. As discussed in Section X, the limitations on who can seek judicial review of a permit decision after a notice and comment process in Texas, currently prohibits Texas from creating an adequate notice and comment process.

39. In addition to the problems discussed above, such as the legal prohibition on consideration of comments when an adjudicatory hearing is held, the current TNRCC process has many other deficiencies including:

a. Inadequate Notices: Many of the types of TNRCC notices used for draft UIC permits do not advise the public that an effective public comment process is available. (See Exhibit 4 for several examples of recent notices under the TNRCC UIC program.) In a notice like that used for Sterling Chemicals, TNRCC does advise the public that it can comment. However the notices also say very clearly that "The Executive Director will issue the permits [as drafted] unless a written hearing request is filed...." The notice then adds significant requirements for requesting a hearing, including proof of being a person "adversely affected in a way not common to the general public."

In effect, the public is notified by TNRCC that submitting comments will have no effect. If an interested person wants to comment, he or she is advised that an adjudicatory hearing must be requested. With the passage of SB 1546, to request a hearing a person must prove that he or she can meet the strict "special injury" test of Texas law of standing.

b. Notices Before Draft Permits are Prepared: TNRCC regularly issues the only notice it gives for "draft permits" long before the agency has completed its review of applications and prepared draft permits and technical summaries or fact sheets. While early notice of applications can be helpful, these notices of draft permits put deadlines on comments that often expire before there is a draft permit to review. When the draft permit is completed, which in some cases has taken 6 months or longer after the notice of the draft permit, there is no notice that the draft permit is then ready for review.

c. Response to Comments: Despite laws requiring the agency to respond to comments, TNRCC does not follow that practice.

d. Confidentiality: TNRCC has created incentives for an applicant to block opportunities for public comment. Applicants can file applications with every page marked as "confidential trade secrets" to delay public review. TNRCC refuses to decide if a document that is marked as confidential by the applicant actually qualifies as a confidential document, even if the document is a newspaper article or some other document that obviously cannot be withheld. TNRCC refers all such disputes to the Attorney General for a determination on the validity of the claim of confidentiality. The review process at the Attorney General Office generally takes from 3 to 12 months, and can often take longer. TNRCC does not delay the permit review process or postpone the deadline for comments even when there is no ruling by the Attorney General on public access to the application. (See Exhibit 5 for one recent example, which, while involving an air permit, applies equally to permits under the UIC program.) Thus, Texas' rules and procedures allow, if not encourage, applicants to frustrate the public participation process.

e. When an Adjudication Hearing is Denied, Comments are not Considered: When a request for an adjudicatory hearing is denied, TNRCC simultaneously issues the draft permit. Under the current TNRCC rules and procedures, any comments that may have been submitted by the requestor or any other person are not considered before or at that time by the decision maker. (30 TAC § 263.23 and See Exhibit 3 for examples of how the TNRCC process works when a hearing is requested.)

X. TNRCC'S UIC PROGRAM IS NOT IN COMPLIANCE WITH EPA'S REQUIREMENTS FOR JUDICIAL REVIEW OF PERMIT DECISIONS

40. EPA requires state programs to provide for effective public participation involving permits. In both EPA rules and judicial decisions on EPA's position, the requirement for public participation has been tied to the right for judicial review.[2] In brief, to assure that an agency cannot simply ignore comments, judicial review must be provided. State programs must allow judicial review of state decisions on permits by persons or organizations that would qualify to appeal the permit to federal courts, if EPA were the permitting agency.

41. The general test for standing under Texas courts is much more limited than in federal courts under Article III of the U.S. Constitution. In effect, in Texas a person must prove a special injury, one not common to the general public. This is considerably narrower than the standing test under Article VIII of the U.S. Constitution. The Attorney General of Texas has, in fact, advised EPA of the differences in Texas and federal law and the implications of the differences for EPA approval of Texas programs. (See, for example, Exhibit 6, excerpts from the opinion of the Attorney General of Texas submitted in 1993 to EPA with the TNRCC application for approval of its Title V program under the Clean Air Act.)

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[2]See, the discussion in the preamble to EPA's new rule on the judicial review requirements for state NPDES programs, 40 CFR 123.30 at 61 Fed. Reg. 20971, May 8 1996. See, also Virginia v. Browner, 80 F. 3d 869, 4th Cir. 1996.

42. Without a statutory exception to the general law of standing, judicial review of TNRCC permit decisions for UIC permits is, therefore, more limited than permitted by EPA. In the past, the Texas Attorney General has argued that the Legislature had, for environmental programs, broadened the scope of who can seek judicial review in Texas courts to be similar to standing under federal law. In effect, the Attorney General argued that the pre-1995 liberal "standing" test established by the Legislature and Texas Courts for TNRCC permit hearings translated into a broad standing test for judicial review. (See Exhibit 6.) Thus, the Attorney General of Texas argued to EPA that anyone who was a party in the permit hearing and was aggrieved by the decision could seek judicial review because all TNRCC laws provide judicial review by "affected persons".

43. This position of the Texas Attorney General was not, however, established in Texas law. In fact, some Texas courts have ruled to the contrary.

> That a party had standing before the agency does not necessarily mean that it has standing for judicial review; the right to participate in administrative proceedings is construed quite liberally to encourage varying points of view. Texas Rivers Protection Association v. TNRCC, 910 S.W. 2d 147 (Tex. App. Austin 1995), citing Fort Bend County v. Texas Parks and Wildlife Comm'n, 818 S.W. 2d 898, 899 (Tex. App.-- Austin 1991, no writ.).

Thus, while EDF would like the law to be as the Attorney General has advised EPA, there was a considerable risk that it was not.

44. More importantly, however, the position taken by the Texas Attorney General in the past, even if valid then, can no longer be valid. The Texas Legislature has passed SB 1546

which, as interpreted by TNRCC, prohibits TNRCC from construing "liberally" "the right to participate in administrative hearings." TNRCC interprets SB 1546 to limit standing in adjudicatory hearings to those people and organizations that meet the traditional and limited Texas standing test of special injury. In some cases, Texas law limits who could appeal a TNRCC permit decision to the applicant. Thus, any exception to the general Texas standing test for judicial review of permits that may have existed before the passage of SB 1546 has now been eliminated under TNRCC's interpretation of the law. The TNRCC UIC program no longer complies with EPA requirements for state programs for any permit that involved an adjudicatory hearing.

45. Moreover, the process for judicial review of the public comment process has the same legal deficiency. Judicial review of a UIC permit by an interested person who submits comments must be taken under the general provision for appeal of a TNRCC decision, Section 5.351 of the TEXAS WATER CODE. That section states that an "affected person" may appeal any final TNRCC decisions. Even before the Texas Legislature has defined "affected person" very narrowly in SB 1546, Texas court required a showing of "special injury" for standing to appeal any type of TNRCC decision under Section 5.351. In fact, before the passage of SB 1546, the Texas Attorney General took that position in appeals of TNRCC decision on rules. With the passage of SB 1546, there is little doubt that how the Texas courts and the Texas Attorney General will view standing to appeal a TNRCC permit

decision under Section 5.351. To appeal a permit decision, a person that submits comments, rather than participate in a "contested case adjudicatory hearing", will have to prove standing under Texas' strict special injury test.

XI. FAILURE OF THE ADMINISTRATOR OF EPA TO PERFORM NON-DISCRETIONARY DUTIES

46. For the reasons discussed in Sections V through X, TNRCC's UIC program fails to meet the minimum requirements of EPA rules. EPA has, in fact, determined that Texas cannot comply with this request. Once EPA has made this determination, it must initiate withdrawal proceedings pursuant to 42 U.S.C. § 300h-1(b)(3)[3].

47. With regard to Section VI above, EPA has been aware of the change in Texas law since at least January 11, 1996, when EDF advised EPA of the problem. The Administrator of EPA has made numerous determinations regarding state audit privilege laws that clearly determine that the Texas program is no longer consistent with the enforcement requirements of EPA's UIC rules.

48. With regard to Section VII above, EPA has determined that the Texas program is not in compliance. When EPA sent its letter of May 5, 1993 to the Texas Attorney General's Office (Exhibit 2), it advised Texas that its laws did not provide adequate opportunities for public participation in NPDES enforcement proceedings. That EPA determination applies equally to the UIC program.

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[3]National Wildlife Federation v. EPA, 980 F.2d 765 (D.C. Cir. 1992)

49. With regard to Sections IX and X above, EPA has been aware of the new problems created by SB 1546 since at least January 11, 1996, when EDF advised the agency of the statutory changes and effects. EPA, however, had already determined that limitations like those in Texas keep a state program from being consistent with EPA rules. For example, EPA rejected the Virginia application for approval of its Title V program under the Clean Air Act because of similar legal limitations.

XII. CONCLUSION

50. WHEREFORE: EDF petitions EPA to take immediate action to withdraw the approval of the TNRCC UIC program and to take such other actions as necessary and appropriate for the violations of compliance with the SDWA by the State of Texas.

Respectfully submitted,

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Pollution Prevention

"Remains of the Day"

Andrew Neblett

Remains of the Day

8th Annual Texas Environmental Superconference
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by

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TNRCC

BIOGRAPHY
OF
ANDREW C. NEBLETT

Andrew Neblett is the Division Director for the Office of Pollution Prevention and Recycling/CLEAN TEXAS 2000 (OPPR).

With a staff of 60 people, OPPR is a Division of the Texas Natural Resource Conservation Commission (TNRCC) that provides technical assistance and training to industry, local governments, and small businesses, sponsors statewide public education on environmental issues, and initiates voluntary programs with industry, businesses and cities. Specific programs include CLEAN CITIES 2000, CLEAN INDUSTRIES 2000, Clean Texas Star, and the Governor's Awards for Environmental Excellence. A special target for OPPR is to further develop all its programs in the Texas/Mexico Border area, working with officials in Mexico to develop voluntary pollution prevention programs.

Prior to assuming the role of Division Director, Mr. Neblett managed the TNRCC's Pollution Prevention and Conservation (PPC), a section within OPPR which includes the division's pollution prevention technical assistance and training programs, pollution prevention planning oversight, and the state's waste exchange program. Mr. Neblett held various positions focusing on environmental policy and project management before joining the TNRCC. Most recently, he served as the Source Reduction Project Director for the Coalition of Northeastern Governors, developing and implementing regional environmental initiatives. He also served as a Policy Analyst for the Council on Environmental Quality in the Executive Office of the President.

Andrew Neblett received a BA in business administration/finance from the University of Texas at Austin, and a JD from the Catholic University of America in Washington, DC.

INTRODUCTION

Remains of the Day is a very appropriate title for pollution prevention's traditional role in our environmental management system. Pollution prevention has traditionally been an afterthought. However, today, we are beginning to see a significant change in the way we approach environmental management and pollution prevention. We are entering a time of transition or environmental adolescence. In the next few years, we will be making decisions that will determine where we go in the twenty-first century and how successful we will be in achieving our mutual goals of economic growth and environmental protection.

With three small children, I find myself often comparing the growth of a child to the development of the environmental management system.. The development of a child is a very complex and interesting process, as is the development of an environmental management or regulatory system. Reviewing a child's development and comparing it to our environmental management system can be very instructive as we search for future direction.

In the environmental field today, we are in a period of transition not unlike parents of growing children. What was an appropriate response for small children may not be as appropriate for those that are ready to accept more responsibility for their actions. As children grow older, they gain more real life experience and grow increasingly independent of their parents. Growing children look for opportunities to exercise more control over their own lives. This is adolescence, a period of great change for both parent and child. The parents must learn to adjust to these changes, and must learn to gradually let go and allow their children to learn for themselves, to mature and to develop trust with their parents. During this time, we realize the critical role that values play in guiding a child through decisions. To the degree a child has received a strong set of values, the more confident the parent can be the child will make appropriate decisions that will allow the child to continue to thrive as a responsible member of the community.

What values do we need to instill in our children to assure they are well-adjusted? The critical values are much the same as those we would want for the regulated community. Common values include:

- Accountability for one's actions;
- Responsibility for carrying out those actions;
- A desire for success and improvement, and
- An ability to trust.

These values are often instilled through discussion between parent and child, defining right and wrong. Parents often offer more powerful lessons by teaching by example. Showing the right way to do things can be an important way to communicate expectations. Positive reinforcement also helps to imprint lessons learned through discussion and example. Values can be reinforced by positive reinforcement (if you clean your room, we'll get ice cream), or negative reinforcement (if you don't clean your room, you're grounded).

THE FORMATIVE YEARS - *Bringing up Baby*

This initial stage in the growth of the environmental movement could be likened to that of the initial 10 to 12 years of a child's life. This is a time when the parents exercise a significant amount of control of the child's life and are working to provide the child with basic values that they can use throughout their life to make informed decisions. In turn, the child looks to the parent for guidance and answers.

Similarly in the environmental field, government arguably has played a similar role to the parent and the regulated community that of the child. Over the last 25 years, we have seen a continued growth in legislation and regulations that control our interaction with the environment. Over a dozen primary laws and thousands of pages of regulation were developed to address some of the most pressing environmental issues of the day on a media by media (air, water, waste) basis. The result is an intricate web of requirements that focuses on the control and management of pollutants and encourages a disconnected one media at-a-time, one pipe-at-a-time approach to environmental management. As a result, the regulatory system is affectionately referred to as the command and control system.

The focus on control is similar to the focus new parents take to one of the more unpleasant tasks of being a parent -- changing diapers. When we are first confronted with it, our focus is how do we control it and what is the best method to clean it up. We quickly focus on finding the control technology that is best suited for the situation -- a diaper and a big container of wipes.
Sometimes you have upsets where your control devise does not work as well as hoped. This is where pollution prevention comes into play. During those times of upset, you look at what they ate and how you can change that so that you avoid the problem in the future.

As children tend to emulate the traits of the individuals that they interact with the most, so do our organizations. Just as the laws developed on a media by media basis, governmental organizations that implement them grew up in a similar fashion with federal, state, and local agencies organizing around air, water, and waste programs. Following this lead, the regulated community and interest groups have developed organizational structures and programs by media.

As a result of this focus and organization, we have pocketed our expertise and to a great degree lost perspective on the interrelated nature of these programs and their collective impact on the environment. Due to this organizational structure and pocketed expertise, a barrier has been placed for pollution prevention that is inherently multimedia.

This focus on control has fostered the belief that waste is inherent and the only way to reduce it is to control it. However, we are beginning to see this mind set change. One of the environmental managers from a facility our engineers visited put it this way: "I consider all my waste to be hazardous, because they cost me money. That is hazardous to my bottom line, which is hazardous to my business." This manager realizes that there no longer is a separation between economic

growth and environmental quality. He realizes that the traditional belief that pollution must result from industrial processes is simply a myth.

In reality, pollution is a result of some inefficiencies in our process or our inputs. Those inefficiencies are resulting in wastes which harm the environment and cost us money -- whether it is the cost of the raw material that does not become product, handling and disposal cost, or the increasing liability associated with waste production and management.

As children become toddlers, parents begin to train them on the benefits of potty training, namely that they can be cleaner, happier and more global in their orientation. It can also give them a great sense of accomplishment. We can do this by providing training and technical assistance, and sometimes we can do this by letting the child watch a big brother or sister who has become successful at this form of waste management. Besides the benefit to the child, the benefits to the parents are very obvious -- fewer messes, less cleanup and less cost. Imagine what would happen if we did not provide this flexible option to the child, but stayed with the original waste management system and control technology. It would take an awfully big changing table.

The concept of pollution prevention has come relatively late in the initial growth of the system. Pollution prevention has primarily been facilitated and encouraged through awareness training, technical assistance, pollution prevention planning requirements, and incentive/recognition programs. In Texas, these programs are not only producing measurable reductions in waste generation, but are also helping our customers to save money by cutting waste. Through these programs, we are proving that we can work constructively together to achieve both a healthy economy and a healthy environment.

Our programs have produced real and measurable results. During the past two years, assistance has been provided to 90 facilities through on-site technical assistance and our Permanent Pollution Prevention Program (P4), and has allowed those facilities to achieve $19.3 million in savings; 296 million gallons of reduced water usage; 31,000 tons of hazardous waste reductions; 27,000 tons of non-hazardous waste reductions, and 3 million kWh of energy savings. More specifics on the TNRCC's pollution prevention and recycling programs and results are attached.

While we are achieving significant results through education and sharing examples, the system is still lacking in its focus on providing the appropriate positive and negative reinforcements. We must look at the overall framework of the system to determine where we should move in the future. We must also ask whether we are instilling the appropriate values in the regulated community. If not, how we can do so?

In parenting, you educate and set parameters that are intended to allow your children to learn the benefit of the values you want to instill over time and act upon them. For example, as children begin to date, the parents must gradually release control and allow their children to mature. At some point all parents are faced with the question, "Mom and Dad, may I go out on a date?" A logical progression of answers often develops over time:

- No dating: "No!"
- Parent chaperon: "Yes, but we're going along to make sure things go OK."
- Group: "Who else is going?"
- Specific limits: "Where are you going and you will be back by ten, right?"
- Broad limits: "Be home by Midnight."
- Trust: "Have a good time."

In the environmental field today, we are still in the parent chaperon business. We are going to lay out the rules and come along to make sure that they live by them. How do we move beyond this traditional approach? How do we increase flexibility, while assuring accountability? The answer is that we don't know -- this is uncharted territory.

ENVIRONMENTAL ADOLESCENCE -- *The Parent Trap*

As children grow older, they gain more real life experience and increasingly grow independent of their parents. They are looking for opportunities to exercise more and more control over their own lives. This is a time we often call adolescence -- a time of great change for both the parent and the child. The parents must learn to adjust to these changes. The parents must gradually let go and allow their children to learn for themselves, to mature, and continue to build trust with the parents.

During this time, we realize the critical role that values play in guiding a child through decisions. To the degree a child has obtained a strong set of values on which to base their decisions, the more confident a parent can often be that appropriate decisions will be made that allow the child to continue to grow and prosper.

Today, in the environmental field, we are collectively moving into a period of transition -- environmental adolescence -- a time of great change. We are beginning to realize that the existing command and control system has allowed us to make significant strides to improve the environment, but is limited in its ability to continue to provide meaningful environmental improvement in the future. A variety of different factors are driving toward environmental adolescence. The marketplace is becoming increasingly global and competitive; time frames to move products from concept to market are diminishing; and technologies are often developing in advance of regulations. Finally, we are all faced with increasingly limited resources with which to tackle increasing workloads.

During this time of change, we must determine how best to proceed to allow for maximum improvement to occur in the most cost effective and efficient manner possible. One question we have to ask ourselves, "is have we instilled the proper values in the regulated community?" Are we using the proper tools to encourage that community to strive for excellence?

In the pollution prevention area, we strongly believe that pollution prevention is an extremely effective tool that, if encouraged through the regulatory framework, can allow us to continue to make significant progress toward achieving our goals.

As we raise our children, we often look to others that have experienced and addressed many of the issues that we face. We ask for advice from our own parents or other more experienced parents. In the environmental field in general, unfortunately, we do not have many other "parents" that we can look to get an idea of where we go from here. Therefore, to some degree, we must learn as we go through trial and error.

Fortunately for many parents and unfortunately for others, all children are different and some mature and take responsibility for their actions at an young age and others never take responsibility for their actions. The regulated community is arguably much the same -- no two facilities are just alike. Some facilities are striving for environmental excellence, others want to just maintain compliance, and still others want to see what they can get away with.

The industry leaders -- the more mature kids --have learned the value system and gone beyond. To some degree, as we move through environmental adolescence, we can and should learn a great deal from them. So, what can we learn from the leaders and how can we encourage others to emulate the leaders? There are some generalities that we can draw from their programs.

First of all, they have realized that by being proactive rather than reactive they can often gain a competitive advantage by expending funds on pollution prevention measures to avoid future or pending legislation and regulation. These facilities are also leveraging the latest technology to get a better handle on their operations. These changes also often provide efficiency benefits that allow them to reduce not only their regulatory costs, but also their material, waste handling, and possible future liability. One facility in the Dallas/Fort Worth area has found their pollution prevention programs to be so successful that they have reallocated half of their traditional compliance staff to work on pollution prevention projects full-time. Bottomline, pollution prevention is about efficiency, as it is about environmental management.

They have also realized that in order to be proactive they must put in place management systems that allow them to identify environmental issues, set environmental improvement goals, train and assign appropriate staff, measure and monitor to assure progress and risk reduction is achieved, and communicate effectively with the community. By using these systematic approaches, they are also able to look beyond the direct regulatory requirements of today, anticipate those of tomorrow, and look directly to the root cause of environmental problems, rather than the traditional approach of focusing on and working to control the symptoms of the problem.

Finally, they are working cooperatively with their communities, educating them on their operations, and addressing the communities issues of concern. The CLEAN INDUSTRIES 2000 members in particular are finding great benefit to addressing community issues early in the process. One electronics firm recently planned a facility in an affluent community in the Dallas/Fort Worth area. In the process of siting the facility, the company brought in and educated the community early in the process. As a result, the facility found no opposition when they went to seek their permits. The issue of bringing in the community early to educate and address their issues provides another dynamic that will be critical to our moving forward in the future -- trust.

Taking the lead from the regulated community, the Texas Natural Resource Conservation Commission (TNRCC) has developed and is developing and participating in many programs that are intended to encourage holistic reviews of facility impacts, proactive and innovative actions, systems-based approaches, and partnering with the community to achieve more significant environmental improvement. A few examples include:

- Through the pollution prevention planning process, facilities identify activities that generate waste or result in on-site releases and off-site transfers of toxic chemicals, set reduction goals, and identify reduction projects that are economically and technologically feasible to implement. Annual progress report data indicates facilities submitting a SR/WM Plan Executive Summary had a 20% reduction in hazardous waste generated from 1993 to 1994. On the other hand, facilities who are required to submit a SR/WM Plan Executive Summary and fail to do so have had a 3% increase in hazardous waste generated from 1993 to 1994. An independent survey conducted in 1995 in Texas regarding SR/WM Planning indicated that 77% of facilities broke even or had a cost savings from pollution prevention projects and 48% had a net cost savings of over $40,000 from these projects, and over one-third of these expect to go from LQG to CESQG over the next 3 years.

- The "flexible" air permit allows a company to make permit and equipment changes as long as total emissions at a facility stay below a permitted maximum level. These emission caps are set at levels that reflect the use of state of the art pollution control technology as opposed to the higher emissions that are allowed under many of the older, traditional permits. Once an emissions cap is established, the company chooses where to control emissions to meet the overall cap and is given broad flexibility to make operational and equipment changes as long as it stays below the cap. This provides for more efficient plant operations while environmental requirements are not only met but exceeded in many cases. Based on results from its first year of operation, an innovative "flexible" permit process has already resulted in binding commitments by industry to reduce potentially harmful air emissions by 116 million pounds over the next several years.

- The agency is also actively participating in initiatives that are looking toward reinvention of the environmental management system. EPA's Common Sense Initiative is working through multi-stakeholder groups to identify cleaner, cheaper, and smarter ways of doing business by industry sector. The Environmental Leadership Program is allowing us to work with Motorola -- Oak Hill to determine the benefits of using an environmental management system to achieve and possibly allow a facility to go beyond compliance. While these initiatives are still underway, the opportunities to act on these concepts are promising.

Individually, these projects are allowing us to make progress in reducing pollution, as well as identifying ways in which we can improve our systems. The question becomes, "how do we foster proactive and innovative actions, systems-based approaches, and partnering with the community to achieve more significant environmental improvement?" How do we encourage an earlier focus on pollution prevention, rather than on end of pipe non-productive controls? What combination of

positive and negative reinforcements do we need to make progress? Can we provide an alternative structure to the existing regulatory programs that allows for greater regulatory flexibility in return for improved environmental performance?

MATURITY -- *Father of the Bride*

At some point, parents must let go and allow their children make decisions for themselves. If they have instilled the proper values and set parameters that they slowly relax until the children can control the situation for themselves, they must trust that this will be sufficient to allow them to become constructive members of society. Ultimately, parents will no longer be the sole judge of their child's actions, society will assume that role.

Currently, environmental agencies are required to set standards and enforce those standards consistently across the board for all facilities. We are often limited in our ability to provide the flexibility to focus on the specific risks and needs of local communities. Sometimes we tend to focus on the process, and not on the results we want to achieve. This approach promotes a one-size fits all solution that sometimes causes resources to be spent to solve problems that may not exist.

However, if provided greater flexibility, an alternative structure could be formed through the development of partnerships that in a site-specific, performance-based "operating agreement", which would offer regulatory innovation to replace existing command and control systems. The goal of the operating agreement will be to maintain high levels of compliance, achieve greater environmental improvement, and engage both government and community in the process. This alternative system would work concurrently with the existing regulatory system, but provide the leaders with an option.

Critical to the success of such an approach would be the new partnership created between the facility, the community, the TNRCC, and other stakeholders. Through this partnership, the participants will set site specific environmental improvement goals based on regional or local needs, identify relevant environmental management systems which will ensure that progress towards goals is being made and compliance with performance standards is maintained.

This type of program would have four primary elements: partnership development, environmental improvement goals, environmental management systems, and negotiation of an operating agreement. Stakeholders participating in the program will agree to enter into the following:

Partnership Development: A team with representatives from industry, government and the community will be responsible for developing the facility's environmental improvement goals and program elements which would be incorporated into the Operating Agreement. The team will also monitor progress toward achieving the goals throughout the duration of the project.

Environmental Improvement Goals/Multimedia Analysis: Concurrently, the facility will undertake a multimedia analysis to determine resource use, process efficiencies, waste and the

environmental impacts of the facility on the environment and the local community. The results of the analysis will be shared with project stakeholders in order to assist in goal setting and prioritization.

Environmental Management System: Reduction goals, compliance with existing emission and discharge limits, and program accountability will be monitored through the facility's EMS. Elements of the EMS may include compliance and performance audits, mechanisms for correcting problems, training and employee incentives, and public disclosure.

Operating Agreement: The Operating Agreement will be a contract negotiated between a site, TNRCC, and the community. At a minimum, it would:

- Establish environmental performance standards that would cap emissions, discharges and wastes from existing operations;
- Set environmental improvement goals from a baseline;
- Provide facility operational flexibility consistent with emissions/discharge limitations;
- Identify a uniform environmental reporting program based on adequate monitoring systems and data;
- Utilize EMS to verify process and results; and
- Provide for community assurance and involvement.

This program must have measurable environmental results. The baseline for this project would be a commitment to meet or go beyond compliance across all media, assuring no backsliding in any area. Continuous improvement goals will be developed that focus on local needs relative to the greatest environmental risks. By focusing on local needs and risks and reducing the administrative burden, resources will be reallocated away from paperwork and toward identifying opportunities to reduce environmental impacts. Performance measures and environmental indicators, if not currently available, may be developed to monitor environmental impacts.

The program should identify and demonstrate opportunities for cost savings and paperwork reductions available to the participating facilities, agencies, and communities. By focusing on the reduction of non-productive costs and addressing local needs/risks, facilities will identify significant opportunities to reduce administrative and operational costs. Specific features of the program that are expected to result in cost savings are:

- Uniform consolidated environmental reporting reducing overlap and redundancies of the current reporting system;
- Flexible operating agreements instead of costly permit revisions; and
- Partnership approach allowing for constructive up-front dialogue rather than confrontational settings.

Increased operational flexibility, which would allow facilities to identify the most cost effective and

environmentally sound options for waste reduction, can offer a facility significant savings in time and money. Facilities faced with a global, competitive marketplace and shorter product life-cycles must meet the challenge of getting products from development to market on shorter time frames. With greater regulatory flexibility, a facility will be able to respond to changing market needs immediately. Through this program, the EMS would allow facilities to determine their multi-media environmental impacts, identify innovative solutions, implement solutions in a proactive manner, and develop a single set of goals and performance measures that achieve community and corporate strategic needs simultaneously. More time would be available for environmental improvement, product development and quality control.

The partnership between community leaders, the facility, and state and federal officials is a critical element of this program that allows for significant and meaningful stakeholder participation in project development and implementation. In addition, by entering into the Operating Agreement, the stakeholders will have ongoing participation in program review and oversight. This approach should ultimately lead to a transparent process that allows for greater understanding of true environmental risks and reduced confrontation between stakeholders.

From the initial facility analysis to the development of the Operating Agreement, the focus of this program should be multimedia. The multimedia analysis would identify opportunities for regulatory innovation and prioritized pollution prevention opportunities. The flexible nature of the operating agreement should allow the facility to prioritize and implement the most cost-effective environmental improvement projects.

Pollution prevention has consistently been shown to be the most cost-effective means of achieving environmental improvements. By developing a program that focuses facilities on impacts to all media and providing them the flexibility to achieve continuous improvements in the most cost-effective manner, innovative pollution prevention opportunities should not only be identified, but also implemented. The reduction goals will also serve as an impetus to implementing pollution prevention projects.

Pollution prevention and the existing regulatory programs are working to achieve environmental protection. In order to achieve our goals efficiently and effectively, we must work together to develop an infrastructure that encourages a focus on innovation, continuous improvement, and partnership.

Change can be a frightening thing as any new father encountering his first wet diaper knows. As with a first date, we are often nervous because of the unknown, while also looking forward to the experience with excited anticipation. Today more than ever before, we are presented with challenges that are not simple to solve, but are worth solving. We must work together in cooperation, not confrontation.

"TNRCC VOLUNTARY POLLUTION PREVENTION PROGRAMS"

INTRODUCTION

Environmental programs are facing an era of tough public scrutiny for their impact on business and for their effectiveness in protecting human health and the environment. Like all other government programs, environmental programs are also being asked to do more with less.

Those of us at the Texas Natural Resource Conservation Commission (TNRCC) invite you to look at our programs as examples of what a results-oriented environmental agency can achieve by working in partnership with other institutions in our state to protect the environment.

We are not only producing measurable reductions in waste generation, we are also helping our customers to save money by cutting waste. In Texas, we are proving that we can work constructively together to achieve both a healthy economy and a healthy environment. Today, we have come together to talk about how we build the partnerships that will take us in the right direction.

WASTE MANAGEMENT HIERARCHY

Let us start by identifying our arrival point -- what is pollution prevention? In Texas, we have a waste management hierarchy ranging from most preferable to least preferable management methods. Top on our list is source reduction, followed by re-use and recycling, then treatment and finally, disposal.

OPPR MISSION STATEMENT

At the TNRCC's Office of Pollution Prevention and Recycling (OPPR), we seek to assist Texas businesses and institutions in making progress along that hierarchy. Our mission is to: "provide leadership and create incentives for business, government, and individual Texans to achieve significant reduction in pollution and waste, which combined with a strong regulatory program, will conserve our resources, provide economic benefits, and produce tangible improvement in our air, land and water."

PROGRAM FOCUS

Our program focus is completely multimedia. We deal with air, water and land related issues. Most of our programs are voluntary and non-regulatory. Our emphasis is on providing training and technical assistance and in offering voluntary participation programs that encourage businesses and other Texas institutions to move beyond compliance toward environmental excellence.

Our programs have produced real and measurable results. Participants in our Clean Industries 2000 voluntary waste reduction program accounted for all of the hazardous waste reductions in Texas in 1993 -- 12 million tons. Industrial facilities that have used our RENEW Waste Exchange have saved $1.9 million in avoided disposal costs while recycling more than 460 million pounds of wastes between 1988 and 1995. Last November, more than 75,000 Texans pledged to participate in recycling projects on our Texas Recycles Day.

OPPR ORGANIZATION

Our division is organized into three sections :

- Pollution Prevention and Conservation, which includes our P4 and SAV technical assistance programs, WRPA compliance and TRI programs, workshops, the RENEW Waste Exchange and the Clean Industries 2000 and Clean Texas Star voluntary waste reduction programs.
- Recycling, which includes municipal, school and workplace programs, composting and a market development team, and the Household Hazardous Waste, Clean Rivers and Texas Country Clean-up programs.
- Our Clean Texas 2000 program, which includes Texas Recycles Day, Clean Cities 2000, and the Governor's Environmental Excellence awards program.

AUDIENCES

We reach a variety of customers, each with their own particular needs, through these programs, including:

- Industry/business;
- Government/local community groups; and
- Individual citizens.

MECHANISMS

We reach our customers through mechanisms geared toward their needs.

- For citizens and local communities, we offer public awareness programs, from Texas Recycles Day to Clean Texas Reporter, a series of televised environmental tips.
- For industries and local governments, we offer training and technical assistance on everything from composting to industrial solvent substitution.
- For community organizations, local governments and industries, we offer public recognition for those who go beyond compliance in their efforts to protect public health and the environment.
- For other programs within the TNRCC, we are working toward integrating our approaches into permitting, enforcement, and other programs.

INDUSTRY/BUSINESS -- AWARENESS AND ASSESSMENT

Let me give you some more detail on how our programs address the needs of our industry and business customers, which includes those of you here today.

We have a pair of assessment programs, Pollution Prevention Planning and the Toxic Release Inventory, that are designed to give both industry and government a clear picture of what wastes are being generated and what progress is being made.

POLLUTION PREVENTION PLANNING ASSISTANCE

Texas passed the Waste Reduction Policy Act in 1991 requiring industrial facilities that generate hazardous waste or release specific toxic chemicals into the environment to develop pollution prevention plans. Companies are allowed the flexibility to develop a plan that meets their needs and capabilities.

Some companies are using the pollution prevention planning process as a part of their strategic business plan and have found this to be beneficial from both an economic and environmental point of view. Since the program began, Texas industrial facilities have:

- Prepared over **600** pollution prevention plans;
- Submitted **more than 200** annual pollution prevention progress reports with five-year source reduction and waste minimizations projection data;
- Projected that more than **36 million tons of hazardous wastes** will not be generated between 1992 and 1997 because of source reduction activities;
- Projected that more than **250 million tons of hazardous waste** will be recycled and treated to destroy hazardous characteristics over the next five years; and
- **70 percent** of facilities surveyed after filing plan summaries reported that the process either did not impose additional costs or actually identified potential savings through waste reduction.
- **80 Percent** of facilities surveyed indicated that pollution prevention plans were beneficial to their facility.

OPPR also maintains Texas Toxic Release Inventory, a publicly available database that is the primary index for tracking toxic releases and transfers by Texas industry. More than 1,250 Texas facilities report annually on their activities regarding some or all of an EPA list of more than 600 chemicals. The Texas TRI has tracked a trend toward source reduction by Texas industry in recent years:

- Between 1987 and 1993, Texas industries reduced on-site releases and off-site treatment/disposal by 23 percent.
- Between 1992 and 1993, the same companies reported a 9.5 percent reduction, the largest one-year reduction since the program started in 1987.

INDUSTRY AND BUSINESS/ TRAINING AND TECHNICAL ASSISTANCE PROGRAMS

The TNRCC supports a staff of experienced professionals who provide on-site technical assistance and training to industrial facilities whose managers are working to develop or improve pollution prevention and recycling programs. Assistance has been provided to all types of industrial facilities, from a small manufacturer with 15 employees to a major petrochemical complex with 2,700 employees.

THE PERMANENT POLLUTION PREVENTION PROGRAM (P4)

In order to provide continuous improvements in environmental performance, OPPR offers an intensive training program to industrial facility managers, supervisors, and employees which teaches an eight-step process for developing cross-functional teams of supervisors and employees who can spot waste reduction opportunities and then implement solutions.

Emphasis is placed on cost effective approaches that can be implemented at the shop floor level. The basic process taught is very flexible, and is adaptable to many industries and institutions. Since 1994, the OPPR has trained staff from 84 facilities in El Paso, Houston, Beaumont, Longview-Tyler-Marshall and Corpus Christi and with U.S. Military installations. Projects have resulted in hundreds of thousands of dollars in savings and thousands of tons of waste reductions.

THE SITE ASSISTANCE VISIT PROGRAM (SAV)

The OPPR also provides voluntary, non-regulatory on-site technical assistance to industrial facilities looking for source reduction, waste minimization and recycling opportunities. During the past two years, assistance has been provided to **90 facilities**, and has resulted in:

- **$19.3 million in savings** overall;
- **296 million gallons** of reduced water usage;
- **31,000 tons** of hazardous waste reductions;
- **27,000 tons** of non-hazardous waste reductions, and
- **3 million kWh** of energy savings.

WORKPLACE RECYCLING TEAM

To assist business and government facilities in developing and improving their recycling programs, OPPR's workplace recycling team provides training and technical assistance, including training in a 10-step process for developing a workplace recycling program, and on-site assistance in identifying recycling opportunities.

More than 4,000 copies of the team's workplace recycling manual have been distributed statewide, and 2,700 copies of an educational video detailing the 10 step process are in use by companies and local governments across the state.

Technical training workshops have been provided to 300 companies since 1992, and meetings to develop support for workplace recycling programs have been attended by 1,500 government and business executives.

RENEW

The TNRCC maintains the Resource Exchange Network for Eliminating Waste (RENEW), a waste exchange which matches wastes generated by industrial facilities with other facilities that can re-use or recycle the waste as feedstocks. Renew publishes a quarterly catalog of listed wastes available and wanted, and we are working on making it available via Internet. Since the first waste was listed for exchange in 1988, renew has successfully:

- Diverted **640 million pounds of materials** for re-use or recycling by industry, and
- Has saved government and industry **$1.9 million in costs avoided** by keeping waste materials out of landfills and disposal facilities.

INDUSTRY/BUSINESS INCENTIVES AND RECOGNITION

Voluntary programs offer our customers the flexibility to use their common sense to find the best and most cost effective ways to meet our waste reduction targets.

We have had extraordinary participation from the regulated community since our voluntary programs were created in early 1992.

THE CLEAN INDUSTRIES 2000

The Clean Industries 2000 is a facility-based voluntary reduction program open to installations whose managers agree to reduce hazardous waste generation and/or releases of pollutants and contaminants into the environment by 50 percent by the year 2000.

Member facilities must also agree to develop an internal environmental management program, sponsor one or more community environmental projects, and develop a community outreach program on environmental issues. In the three years since Clean Industries 2000 was launched:

- Member facilities cut their hazardous waste generation by 12 million tons, or 17percent, during the first year of the program.
- Member facilities cut their releases of toxic release inventory chemicals by 25%, or 88 million pounds, between 1987 and 1993.
- The program has grown to 136 Clean Industries 2000 member facilities that have created 250 community environmental programs and 137 citizen communication programs.

TEXAS RECYCLES DAY

To further encourage Texans to participate in recycling and other environmental activities, the OPPR has sponsored Texas Recycles Day on November 15 for the past two years. This statewide event involves a broad partnership between TNRCC and more than 300 sponsoring organizations representing corporations, local governments, universities and non-profit institutions. A total of 300 events took place, and more than 78,000 pledges have been received to sponsor recycling projects.

CLEAN TEXAS STAR

Last September, OPPR launched its newest voluntary reduction program, Clean Texas Star, based on our successful experience with Clean Industries 2000. The Clean Texas Star program encourages Texas businesses and other institutions to take voluntary steps to reduce their non-hazardous solid waste generation by between 25 and 75 percent by the year 2000.

Program members also agree to sponsor local environmental projects and to increase their purchase of recycled content supplies and to assist local environmental projects.

In its first six months of operation, Clean Texas Star has become the largest program of its type in the nation, with more than 50 councils of government, corporate recycling councils and corporations serving as partner organizations, and more than 1,400 Texas firms, institutions and military installations enrolled as charter members.

LOCAL COMMUNITIES -- TECHNICAL ASSISTANCE

COMMUNITY RECYCLING PROGRAM

The Office of Pollution Prevention and Recycling's Community Recycling Team provides training to regional and local governments, community groups, public institutions and businesses on waste reduction and recycling strategies and policy issues through workshops, seminars and roundtables.

In addition, the program maintains databases on waste reduction and recycling programs from more than 65 communities across the state, as well as a directory of statewide solid waste and recycling contacts from more than 500 municipalities. In all, more than 1,500 customers have received technical assistance at the local level from the community recycling program.

COMPOSTING

The composting program provides technical training, on-site review, program analysis, and grant assistance to public and nonprofit entities for the implementation of comprehensive organics management programs ranging from backyard composting to centralized municipal composting facilities.

- Since the program was implemented in 1992, it has provided grant funding and technical assistance used in the establishment of 21 source reduction programs and 23 centralized composting programs for yard trimmings.
- The program has helped 38 communities to implement master composter programs for training citizens to develop their own composting projects.
- Developed 4 community/farmer co-op projects with the soil conservation service to demonstrate the effects of the application of raw and composted yard trimmings on agricultural land. This summer, 30,000 farmers are expected to visit the Lubbock demonstration site.

RECYCLING MARKET DEVELOPMENT PROGRAM

Recycling markets are growing rapidly in Texas and the rest of the country, fueled by a surge in demand for recyclable materials as input materials for new products. Working with the Recycling Market Development Board (made up of representatives of the Texas Department of Commerce, the General Land Office, the General Services Commission and the TNRCC), the TNRCC recycling market development program initiated a strategic market development plan to outline a comprehensive strategy for marketing recyclable materials in Texas.

The program also provides up to the minute information on recycling markets and provides technical assistance to communities, recyclers and others seeking recyclable materials and markets

for them. The OPPR Market Development program publishes Texas Recycler Market News, a monthly newsletter on current prices, market developments and opportunities, distributed to 3,000 public and private contacts. Also published is Recycle Texas, an annual directory of over 900 in-state collectors, buyers, waste haulers and processors of more than 150 types of recyclable materials.

Armed with market development information generated by the market development team, businesses have invested millions of dollars in recycling facilities across the state, from Champion International investing over $100 million in a paper de-inking plant near Houston to Corrugated Services investing $60 million to expand their 100% recycled-content linerboard mill located in Forney.

LOCAL COMMUNITIES --INCENTIVES AND RECOGNITION

CLEAN CITIES 2000

In order to encourage Texas municipalities to increase their waste cutting efforts, the Office of Pollution Prevention and Recycling also sponsors Clean Cities 2000, a voluntary, non-regulatory program for cities that agree to work toward cutting their solid waste generation by 50 percent by the year 2000.

Participating communities also agree to take steps to increase their purchase of recycled content materials, as well as undertaking projects to improve air and water quality. A total of 47 Texas cities from all regions of Texas are currently enrolled in the program, and represent a combined population of 2.5 million people.

CITIZEN PARTICIPATION

We also offer citizens opportunities to get directly involved in environmental projects by providing them with both information and public participation projects. With our new Clean Texas Reporter public service segments for television and our consumer tip sheets, we provide information on recycling, household hazardous waste collection, composting and other techniques for reusing, recycling and properly disposing of household wastes.

GOVERNOR'S ENVIRONMENTAL EXCELLENCE AWARD

Finally, we have our major recognition event, the Governor's Environmental Awards program, each spring. With a blue ribbon panel of experts, we pick what we feel are the very best environmental projects in Texas for special recognition. The winners serve as case study examples of what other Texans can do to protect human health and the environment. Most winning projects are also very cost-effective to implement.

These are the programs we offer to assist Texas citizens and institutions in getting on the right environmental track. Our projects tend to produce cost-effective results over relatively short time periods. Again, let me emphasize that our most successful efforts are the direct result of the development of effective partnerships. This allows us to leverage our resources in order to better serve our customers across the state.

Emergency Response

"Clear and Present Danger"

Don Fawn

Statutory Authorities and Jurisdictions

Texas Natural Resource Conservation Commission

Section 26.127 of the *Texas Water Code* establishes the Texas Natural Resource Conservation Commission (TNRCC) as the principal authority in the State on matters relating to the quality of water in the State. In addition, the Hazardous Substances Spill Prevention and Control Act (Chapter 26, Subchapter G, §26.262, *Texas Water Code*) stipulates that it is the policy of this State to prevent the spill or discharge of hazardous substances into the waters in the State and to cause the removal of any spills and discharges without undue delay. This subchapter shall be construed to conform with Chapter 40 of the *Natural Resources Code*.

The TNRCC is the State's lead agency in spill response to certain inland oil spills, all hazardous substance spills, spills of other substances which may cause pollution, as well as any releases of substances which may adversely impact air quality. The TNRCC shall conduct spill response for the State, and shall otherwise administer the provisions of the Act. The Act also authorizes the Executive Director of the TNRCC (hereinafter referred to as the *Executive Director*) to act independently if no federal on-scene coordinator is present or no action is being taken by an agency of the federal government in response to a spill or discharge of oil, hazardous substances, or other substances. The Executive Director's response may include actions to abate and remove the spill.

Under the authority of certain provisions of Chapter 361 of the *Texas Health and Safety Code*, the TNRCC has additional removal authorities with respect to cleanup of a release or threatened release of hazardous substances at a facility on the TNRCC's registry as described in the Act.

The TNRCC has been designated by the Governor of Texas, in accordance with the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), (42 U.S.C. §9601, et seq.); the Superfund Amendments and Reauthorization Act of 1986 (SARA), (Public Law 99-499); the Clean Water Act, as amended (33 U.S.C. §1251, et seq.); and, the *National Oil and Hazardous Substances Pollution Contingency Plan* (40 CFR Part 300), as the State's lead agency for "Superfund" activities and as one of the State's representatives to the federal Regional Response Team (RRT). In accordance with 40 CFR Part 300.32(b), the RRT serves as the regional body for planning and preparedness before a response action is taken and for coordination and advice during such actions.

Further, the Governor of Texas has designated the TNRCC as one of the three State Trustees for damage assessment and restoration of the State's natural resources that may be affected by a spill, discharge or release. The TNRCC is the designated trustee for air, surface water including sediments, groundwater, and drinking water resources. The TNRCC as a natural resource Trustee has the obligation to protect and preserve all trust resources of the State of Texas.

The State's municipal hazardous waste and industrial solid waste program is implemented by 30 *Texas Administrative Code* (TAC, Chapter 335), adopted under the authority of the State Solid Waste Disposal Act

(*Texas Health and Safety Code Ann.*, Chapter 361, *Vernon Supp.* 1990). Chapter 335 includes the requirement that any person who conveys or transports hazardous waste by truck, ship, pipeline or other means, shall clean up any hazardous waste discharge or release or take such action as may be required or approved by the TNRCC so that the hazardous waste discharge or release no longer presents a hazard to human health or the environment (see 30 TAC 335.93). These Rules also require that owners and operators of hazardous industrial solid waste storage, processing, or disposal facilities must maintain and operate such facilities so as to minimize the possibility of a fire, explosion, or any unplanned sudden or nonsudden release of hazardous waste or hazardous waste constituents to air, soil, or water which could threaten human health or the environment. Additionally, each owner or operator of a hazardous industrial solid waste facility must have a contingency plan for the facility designed to minimize the above possibilities (see 30 TAC 335.152, incorporating by reference 40 *Code of Federal Regulations* Part 264).

The State's regulation of underground and aboveground storage tanks, as administered by the Petroleum Storage Tank Program, is authorized by 30 Texas Administrative Code (TAC, Chapter 334), promulgated under the Texas Water Code §§26.341-26.359. This program establishes minimum standards and procedures to protect and maintain the quality of the state's groundwater and surface water resources from environmental contamination that could result from any releases of harmful substances stored in such tanks. Authority was granted to assess and collect fees for deposit into a fund which could then be used for remediation purposes. In addition to ongoing preventive and remedial actions, emergency orders may be issued to the owner and/or operator of an underground or aboveground storage tank if there is an actual or threatened release of a regulated substance (*Texas Water Code* §26.354). Emergency orders may also be issued if it is determined that more expeditious corrective action than is otherwise provided for is necessary to protect the public health and safety or the environment from harm. Orders issued under this provision may prohibit a person from allowing or continuing the release (or threatened release) and require the person to take the actions necessary to eliminate it. Additionally, the TNRCC is authorized to undertake corrective action measures under any circumstances in which the commission considers it necessary to protect the public health and safety or the environment (*Texas Water Code* §26.3511).

Under the authority of the Texas Clean Air Act (*Texas Health and Safety Code*, Chapter 382, *Vernon Supp.* 1990), the TNRCC is charged with safeguarding the State's air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property, including the aesthetic enjoyment of air resources by the public and the maintenance of adequate visibility. The TNRCC Office of Air Quality requires facilities to report any *major upset* condition (see 30 TAC §101.6). A *major upset* is defined as an unscheduled occurrence or excursion of a process or operation that results in an emission of air contaminants that contravenes the Texas Clean Air Act and is beyond immediate control, or a release that is initiated to protect life in the immediate or adjacent areas (see 30 TAC §101.1). Many may constitute a spill or discharge under the Hazardous Substances Spill Prevention and Control Act as well as a *major upset* under the TNRCC rules.

General Land Office

The Texas General Land Office (GLO) is the state's lead agency for response to oil spills that enter or threaten to enter coastal waters. State discharge response and cleanup operations resulting from unauthorized discharges of oil that enter or threaten to enter coastal waters are administered and directed by the GLO pursuant

to the Oil Spill Prevention and Response Act of 1991 (OSPRA), *Texas Natural Resources Code* §40.001 *et seq.*

OSPRA defines *coastal waters* as *the waters and bed of the Gulf of Mexico within the jurisdiction of the State of Texas, including the arms of the Gulf of Mexico subject to tidal influence, and any other waters contiguous thereto that are navigable by vessels with a capacity to carry 10,000 gallons or more of oil as fuel or cargo.* Thus, the jurisdiction of the GLO extends beyond simply waters that are subject to tidal influence.

OSPRA defines *unauthorized discharge of oil* as *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.*

OSPRA defines *discharge of oil* as *an intentional or unintentional act or omission by which harmful quantities of oil are leaked, spilled, 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.*

The GLO has been designated by the Governor of Texas as a natural resource trustee under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §§ 9601 *et seq.* and the Oil Pollution Act of 1990, 33 U.S.C.A.. The natural resources for which the GLO is responsible are those related to State-owned lands. The GLO as a natural resource Trustee has the obligation to protect and preserve all trust resources of the State of Texas.

Sections 51.121 and 51.291 of the *Texas Natural Resources Code* also give the **GLO permitting authority over pipelines and platforms located on State lands** and antipollution requirements are built into GLO contracts and rules.

Railroad Commission of Texas

The Railroad Commission of Texas (RRC) has spill response authority for spills or discharges from all activities associated with the exploration, development, or production, including storage or transportation, of oil, gas, and geothermal resources (*Texas Natural Resources Code* §§85.042, 91.101, and 91.601). Spills or discharges from brine mining or surface mining are also under the jurisdiction of the RRC (*Texas Revised Civil Statutes Ann.* Art. 5920-11 (Vernon) and Chapter 131 of the *Texas Natural Resources Code*). Any spill or discharge, whether hazardous or nonhazardous, that emanates from an oil, gas, or geothermal resource exploration or production facility or brine mine or surface mine is under the jurisdiction of the RRC.

Activities associated with the exploration, development, and production of oil or gas do not include refining or manufacturing processes; however, the processing of natural gas or natural gas liquids at gasoline plants or at natural gas or natural gas liquids processing plants is subject to the jurisdiction of the RRC with one narrow exception concerning waste from gas processing activities. Until the RRC receives delegation of RCRA authority, waste from gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants **and that is a hazardous waste under RCRA** is under the authority of the Texas Natural Resource Conservation Commission. If the waste from these gas processing plants is **not** hazardous

under RCRA, then the waste is under the jurisdiction of the RRC (*Texas Natural Resources Code* §91.101).

Prevention of pollution from spills or discharges of hazardous or nonhazardous materials from crude oil and natural gas pipelines is under the jurisdiction of the RRC. The RRC does not have pollution prevention authority over pipelines carrying refined petroleum products such as gasoline, diesel, and other fuel oil.

A spill of crude oil into coastal waters may involve both the RRC and the GLO. Although the GLO is the lead agency for spills of oil, including crude oil, into coastal waters or that pose an imminent threat to coastal waters if not abated, the RRC is on-scene coordinator for coastal spills of 240 barrels or less (*Texas Natural Resources Code* §40.008).

The RRC also has pipeline safety jurisdiction over pipleines carrying carbon dioixde, natural gas, and hazardous liquids. The Pipeline Safety Division of the RRC is charged with ensuring the safe operation of such pipelines (***Texas Revised Civil Statutes***, Article 6053-1 *Texas Natural Resources Code*, Chapter 117). Therefore, personnel from the RRC's Pipeline Safety Division may be present at the scene of a spill to investigate concerns related to the safe operation of the pipeline and to determine a probable cause of the spill.

Texas Parks and Wildlife Department

The Texas Parks and Wildlife Department (TPWD) is the State agency with the primary responsibility for protecting the State's fish and wildlife resources (Chapter 12, *Texas Parks and Wildlife Code*). In addition to TPWD authority granted under Chapter 26 of the *Texas Water Code*, §12.0011 of the *Texas Parks and Wildlife Code* states that TPWD's resource protection activities include investigating fish kills and any type of pollution that may cause loss of fish and wildlife resources, taking necessary action to identify the cause and party responsible for the fish kill or pollution, estimating the monetary value of lost resources, and seeking restoration through presentation of evidence to the agency responsible for permitting or through county or district court.

By designation of the Governor of Texas, the TPWD is also a State natural resource Trustee. The natural resources for which the TPWD is responsible are the biota, i.e., aquatic life, wildlife, birds, vegetation, etc. The TPWD as a natural resource Trustee has the obligation to protect and preserve all trust resources of the State of Texas.

Section 11.071 of the *Texas Parks and Wildlife Code* gives the TPWD the authority to regulate the use of Department lands for oil, gas, and other mineral recovery and associated activities as the TPWD considers reasonable and necessary to protect the surface estate of Department lands or to protect human health or property. Department lands include State parks, wildlife management areas, and natural areas.

Chapter 86 of the *Texas Parks and Wildlife Code* authorizes the TPWD to regulate, control, and protect marl and sand of commercial value and all gravel, sand, and mudshell located within the tidewater limits of the State and on islands within those limits, and within the freshwater areas of the State not embraced by a survey of private land and on islands within those areas.

Texas Department of Public Safety

The Texas Department of Public Safety (DPS) has adopted rules relating to the reporting of all transportation incidents involving releases of reportable quantities of hazardous materials and on-site coordination of transportation emergencies on public roads and railroads (*Texas Government Code Ann.*, §411.018, *Vernon Supp.* 1990). These rules specify DPS's role in on-site coordination and outline a written report requirement for carriers involved in hazardous materials transportation incidents (see 37 TAC §§3.101 and 3.102).

During transportation incidents involving hazardous materials, the DPS official, as on-site coordinator, is responsible for on-site coordination of transportation emergencies for all unincorporated areas and may assume the on-site coordination role within cities when requested to do so by local government (37 TAC §3.101(a)). The DPS law enforcement officer who is the first responder on-site is responsible for the on-site coordination (37 TAC §3.101(b)). The DPS on-site coordinator is authorized to make emergency rules when normal operating procedures prove inadequate (37 TAC §3.101(d)). DPS coordination responsibilities will be performed until relieved by appropriate DPS authority or until the incident is concluded.

Texas Department of Transportation

The Texas Department of Transportation (TxDOT) and the Texas Natural Resource Conservation Commission, as provided in §25.264(f) of the *Texas Water Code*, have developed a contractual agreement whereby TxDOT personnel, equipment, and materials may be used in State-funded cleanup actions. All expenses and costs resulting from cleanup activities are subject to reimbursement from the Texas Spill Response Fund.

The Governor of Texas and the Governor's Division of Emergency Management

If a spill presents or threatens to become a disaster, the Governor of Texas may utilize the authority granted under the Texas Disaster Act of 1975 (*Texas Government Code Ann.*, Chapter 418, *Vernon Supp.* 1990) to make available and bring to bear all resources of the State to prevent or lessen the impact of such a disaster. As defined in the Texas Disaster Act of 1975, *disaster* means the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause or other public calamity requiring emergency action. A disaster is declared by executive order or proclamation if the Governor finds that a disaster has occurred or that the occurrence or the threat of a disaster is imminent. Such an executive order activates the recovery and rehabilitation phase of the *State of Texas Emergency Management Plan*.

The Texas Disaster Act of 1975 authorizes the Governor to establish an Emergency Management Council to advise and assist the Governor in all matters relating to disaster preparedness, emergency services, energy emergencies, and disaster recovery. The Emergency Management Council is composed of the heads of all the State's agencies, boards and commissions, and representatives of organized volunteer groups whose legal functions relate to important phases of emergency management (*Texas Government Code Ann.*, §418.013, *Vernon Supp.* 1990). The director of DPS also serves as the director of the Governor's Division of Emergency Management (DEM) and chairs the Emergency Management Council.

Under the *State of Texas Emergency Management Plan*, the Emergency Management Council is responsible for the coordination and utilization of all State resources during a disaster. Operations of the Council are coordinated by the Governor's Division of Emergency Management (DEM).

Under the *State of Texas Emergency Management Plan*, emergencies concerning spills or discharges of hazardous substances, or the release or threatened release of hazardous substances, radiological emergencies, and release which may adversely impact the State's air quality, are addressed under Emergency Support Function 10 (ESF-10). The Texas Natural Resource Conservation Commission serves as the lead agency for ESF-10 with support being provided by the General Land Office and the Railroad Commission of Texas.

Notification Requirements and Reportable Quantities

Federal

Reportable spills, as defined by federal regulations, shall be reported by the responsible person immediately to the National Response Center (NRC) duty officer in Washington D.C. The toll-free number for the NRC is 800/424-8802. All notices of spills received at the NRC are relayed immediately by telephone to the predesignated federal On-Scene Coordinator (OSC) for the affected area. If it is not possible to immediately report to the NRC, the report may be given to the office of the appropriate federal OSC (Coast Guard or EPA, Appendix A). However, the responsible person is still required to notify the NRC as soon as possible. **Notification of the NRC does not constitute notice to the State.**

State of Texas

The State of Texas has established a **toll-free Environmental Release Hotline at 1-800-832-8224** to provide the regulated community with a notification system designed to satisfy their State reporting requirements with a single phone call. Callers dialing the hotline will be connected to the Texas Department of Public Safety Communications Center where DPS dispatchers will record the incoming call, determine which State agency has jurisdiction, and relay the report to the agency with jurisdiction both verbally and by telefax. Agencies included in the system are the TNRCC, GLO, and RRC. This system generates an incident report and establishes a common incident numbering system.

Texas Natural Resource Conservation Commission

The *Texas Water Code*, Section 26.039 and Subchapter G requires reporting to the TNRCC of discharges, spills and releases, "which cause or may cause pollution of water in the state". A telephone report is required by the person responsible, **"as soon as possible and not later than 24 hours after the occurrence"**. The toll-free number **1-800-832-8224** may be called by the regulated community to report discharges, spills, and releases to the TNRCC.

Although TNRCC anticipates that the Environmental Release Hotline will accept any call that they receive, the number has been established primarily for the regulated community. Additionally, there are other State and federal requirements for release reporting which may be satisfied by calling the TNRCC at 1-800-832-8224.

Callers may also satisfy reporting requirements by contacting their TNRCC Regional Office during regular business hours (8:00 am to 5:00 pm) or by calling the agency's 24-hour location at 512-463-7727 or 512-239-2507.

TNRCC may also be called directly by persons other than the person responsible for a discharge, spill, or release when the caller wants to provide or obtain information regarding an environmental emergency.

A reportable discharge or spill is a discharge or spill of oil, petroleum product, used oil, hazardous substances, industrial solid waste, or other substances into the environment in a quantity equal to or greater than the reportable quantity listed in 30 TAC §327.4.

Upon the determination that a reportable discharge or spill has occurred, the responsible person shall notify the agency as soon as possible but not later than 24 hours after the discovery of the spill or discharge. The responsible person shall notify the agency in any reasonable manner including by telephone, in person, or by any other method approved by the agency. The responsible person shall notify one of the following:

(1) the State Emergency Response Center at 1-800-832-8224;

(2) during normal business hours only, the regional office for the agency region in which the discharge or spill occurred; or

(3) the agency at the agency 24-hour spill reporting number

The initial notification shall provide, to the extent known, the information in the following list. Copies of spill reports prepared for other governmental agencies shall satisfy this requirement if they contain, or are supplemented to contain, all the information required by this subsection. The initial notification shall contain:

(1) the name, address and telephone number of the person making the telephone report;

(2) the date, time, and location of the spill or discharge;

(3) a specific description or identification of the oil, petroleum product, hazardous substances or other substances discharged or spilled;

(4) an estimate of the quantity discharged or spilled;

(5) the duration of the incident;

(6) the name of the surface water or a description of the waters in the state affected or threatened by the discharge or spill;

(7) the source of the discharge or spill;

(8) a description of the extent of actual or potential water pollution or harmful impacts to the environment and an identification of any environmentally sensitive areas or natural resources at risk;

(9) if different from paragraph (1) of this subsection, the names, addresses, and telephone numbers of the responsible person and the contact person at the location of the discharge or spill;

(10) a description of any actions that have been taken, are being taken, and will be taken to contain and respond to 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.

The responsible person shall notify the agency as soon as possible whenever necessary to provide information that would trigger a change in the response to the spill or discharge.

Notifying the agency that a reportable discharge or spill has occurred shall not be construed as an admission that pollution has occurred. Furthermore, if the responsible person determines, after notification, that a reportable discharge or spill did not occur, the responsible person may send a letter to the agency documenting that determination. If the executive director agrees with that determination, the executive director will note the determination in commission records. If the executive director disagrees with that determination, the executive director will notify the responsible person within 30 days.

If the discharge or spill creates an imminent health threat, the responsible person shall immediately notify and cooperate with local emergency authorities (fire department, fire marshall, law enforcement authority, health authority, or Local Emergency Planning Committee (LEPC), as appropriate). The responsible party will cooperate with the local emergency authority in providing support to implement appropriate notification and response actions. The local emergency authority, as necessary, will implement its emergency management plan, which may include notifying and evacuating affected persons. In the absence of a local emergency authority, the responsible person shall take reasonable measures to notify potentially affected persons of the imminent health threat.

As soon as possible, but no later than two weeks after discovery of the spill or discharge, the responsible person shall reasonably attempt to notify the owner (if identifiable) or occupant of the property upon which the discharge or spill occurred as well as the occupants of any property that the responsible person reasonably believes is adversely affected.

TNRCC Reportable Quantities

Hazardous substances. The reportable quantities for hazardous substances shall be:

(1) for spills or discharges onto land - the quantity designated as the Final Reportable Quantity (RQ) in Table 302.4 in 40 CFR §302.4; or

(2) for spills or discharges into waters in the state - the quantity designated as the Final RQ in Table 302.4 in 40 CFR §302.4, except where the Final RQ is greater than 100 pounds in which case the RQ shall be 100 pounds.

Oil, petroleum product, and used oil.

(1) The RQ for crude oil and oil other than that defined as petroleum product or used oil shall be:

(A) for spills or discharges onto land - 210 gallons (five barrels); or

(B) for spills or discharges directly into water in the state - quantity sufficient to create a sheen.

(2) The RQ for petroleum product and used oil shall be:

(A) except as noted in subparagraph (B) of this paragraph, for spills or discharges onto land - 25 gallons;

(B) for spills or discharges to land from PST exempted facilities - 210 gallons (five barrels); or

(C) for spills or discharges directly into water in the state - quantity sufficient to create a sheen.

Industrial solid waste or other substances. The RQ for spills or discharges into water in the state shall be 100 pounds.

Regulations for spills from certain underground storage tanks (UST) and aboveground storage tanks (AST) are outlined in 30 *Texas Administrative Code* §334.75 entitled "Reporting and Cleanup of Surface Spills and Overfills". Owners and operators of UST systems must contain and immediately clean up a spill or overfill, report to the Commission within 24 hours, and begin corrective action in accordance with 30 TAC §§334.76--334.81 (relating to Initial Response to Releases; Initial Abatement Measures and Site Check; Initial Site Characterization; Free Product Removal; Investigation for Soil and Groundwater Cleanup; and Corrective Action Plan) in the following cases:

- a spill or overfill of petroleum that results in a release to the environment that exceeds 25

gallons, or that causes a sheen on nearby surface water; and,

- a spill or overfill of a hazardous substance that results in a release to the environment that equals or exceeds its reportable quantity under CERCLA (40 *Code of Federal Regulations* Part 302).

Owners and operators of UST systems must contain and immediately clean up a spill or overfill of petroleum that is less than 25 gallons, and a spill or overfill of a hazardous substance that is less than the reportable quantity under CERCLA (40 CFR Part 302). If cleanup cannot be accomplished within 24 hours, owners and operators must immediately notify the executive director.

Railroad Commission of Texas Notification Requirements and Reportable Quantities

The responsible party must **immediately** notify the Railroad Commission of any fire, leak spill, or break from activities associated with the exploration, development, and production of oil, gas, or geothermal resources. These include:

- All spills of crude oil greater than five (5) barrels;
- All spills of any quantity of crude oil than enters water;
- All blowouts and/or fires associated with oil, gas, and geothermal activities;
- Any accidental release of hydrogen sulfide gas of sufficient volume to present a hazard and of any hydrogen sulfide related accident; or,
- Any injury, death, property damage from gas pipelines ($5,000) or hazardous liquid pipelines ($50,000) or other significant incident.

Spills should immediately be reported to the appropriate Railroad Commission division through the appropriate district office, or if necessary to the RRC 24-hour statewide emergency number 512/463-6788. Examples of some spills requiring notification are spills from leases, crude oil or natural gas pipelines, rigs or platforms operating in coastal waters, or trucks on an oil or gas lease. Upon notification, the RRC will:

- Act as lead agency and State on-scene coordinator (OSC) for spills from facilities associated with the exploration, development, and production, including transportation or storage, of oil, gas, or geothermal resources, along with brine and other surface mining activities.
- Act as OSC for a crude oil spill of less than 240 barrels from an exploration, development, or production facility that enters coastal waters or poses an imminent threat of entering coastal waters.
- Provide technical expertise to the SOSC regarding releases of hydrogen sulfide gas.

- Provide communications gear, H_2S monitoring equipment, and boats if requested by the OSC.

Reporting requirements for Operators Regulated by the RRC

(1) Crude oil spills over five barrels. For each spill exceeding five barrels of crude oil, the responsible operator must comply with the notification and reporting requirements of 16 TAC §3.20 of this title (relating to Notification of Fire Breaks, Leaks, or Blow-outs) and submit a report on a Form H-8 to the appropriate district office. The following information must be included:

(A) area (square feet), maximum depth (feet), and volume (cubic yards) of soil contaminated with greater than 1.0% by weight total petroleum hydrocarbons;

(B) a signed statement that all soil containing over 1.0% by weight total petroleum hydrocarbons was brought to the surface for remediation or disposal;

(C) a signed statement that all soil containing over 5.0% by weight total petroleum hydrocarbons has been mixed in place to 5.0% by weight or less total petroleum hydrocarbons or has been removed to an approved disposal site or to a secure interim storage location;

(D) a detailed description of the disposal or remediation method used or planned to be used for cleanup of the site;

(E) the estimated date of completion of site cleanup.

(2) Crude oil spills over 25 barrels. For each spill exceeding 25 barrels of crude oil, in addition to the report required in paragraph (1) of this subsection, the operator must submit to the appropriate district office a final report upon completion of the cleanup of the site. Analyses of samples representative of the spill site must be submitted to verify that the final cleanup concentration has been achieved.

(3) Crude oil spills of five barrels or less. Spills into the soil of five barrels or less of crude oil must be remediated to these standards, but are not required to be reported to the commission. All spills of crude oil into water must be reported to the commission.

General Land Office Notification Requirements and Reportable Quantities

Any person responsible for an unauthorized discharge of oil or the person in charge of any vessel or terminal facility from or at which an unauthorized discharge of oil has occurred, as soon as that person has knowledge of the discharge, shall:

(1) **immediately notify the GLO at 1-800-832-8224 of the discharge**, and

(2) undertake all reasonable actions to abate, contain, and remove pollution from the discharge.

On notification of a spill, the GLO will act as on-scene coordinator (OSC). The OSC shall ensure that response activities are consistent with the *National Contingency Plan* (NCP), the *State Coastal Discharge Contingency Plan*, *State of Texas Oil and Hazardous Substances Spill Contingency Plan*, and any other applicable plans.

Any responsible person or person or organization under the control of the responsible person shall comply with directions and orders of the OSC. The only grounds upon which the OSC's orders and directions can be challenged are:

(1) they constitute an unreasonable threat to public safety or natural resources or

(2) they conflict with the directions or orders of the federal OSC

The responsible person or his agent must verbally state the grounds for his refusal to comply and must given written notice of the grounds for failure to comply within 48 hours of the refusal. Written notice of reasons for failure to comply with the orders or directions of the OSC shall be mailed to :

Division of Oil Spill Prevention and Response
Texas General Land Office
1700 North Congress Avenue, Room 740
Austin, Texas 78701-1495

TNRCC Spill Response and Remediation Requirements

The responsible person shall immediately abate and contain the spill or discharge and cooperate fully with the executive director and the local incident command system. The responsible person shall also begin reasonable response actions which may include, but are not limited to, the following actions:

(1) arrival of the responsible person or response personnel hired by the responsible person at the site of the discharge or spill;

(2) initiating efforts to stop the discharge or spill;

(3) minimizing the impact to the public health and the environment;

(4) neutralizing the effects of the incident;

(5) removing the discharged or spilled substances; and

(6) managing the wastes.

Upon request of the local government responders or the executive director, the responsible person shall provide a verbal or written description, or both, of the planned response actions and all actions taken before the local governmental responders or the executive director arrive. When the agency on-scene coordinator requests this information, it is subject to possible additional response action requirements by the executive director. The information will serve as a basis for the executive director to determine the need for:

(1) further response actions by the responsible person;

(2) initiating state funded actions for which the responsible person may be held liable to the maximum extent allowed by law; and

(3) subsequent reports on the response actions.

The responsible person shall submit written information, such as a letter, describing the details of the discharge or spill and supporting the adequacy of the response action, to the appropriate agency regional manager within 30 working days of the discovery of the reportable discharge or spill. The regional manager has the discretion to extend the deadline. The documentation shall contain one of the following items:

(1) A statement that the discharge or spill response action has been completed and a description of how the response action was conducted. The statement shall include the initial report information required by 30 TAC §327.3(c). The executive director may request additional information. Appropriate response actions at any time following the discharge or spill include use of the Risk Reduction Rules in 30 TAC §335.8 or other appropriate agency risk-based corrective action programs.

(2) A request for an extension of time to complete the response action, along with the reasons for the request. The request shall also include a projected work schedule outlining the time required to complete the response action. The executive director may grant an extension up to six months from the date the spill or discharge was reported. 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.

(3) A statement that the discharge or spill response action has not been completed nor is it expected to be completed within the maximum allowable six month extension. The statement shall explain why completion of the response action is not feasible and include a projected work schedule outlining the remaining tasks to complete the response action. This information will also serve as notification that the response actions to the discharge or spill will be conducted under the Risk Reduction Rules in 30 TAC §335.8 or other commission risk-based corrective action rules, and shall indicate the appropriate risk-based corrective action program.

Ethical Concerns of Environmental Practitioners

"True Lies"

Prohibitions of Ex Parte Contacts in Administrative Law: Ethical Concerns for Environmental Attorneys

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Prohibitions on Ex Parte Contacts in Administrative Law: Ethical Concerns for Environmental Attorneys.

Introduction

Environmental attorneys in Texas are increasingly finding themselves in a quandary as to what agency contacts on behalf of a client constitute a prohibited ex parte contact versus necessary interaction with agency staff. This situation is arising with increasing frequency when (1) participating in rulemaking activities and (2) seeking agency authorization from the Texas Natural Resource Conservation Commission (TNRCC) to operate a business in Texas under TNRCC jurisdiction.

This issue has become more of a problem because of the TNRCC's drive to streamline the environmental "permit" process in Texas by issuing registrations for certain types of regulated activities rather than contested case permits. Given recent court challenges, it is expected that the TNRCC's statutory authority to issue such registrations will be decided by the 201st Judicial District, Travis County, in the near future. Given the legislative history of the issue, it is expected that the court will uphold the Agency's statutory authority.

The purpose of this paper is to examine both Texas Administrative Procedures Act (APA) and statutory procedures before the TNRCC and, hopefully, provide the environmental practitioner with some insight into what types of agency contacts are prohibited during both the rulemaking and regulatory approval processes. The following sections will highlight ethical considerations in agency practice, provide an overview of the state of the law in Texas on APA and statutory ex parte prohibitions, and will conclude with a case study based on new TNRCC rules that can involve both APA and statutory proceedings. Included are citations to recent cases and other seminar papers as additional resources for those attorneys who find themselves with an ex parte issue.

Ethical Considerations in Agency Practice

It may be appropriate at this point to discuss the legal reason for the prohibition on ex parte communications with certain Agency members. The reason is to prevent both applicants and the public from being denied due process of law when dealing with regulatory agencies. The primary purpose of the APA is to prevent a denial of due process in the administrative arena. While not generally as well known among environmental practitioners, pre-APA statutory prohibitions on denial of due process still exist and are expected to become increasingly important in current agency practice, particularly before the TNRCC.

Since the APA only applies to contested case hearings, as will be explained in more detail in the next section, it is important to note the distinction between a contested case proceeding and a non-contested case proceeding before the TNRCC. Until recently the TNRCC generally regulated activities by permit. Issuance of a permit occurs only after notice and opportunity for an evidentiary hearing under the APA. This is a contested case proceeding.

The TNRCC is now regulating an increasing number of activities through an Executive Director issued registration rather than a permit. Certain of these registrations only require public notice and the opportunity to appeal the Executive Director's decision on the registration to the Commissioners. There is no procedural mechanism for a contested case proceeding.

These registration proceedings are explicitly excluded from the APA. However, this exclusion does not mean that the ex parte prohibition does not apply under the strictures of the TNRCC's enabling statutes. It seems clear that direct contacts with the Commissioners are still prohibited even under a non-contested case registration proceeding. The ex parte prohibition should not apply to contacts with the Executive Director's staff since the Commissioners are still the ultimate decisionmakers under the registration rules.

Texas courts are faced with the difficult task of balancing the procedural due process rights of applicants and the public against the agency's interest in efficient agency functioning and use of information. The issue becomes even more complicated when a public interest or citizens' group is interested in the outcome of a particular application, whether for a permit or registration. These groups often have legitimate rights which are implicated in a permit or registration proceeding, and they therefore have an interest in gaining information about, and influencing, that proceeding. The problem arises when such a group, subsequent to engaging in ex parte communications, decides to protest a given permit or registration application. Although no caselaw has been found addressing this point, the situation is not totally dissimilar from that of an applicant who necessarily interacts with agency staff in developing a technically complete application. The ex parte prohibition on Commission contacts, however, should apply to such groups or individuals just as it does to applicants.

The TNRCC is also engaged in major rulemaking on a number of fronts. Rulemaking is implicitly excluding from the ex parte prohibitions of the APA. In some cases before the TNRCC applicants are concurrently involved in rulemaking, permitting activities and registration activities. This situation obviously leads to confusion over which Commission contacts are prohibited and which are allowed.

APA Restrictions on Ex Parte Communications

The APA provides for a broad general rule against ex parte communications in contested cases before a state agency. Section 2001.061 of the statute provides:

> Unless required for the disposition of an ex parte matter authorized by law, *a member or employee of a state agency assigned to render a decision or to make findings of fact or conclusions of law in a contested case* may not directly or indirectly communicate in connection with an issue of fact or law with a state agency, person, party, or a representative of those entities, except on notice and opportunity for each party to participate. V.T.C.A., Government Code § 2001.061 (emphasis added).

It should be emphasized that the statute prohibits a party from communicating with a member of a state agency only in a "contested case". A contested case is defined as a "proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing". *Id.* at § 2001.003(1). "Party" is defined as "a person or state agency named or admitted as a party", and "person" is defined as "an individual, partnership, corporation, association, governmental subdivision, or public or private organization that is not a state agency". *Id.* at § 2001.003(4)(5). Thus, decision-making or fact-finding members or employees of state agencies are prohibited from communicating with any named or admitted party, whether that party be a person (individual, corporation, association, governmental subdivision, or public or private organization) or a state agency. Because the prohibition on ex parte communications is only applicable in contested cases, it appears that parties could communicate ex parte with an agency in regard to other agency functions, such as rulemaking.

The primary purpose of Section 2001.061 is to "preclude 'litigious facts' coming before the decisionmaker without becoming part of the record in the contested case". *County of Galveston v Texas Dep't of Health*, 724 S.W.2d 115, 121 (Tex.App.-Austin, 1987, *writ ref'd n.r.e.*). For example, in *Lewis v. Guaranty Federal Savings and Loan Assoc.*, 483 S.W.2d 837, 842 (Tex.Civ.App.-Austin 1972, *writ ref'd n.r.e.*), the court stated:

> If in [an administrative] hearing a party is denied notice that it is being confronted by evidence gathered Ex parte by the Commissioner and is not afforded opportunity to 'respond and present evidence and argument' or in some manner to offer evidence in explanation or rebuttal, the party is denied due process.

In *Smith v. Houston Chemical Services, Inc.*, 872 S.W.2d 252 (Tex.App.-Austin 1994, *writ denied*), Harris County challenged a solid waste facility permit granted by the Texas Water Commission, now TNRCC. The County argued that a Commissioner engaged in ex parte communications with the agency staff which violated the County's due process rights and that Section 2001.061 of the APA was unconstitutional in purporting to authorize agency heads to communicate with their staff for the purpose of utilizing the staff's special skills or knowledge in evaluating the evidence. *Id.* at 278. The court held that Section 2001.061 is not unconstitutional in purporting to authorize agency heads to consult with their staff for the purposes indicated in the statute. *Id., citing Withrow v Larkin*, 421 U.S. 35, 58 (1975) ("The combination of investigative and adjudicative functions does not, without more, constitute a due process violation").

Similarly, the court declined to find the APA provision to be violative of procedural due process rights, whether under the APA or the federal and state constitutions, where there was no claim that the Commissioner acquired facts, through his consultations, that were simultaneously "(1) outside the evidentiary record and (2) grounds for the decision made by the three Commissioners." *Id.* The court also rejected the theory that the mere fact that consultations among agency members occurred is sufficient to establish a violation of the constitutional guarantees of due process of law. *Id. See also Larkin*, 421 U.S. at 55 (noting that State administrators are presumed to be free of bias and "[t]he mere exposure to evidence presented in nonadversary investigative procedures is insufficient to impugn" their fairness at an adversary hearing).

The APA provides four explicit exceptions to the general rule prohibiting ex parte communications. There is also an implicit exception for rulemaking activities. The four explicit exceptions are as follows:

> (1) Ex parte communications are allowed as long as notice has been given and each party has the opportunity to participate in the discussions. *Id.* at 2001.061(a).
> (2) A member of a state agency "may communicate ex parte with another member of the agency unless prohibited by other law." *Id.* at 2001.061(b).
> (3) A member or employee of a state agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case may communicate ex parte with an agency employee who has not participated in a hearing in the case for the purpose of using the special skills and knowledge of the agency and its staff in evaluating the evidence. *Id.* at 2001.061(c).
> (4) Ex parte communications are not prohibited when required for the disposition of ex parte matters authorized by law. *Id.* at 2001.061(a).

A. The First Exception: Notice to All Parties.

The first exception to § 2001.061 is the most practical and straight-forward. Given the technical nature of many administrative decisions, hearings officers frequently require additional information from the parties. Pamela M. Giblin, *Ex Parte Contacts in Administrative Proceedings: Just Say "No"*, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED ADMINISTRATIVE LAW COURSE, D, D-2 (1994). This exception makes easy and fair solutions to this recurring problem possible, allowing everything from conference calls with all parties to the more formal system of requesting additional briefs on particular issues. *Id.* Regardless of the method chosen, this exception explicitly guarantees an equal opportunity to respond and be heard.

B. The Second Exception: Ex Parte Contacts Among Agency Members.

The second exception in § 2001.061, allowing agency members to discuss pending matters ex parte, has been scrutinized by the Texas Supreme Court and "sharply curtailed in certain instances". *Id.*

In *Acker v. Texas Water Comm'n*, 790 S.W.2d 299 (Tex. 1990), the Texas Supreme Court considered the applicability of Section 2001.061(b) where two Commissioners discussed a pending matter outside the hearing room immediately prior to their final vote. The agency argued, and the court of appeals held, that the second exception to the ban on ex parte communications explicitly authorized agency members to engage in such off-the-record communications. *Id.* at 300. In reversing, the Supreme Court focused on whether Section 2001.061(b) of the APA could be read to, in effect, repeal the Open Meetings Act for purposes of all administrative agency consideration of contested cases. The Court held that Section 2001.061(b) did not repeal the Open Meetings Act for these purposes. *Id.* at 301.

Instead the Court found that Section 2001.061(b) of APA could be "harmonized with the Open Meetings Act by allowing a state commission's members to confer ex parte, but only when less than a quorum is present." *Id.* The Court reasoned that such a rule would preserve both the APA and the objective of the Open Meetings Act to forbid ex parte deliberations between a majority of governmental decisionmakers. The Court noted that:

> This harmonization admittedly denies to three member commissions the opportunity to meet ex parte, since any meeting of more than one commissioner obviously constitutes a quorum. *Id.* at 302, n. 3.

Thus, the holding in *Acker* effectively eliminates the statutorily-created exception for ex parte communications among agency members

whenever there are three or fewer members on an agency's decision-making body. The TNRCC has a three member Commission.

In *Lone Star Greyhound Park, Inc. v. Texas Racing Comm'n*, 863 S.W.2d 742 (Tex. App.--Austin 1993, *writ denied*), a group of rejected greyhound racing license applicants brought an action for judicial review of a final order issued by the Racing Commission. The applicants argued that the order should be set aside because the order was fatally poisoned by ex parte communications between Commission members and the commission's general counsel. The court pointed out that the prohibition of ex parte communications contained in the APA does not ordinarily apply to contested-case communications between agency decision makers and the agency's general counsel. *Id.* at 750, *citing County of Galveston v Texas Dep't of Health*, 724 S.W.2d 115, 124 (Tex.App.-Austin, 1987, *writ ref'd n.r.e.*). More specifically, the court found that the ex parte communications at issue were not violative of the APA because they were not shown "to have involved evidence in, or the merits of, a contested case". *Id.* at 751.

Because the appellants in Lone Star failed to show that the evidence established as a matter of law that the allegations they made were true, the trial court's findings of fact regarding the communications were allowed to stand. They shed light on what may or may not be found to constitute prohibited communications between agency members and general counsel:

> (1) they concerned only procedural or administrative matters and not the merits of the contested case; (2) they were not made as a conduit for bringing before the Commissioners the parties' views regarding the merits of the various applicants; (3) they did not amount to suggestions as to how the Commissioners should vote; (4) they did not pertain to the preparation of findings of fact or conclusions of law; and (5) all parties were aware of the communications and did not object to them before issuance of the final order...*Id.* at 750.

Thus, it was held that the communications between the general counsel and the Commissioners did not violate the APA, and "in any case such a violation was harmless or had been waived". *Id.*

The applicants also argued that prohibited ex parte communications had taken place between one of the Commissioners and the Agency Veterinarian. *Id.* The court ruled that because the applicants could not establish that the content of the ex parte communication was prohibited by the APA, no prohibited ex parte communication took place. *Id.* at 751.

C. The Third and Fourth Exceptions: Utilizing Special Skills of Agency Employees and When Permitted by Law.

The third exception to the general prohibition against ex parte contacts provides that:

> Under Section 2001.090, a member or employee of a state agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case may communicate ex parte with an agency employee who has not participated in a hearing in the case for the purpose of using the special skills or knowledge of the agency and its staff in evaluating the evidence." V.T.C.A., Government Code § 2001.061(c).

Section 2001.090 simply provides that the "special skills or knowledge of the state agency and its staff may be used in evaluating the evidence". *Id.* at § 2001.090(d).

This exception allows agencies to, in effect, segregate their employees according to function in order to permit continued ex parte communication within the agency. Giblin at D-2. For example, an agency could designate one division to accept and help prepare applications which will later be reviewed in a contested case hearing by another division of the agency. *Id.* Thus, even though an application may ultimately be contested, agency members that work in the division that accepts and prepares the application may engage in unlimited ex parte communications amongst themselves as long as these employees will not themselves be called upon to make findings of fact or conclusions of law. *Id.* This scheme was validated in *Galveston County*.

In *Galveston County*, the court held that a permit applicant's pre-hearing communications with employees of the Bureau of Solid Waste Management, a party to the contested case and a component of the Department of Health, did not violate the general prohibition against ex parte communications. *Id.* at 122. The opponents of the permit had complained that the applicant had enjoyed many opportunities to communicate ex parte with Department of Health employees before any members of the public were even notified of the application. The court found this to be immaterial in the sense that none of the communications were to or from a member or employee "assigned to render a decision or to make findings of fact and conclusions of law" in the case. *Id.* at 121.

In so finding, the appellate court noted that the permit applicant had communicated only with the section of the agency responsible for ensuring that all required information accompanied the application. *Id.* Because the decision making authority of the

Department of Health was vested in another distinct part of the agency, the Commissioner of Health, the communications between the applicant and the employees of the agency were found not to be prohibited under the APA. *Id.* The court also addressed post-hearing communications which occurred between the Commissioner of Health and the Department's general counsel, who "ha[d] no connection with the conduct of contested cases of the kind involved" in *Galveston County*. *Id.* at 122. The court began by noting that the Commissioner obtained legal advice from the general counsel, and "presumably based [his decision] thereon". *Id.* The court had the following to offer in evaluating communications between commissioners and their general counsel:

> ...[APA § 2001.061] forbids a decisionmaker's obtaining legal advice ex parte, concerning a contested case, unless such advice may be said to fall within the exception allowed for ex parte communications "required for the disposition of ex parte matters authorized by law..." This exception is stated in very broad terms indeed and we have found no judicial opinion or other authority that sheds light on the legislative intention that lies behind the phrase. It *has* been stated, without reference to any authority or reasoning, that after the passage of APTRA Sec. 17 [APA § 2001.061] "agency members should and will *continue* to communicate with other members, their *counsel*, personal assistants, and staff personnel, *subject to the requirements of the Act*". McCalla, *The Administrative Procedure and Texas Register Act*, 28 BAYLOR LAW REV. 445, 459 (1976) (emphasis added). *Id.*

The court then went on to note that this statement was not very useful for present purposes because the very question to be decided was whether APA Section 2001.061 forbids agency members from communicating ex parte with their counsel in the context of contested cases, or whether such communications fall within the exception of being "required for the disposition of ex parte matters authorized by law...". *Id.* The court held as follows:

> In sum, legal problems, powers, procedures, and methods pervade and dominate the administrative process generally and contested-case proceedings particularly. They are, indeed, the very essence of the latter. May it nevertheless be concluded, as appellants do, that the decisionmaker in a contested case must be isolated from any legal advice from anyone, other than the parties and

> their "representatives", owing to the apparent prohibition contained in APTRA Sec. 17 [APA Section 2001.061]?
>
> Consistently with its general practice, the Legislature has not required that the Commissioner be legally trained. This implies in the strongest sense, in our view, that the Legislature intended that he should have the independent advice of a legally trained person when necessary to the discharge of his responsibilities under the numerous statutes the Legislature has given him to administer and enforce...We hold, therefore, that the Legislature intended that the Commissioner should have the independent legal advice of the Department's general counsel, when he has not participated in the case theretofore,...*Id.* at 123-124.

In fact, the *Galveston County* court went one step further in recognizing that the APA's language also permits an agency to segregate employees in order to permit certain ex parte communications by those who will ultimately issue decisions in contested cases. Once again, these agency members may communicate ex parte with other agency employees, as long as the communication is for the purpose of utilizing the specialized skills and knowledge of the employees and as long as those employees will not themselves be called upon to make findings of fact or conclusions of law. *Id.* at 122.

It has been written that such a segregation-by-position scheme is "preferable to the scenario approved by the Texas Supreme Court in *Vandygriff v. First Savings and Loan Ass'n of Borger*, 617 S.W.2d 669 (Tex. 1981)". Giblin at D-3. In *Vandygriff*, a group of residents in Borger, Texas, filed an application with the Savings and Loan Commission of Texas for a new savings and loan association to be located in Borger. The Savings and Loan Commissioner originally denied the charter in August of 1978. In September, a few of the unsuccessful applicants met with the Commissioner "to find out what they had done wrong." *Id.* at 671. Shortly after this meeting, an existing savings and loan association filed an application with the Commission to establish a branch office in Borger. One month later, the original group of residents refiled their application. The Commissioner granted a charter to the residents, but denied the charter for the existing branch savings and loan. The existing savings and loan complained that the residents had communicated ex parte with the Commissioner in violation of APA Section 2001.061. *Id.*

The Texas Supreme Court held that the meeting between the residents and the Commissioner was not a prohibited ex parte communication. *Id.* at 672. The Court emphasized that the APA only prohibits ex parte communications during the pendency of a contested case. The Court found that there was no pending case before the Commission when the discussion took place, since the second application for the charter had not yet been filed. *Id.* The Court reasoned that "there is no contested case until an application for a savings and loan association charter is filed." *Id.* Therefore, the Court concluded that because there was no contested case before the Commission there was no prohibited ex parte communication. *Id.*

However, it has been noted that "structuring permissible communications according to the responsibilities of the participants, as approved by the appellate court in Galveston County, may present fewer ethical questions than permitting ex parte contacts during a window of time before a case has been formally docketed". Giblin at D-3. This is so because in the first scenario parties are communicating solely with employees or officers who have no decision making authority. In contrast, in the second scenario parties are communicating with individuals empowered or ultimately responsible for deciding the fate of their application.

It may be that this question has not been finally settled, as the following quotation indicates:

> The question presented in the *Vandygriff* case is a close one. The Supreme Court's decision may encourage parties to time their ex parte contacts carefully so as to avoid the sanctions of [APA Section 2001.061] and yet achieve the desired result of the contact. If this occurs, the solution may be to amend [Section 2001.061] to cover not only parties involved in actually pending contested cases, but also those who know they will be involved in a prospective contested case connected with the private communication. John L. Hill & David C. Kent, *Administrative Law*, 36 SW. L.J. 527, 535-536 (1982-83)(citations omitted).

This reasoning seems to have particular relevance in terms of the factual scenario presented later in this paper. The caselaw presented above indicates that where there are concurrent permitting and registration activities, the parties should not communicate with Commissioners who have decision-making power concerning either the registration or the permitting process, as these are pending issues based on the same set of facts which will ultimately be decided by the same Commissioners. However, in

certain situations agency staff, rather than only Commissioners, may have decisionmaking powers.

In *Coalition Advocating a Safe Env't v. Texas Water Comm'n*, 798 S.W.2d 639 (Tex. App.--Austin 1990, writ granted), *vacated* 819 S.W.2d 799 (Tex. 1991) (vacated at request of parties after settlement), the Third Court of Appeals considered an alleged ex parte communication which occurred during a contested case hearing before the Texas Water Commission ("TWC") [now the TNRCC] on a permit to operate a hazardous waste incinerator. The TWC had the exclusive statutory authority to grant or deny such a permit, while the Texas Air Control Board ("TACB") participated in hearings as a party. *Id.* at 641. The permit applicant provided information to the TACB staff during the course of the hearing, and the TACB later used this information in presenting testimony to the TWC. *Id.* at 640.

The Third Court of Appeals reversed the issuance of the permit and held that the communications between the TACB staff and the applicant constituted impermissible ex parte communications. *Id* at 643. The court looked to the statutory provisions whereby the TWC was to defer to the TACB's interpretations on air-quality issues and accept the findings, conclusions and permit language submitted by the TACB. *Id.* at 641-2. The court reasoned that in view of these statutory provisions, the TACB served as the decision-maker rather than as a party to the hearing and the TACB's ex parte contacts with the applicant were prohibited. *Id.* at 643. Although this case was vacated and dismissed as moot at the request of the parties, the court's reasoning should be looked to in deciding who would be considered a decision maker in a contested case.

D. The Implicit Exception: Rulemaking.

The APA contains an entire subchapter on rulemaking activities by state agencies. While there is no explicit exception to the ex parte prohibition for rulemaking, the exception is implicit in the APA's language. Giblin at D-6. In fact, section 2001.031 encourages informal contacts between the agency and interested persons during rulemaking. The term "interested persons" includes both the general public and the regulated community.

There is a sound reason behind this exception. If a rule is to be effective in practice, it must take into account technological problems and political concerns related to the regulated activity. Informal discussions with all interested parties is a very effective way for the agency to learn about such issues during development of the proposed rule.

Statutory Restrictions on Ex Parte Communications

It should be remembered that the APA must be construed in light of other statutes which may provide for more stringent prohibitions on ex parte communications. For example, in 1991, the Legislature enacted new legislation which amended Chapter 361 of the Health & Safety Code to provide for more stringent prohibitions than those contained in the APA on ex parte communications in certain contested hazardous waste permit cases. The Office of the Attorney General issued an opinion which found that the Health & Safety Code would prevail over the APA where there were any conflicts or inconsistencies between the two statutes. Op. Tex. Att'y. Gen. No. DM-144 (1992).

The Attorney General Opinion specifically found that Section 361.0831 of the Health and Safety Code prohibits a hearings examiner in a contested case involving a hazardous waste permit from communicating ex parte with any employee of the Commission. *Id.* This provision was found to prohibit ex parte communications between hearings examiners and employees of the agency who have not participated in any hearing of the case for the purpose of utilizing their special skills or knowledge, or communications of hearings examiners with supervising attorneys within the Office of Hearings Examiners. *Id.* The opinion also found that Section 361.0831 prohibits direct and indirect communications between the hearings examiner and the commissioners or the general counsel. *Id.* In addition, the restriction on ex parte communications was found to apply during the pendency of a contested case. *Id.*

Subsequent to the 1992 Attorney General Opinion, the Legislature amended the Health & Safety Code further by adding the provision "unless permitted by Section 2001.061, Government Code" to the general prohibition on ex parte communications between a hearings examiner and any employee, commissioner, or any party to the hearing. TEX. HEALTH & SAFETY CODE ANN. § 361.0831(a) (Vernon 1996 Supp.). Because no court has yet interpreted this new provision, it is not clear whether it will change the current relationship between the Health & Safety Code and the APA in regard to ex parte communications.

As an added note, the transfer of contested case hearings from the jurisdiction of agency hearings examiners to the State Office of Administrative Hearings has added an additional layer of safeguards to the ex parte communication problem. Further discussion of that topic is beyond the scope of this paper.

Case study

The TNRCC recently adopted a comprehensive set of new rules to regulate composting activities in Texas. These rules are found at 30 Texas Administrative Code (TAC) Chapter 332. Until these rules were adopted, composting activities were regulated under the

general municipal solid waste rules found at 30 TAC Chapter 330. Chapter 330 required a Type V permit for essentially all types of composting activities. Chapter 332 only requires a permit for mixed municipal solid waste composting. Source separated municipal solid waste composting under Chapter 332 requires a registration, not a permit. Other types of composting do not require either a permit or registration. This general regulatory structure is similar to other recently adopted TNRCC rules, as well as existing air control regulations.

Suppose an environmental attorney finds herself in the following situation. Her client wished to operate a source separated compost facility prior to the adoption of the new Chapter 332 rules. On behalf of her client, the attorney filed an application for a Type V municipal solid waste permit with the TNRCC pursuant to 30 TAC Chapter 330. At the same time her client was actively involved in the rulemaking process for the new composting rules. In this situation, what types of agency contacts were allowed under the APA and/or the Health & Safety Code and what were prohibited ex parte contacts?

The applicant and its attorney had necessary contacts with TNRCC staff in developing the permit application that was subsequently declared technically complete. During this same period concerned neighbors and their attorney legitimately contacted TNRCC staff regarding the proposed facility. While there was not as yet a contested case, all such contacts were allowed both by the APA and the Health & Safety Code. Arguably, even contacts with the Commissioners would have been allowed at that point in the process.

Once the application was declared technically complete by the TNRCC staff, notice was given and a jurisdictional hearing was held. The permit application was clearly subject to the APA as a contested case when jurisdiction was taken by the hearings examiner and parties were designated. Ex parte contacts with the Commissioners were clearly prohibited from that point forward. However, since the agency staff was not in the role of decisionmakers, but was a statutory party to the proceeding, ex parte contacts with the staff were not prohibited by either the APA or the Health & Safety Code.

Contemporaneously, the TNRCC was involved in an extended APA rulemaking proceeding leading to adoption of the new composting rules. Both the applicant and the protestant parties to the contested case hearing were involved in the rulemaking. Before the hearing proceeded past the initial jurisdictional stage, it was continued pending possible adoption of the Chapter 332 rules, which would not require a permit for the proposed facility.

As a result of the concurrent contested case proceeding and possibly controlling rulemaking proceeding, both the applicant, protestants and agency staff find themselves in a confused situation regarding ex parte contacts. Ex parte contacts with the Commissioners are clearly not allowed under the APA or the Health & Safety Code as they relate to the contested case hearing. However, the Health & Safety Code does not address rulemaking since it is covered by the APA. The APA does not prohibit contact with agency staff or the Commissioners during rulemaking. It appears that the staff, applicant or protestants could have ex parte discussions with Commissioners as they relate to the rulemaking, but not the contested case. A situation similar to walking on thin ice.

The best advice seems to be that any contacts with a Commissioner related to the rulemaking by any of the parties to the contested case proceeding should be quite circumspect. It should be made very clear to the Commissioner that the contact is related to the rulemaking and not the contested case. There should be no discussion of issues related to the contested case. In an abundance of caution, any direct contacts with the Commissioners related to the rulemaking should be avoided if possible.

Back to the fact situation. Once the rules are adopted, the applicant files an application with the TNRCC for a registration and contemporaneously files a motion with the administrative law judge to withdraw the permit application. The situation then becomes even more confusing, at least on the surface. The permit withdrawal is still a contested case under the APA. The registration proceeding is explicitly non-APA.

A careful review of the situation does bring the ethical considerations into focus. The attorneys should remember that the registration proceeding is still covered by the Health & Safety Code restrictions on ex parte contacts. While contacts with the Commissioners related to the rulemaking were not prohibited by the APA or the Health & Safety Code, any such contacts related to the registration proceeding are prohibited by the Health & Safety Code, not the APA. Contacts with the Commissioners related to the permit withdrawal are still prohibited by both the APA and the Health & Safety Code. Contacts with the Executive Director's staff are not prohibited in either proceeding since the Executive Director is not the ultimate fact finder and decisionmaker for the permit withdrawal or the registration approval.

Conclusion

The final answer to the situations such as that described in the case study will likely come from the courts. However, a logical examination of prior decisions and the language of the applicable statutes leads to the conclusion reached above.

The best advice to the environmental practitioner is to avoid ex parte discussions with Commissioners during rulemaking if a concurrent permit or registration application is pending. Contacts with staff are allowed, and frequently necessary, both during rulemaking and permit or registration application proceedings. Strict adherence to this advice will keep the careful attorney out of trouble.

GLO Programs

"Prince of Tides"

In the Aftermath of a Marine Pollution Incident Dealing with the Texas General Land Office A Vessel Counsel's Perspective

Frank J. Gonynor

SUMMARY PROFESSIONAL BIOGRAPHY OF FRANCIS J. GONYNOR

Francis J. Gonynor is partner with the Houston law firm of Eastham, Watson, Dale & Forney, L.L.P. He has been involved in over 300 marine pollution cases since 1983, including several major spills: the MEGA BORG fire and explosion off of Galveston in 1990, the BERGE BANKER/SKAUBAY collision and spill in February, 1995, the BUFFALO 292 barge spill in February, 1996, and the BUFFALO 286 barge spill in May, 1996.

Mr. Gonynor is a graduate of the University of Florida and the University of Houston. He is a proctor member of the Maritime Law Association of the United States, and a certified mediator with the American Arbitration Association. He has written various articles on marine environmental law topics, appearing in such publications as the University of San Francisco Maritime Law Journal, the Environmental Lawyer, Houston Journal of International Law, and the Tulane Law Review.

EIGHTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

PRESENTATION: GLO PROGRAMS - "PRINCE OF TIDES"

FRANK J. GONYNOR
EASTHAM, WATSON, DALE & FORNEY, L.L.P., HOUSTON

INGRID HANSEN
TEXAS GENERAL LAND OFFICE, AUSTIN

SUMMARY:

To respond to pollution incidents along the Texas coast, a variety of programs and regulations have been created in the State of Texas, mostly residing with the Texas General Land Office. Basically, these deal with the areas of prevention of marine pollution, advance preparation for cleanup response, assessment of damage to Texas trust resources a result of a pollution incident, and the enforcement of laws against polluters for this type of incident.

Ingrid Hansen will discuss these programs from the perspective of the Texas General Land Office, and Frank Gonynor will discuss the perspective of vessel owners.

IN THE AFTERMATH OF A MARINE POLLUTION INCIDENT DEALING WITH THE TEXAS GENERAL LAND OFFICE A VESSEL COUNSEL'S PERSPECTIVE

Presented By: Frank J. Gonynor
Eastham, Watson, Dale & Forney, L.L.P.
Houston, Texas

In the aftermath of the EXXON VALDEZ incident in March, 1989 and, closer to home, the MEGA BORG incident off of Galveston in June, 1990, the Texas Legislature passed the Oil Spill Prevention and Response Act of 1991, attempting to clarify and enhance the role of the State of Texas in dealing with such environmental casualties.

Briefly stated, the statute provides for the Texas General Land Office to take the lead in this area, to promulgate appropriate regulations and rules to properly administer the mandates of the statute, principally with the creation of a compensation scheme for claimants adversely affected by such incidents, by properly assessing damages to natural resources for which the State of Texas is a Trustee, to promote regulations that will help prevent such incidents, to ensure that vessels calling in the State of Texas will be able to financially adequately respond to such cases when they occur, and to appropriately monitor the preparations made by the shipping community to respond when such pollution casualties occur.

In the aftermath of a pollution incident, as vessel counsel one deals with the Texas General Land Office, primarily in three separate respects: 1. creating an

interface between scientist consultants, whom you have hired, and the Natural Resource Trustees, with regard to Natural Resource Damage Assessment; 2. making a presentation to the Texas General Land Office if a fine or penalty is assessed; 3. coordinating cleanup efforts with representatives of the Texas General Land Office to ensure meeting certain performance standards; and, 4. if any criminal sanctions are proposed by the State of Texas via the Attorney General's Office, it is your job to ensure that appropriate criminal law specialists are appointed to adequately represent vessel interests in that regard.

Regarding the latter most area, criminal sanctions, fortunately this does not arise often, at least as far as the State of Texas is concerned. There has been some activity on the part of the U.S. Attorney's Office with regard to evaluating pollution cases for possible criminal prosecution, and there are indeed at least two cases in which matters were actively pursued. While it is rare that such an area becomes active, when it does, it can indeed create significant problems in dealing with the other areas involving government agencies, due to the fact that there is a great reluctance on the part of vessel interests to engage in other activities which may prejudice their position with regard to criminal prosecution. There exists a great fear of self incrimination or other types of constitutional or statutory waiver problems, if an active role is taken by vessel interests regarding civil penalties or, more particularly, Natural Resource Damage Assessment. This is indeed a problem for which creative solutions could be formulated and implemented, such as isolating the potential

criminal areas, negotiating types of limited immunity, or perhaps other solutions which would prevent such criminal law prosecutions from acting as a complete "roadblock" to the forward progress in the other areas, in the civil realm.

Turning to the first named area, Natural Resource Damage Assessment, this is perhaps by far the most important area for consideration by vessel interests in their relationship with the Texas General Land Office. The Texas General Land Office in recent years has become very active in assuming a leadership position in connection with other trustees, both state and federal, regarding incidents occurring along the Texas coast.

The State of Texas has developed a set of rather innovative regulatory rules with regard to dealing with the Natural Resource Damage Assessment process. In that regard, such rules mandate the involvement of vessel interests in the formulation and carrying out of such assessment plans. (31 Tex. Administrative Code, Chapter 20). This is a key area for vessel interests involvement, since the fiscal potential, in a severe case of pollution, is for the assessment and damages that are assessed to outweigh the cleanup costs, which already involve significant sums of money. Thus, it is key that vessel interests pursue their opportunity for involvement as vigorously as possible, appointing scientific consultants to act as liaisons with the Trustees in order to ensure that vessel interests appropriately exercise their opportunity, to make comments and proposals as to how such an assessment should be carried out.

If there occurs disagreements in such discussions between the Trustees and Vessel Interests, the rules provide for mediation of the dispute, to prevent the process from becoming derailed by litigation, if at all possible.

From the vessel interests' perspective, the key issues in this area are discovering what studies the Trustees wish to be instituted and why, the costs of such studies, and the goals or the scientific theorems which the studies propose to prove/disprove.

It is also possible in this area to take the additional step of not only utilizing the rules per se, but creating an additional framework for cooperative damage assessment, with the use of a Memorandum of Agreement. Such a formal contract is negotiated between vessel interests and the Texas General Land Office and other Natural Resource Trustees, in which it is discussed exactly how the studies will be taking place, how they will be pre-funded by vessel interests, and how such information generated by the studies is to be treated between the parties. Such agreements should be carefully drafted, to avoid not compromising the trustees' independence nor their statutory responsibilities for public comment, and, on the other hand, do not compromise the legal position on liability of the Responsible Person regarding the events that caused the oil spill.

With regard to the area of fines and penalties, the Texas General Land Office

has the authority to issue and levy such monetary fines on vessel interests for violating pollution laws. These fines can be quite significant, and involve an administrative law process, set forth in the Texas Administrative Code, 31 TAC§21.2 *et seq.* These rules provide that certain factors that are to be examined by the Texas General Land Office before making a designation of responsibility is made, and in levying a penalty. As vessel owners'counsel, it is important to review these factors with the Texas General Land Office, in making a presentation as to why you think certain factors may apply, and why such factors are mitigative in nature. If the final proposed fine or designation by the Texas General Land Office is viewed by vessel interests as improper or excessive, there is a process under the Texas Administrative Code for an administrative law judge to review same.

One practice tip to note is that while the Texas General Land Office is assessing such a fine, the U.S. Coast Guard is likely simultaneously going through a similar process. It is indeed important for vessel interests to try to work with one agency or the other separately and conclusively, before the other comes out with a fine. This avoids the possible inequity of having fines being assessed by both agencies independently, that when taken in account together may indeed seem excessive, yet when viewed separately are seemingly reasonable. Thus it is important to either ask the Texas General Land Office or the Coast Guard to stay consideration of their penalty until the other agency has had an opportunity to review and issue its penalty in connection with the case. The other reason this is important is because each

agency has the ability and the right to investigate and promulgate a report on the incident, and thus it is important to have that one agency report be finished and available for the other agency to examine, to compare to their own investigation or to use to contrast with their own investigation.

In conclusion, the Texas General Land Office has established a series of procedural frameworks to use when they are dealing with the aftermath of an oil spill in the waters of the State of Texas. From the vessel interests' perspective, the system, although quite new, seems to be working. There has not as yet been serious difficulties or litigation occurring as a result of controversy in the area, but as time goes on, these type of legal problems may indeed arise, and will offer opportunities for judicial clarification as to how the process is to unfold.

GLO Programs

"Prince of Tides"

Environmental Programs at the Texas General Land Office

Ingrid K. Hansen

"Prince of Tides"

General Land Office
Environmental Programs

8th Annual
Texas Environmental
Superconference

August 2, 1996
Austin, Texas

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GLO Environmental Programs
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Environmental Programs at the Texas General Land Office

"There shall be one General Land Office in the State, which shall be at the seat of government, where all land titles which have emanated or may hereafter emanate from the State shall be registered, except those titles the registration of which may be prohibited by this Constitution. It shall be the duty of the Legislature at the earliest practicable time to make the Land Office self-sustaining, and from time to time the Legislature may establish such subordinate offices as may be deemed necessary."

Article XIV, Sec. 1. Texas Constitution

GLO Web Page

http///www.glo.state.tx.us/

Coastal Management Program

Texas Natural Resources Code, Chapter 33, "Management of Coastal Public Land."
Regulations:
31 TAC

- chapter 501:Coastal Management Program (CMP)
  - Subchapter A. General Provisions
  - Subchapter B. Goals and Policies
    - §501.14 Policies for Specific Activities and Coastal Natural Resource Areas

- chapter 503: CMP Boundary

- chapter 505:
  Procedures for State Consistency with the CMP Goals and Policies

- chapter 506:
  Procedures for Federal Consistency with the CMP Goals and Policies

Basic Program Elements

The Texas Coastal Management Program is a net-worked program; i.e. there is no one agency which exercises control over coastal management. The Coastal Coordination Council is comprised of:

1. Commissioner of the General Land Office
2. Chair of the Parks and Wildlife Commission
3. Chair of the Texas Natural Resource Conservation Commission

4. a member of the Railroad Commission
5. Chair of the Texas Water Development Board
6. Chair of the Texas Transportation Commission
7. a member of the State Soil and Water Conservation Board and
8. a city or county elected official who resides in the coastal area
9. one owner of a business located in the coastal area who resides in the coastal area
10. one resident from the coastal area
11. a representative of agriculture,

all appointed by the Governor with the advice and consent of the senate for two-year terms, is the governing entity for the Texas CMP.

The CMP focuses on the protection of these coastal natural resource areas:

- coastal barriers
- coastal historic areas
- coastal preserves
- coastal shore areas
- coastal wetlands
- critical dune areas
- critical erosion areas
- gulf beaches
- hard substrate reefs
- oyster reefs
- submerged land
- special hazard areas
- submerged aquatic vegetation
- tidal sand and mud flats
- water of the open Gulf of Mexico
- water under tidal influence

State agency and political subdivisions' actions must be consistent with the goals and policies of the CMP. The actions to which the CMP applies are specifically delineated in the statute. See section 33.2053.

Agencies may have their rules certified by the CCC as consistent with the CMP goals and policies. A benefit of rule certification is that the agency can establish thresholds for actions which may be referred to the CCC for review. Once the CCC has approved an agency's rules and thresholds, actions taken below threshold levels generally cannot be reviewed by the CCC. See section 33.2052.

Current Status

The Draft Environmental Impact Statement (DEIS) for the Texas Coastal Management Program was published in June 1996 by the National Oceanic and Atmospheric Administration (NOAA). The DEIS was prepared by the Texas Coastal Coordination Council and NOAA. The DEIS consists of three parts: Part I provides a summary of the CMP and how it meets the requirements of the federal Coastal Zone Management Act; Part II describes the CMP; and Part III is an analysis of the proposed approval required by the National Environmental Policy Act. The public comment period on the DEIS closes August 5, 1996. The program's final federal approval is expected in the fall of 1996.

Dune Protection

Texas Natural Resources Code, Chapter 63, "Dunes."
Regulations at 31 TAC chapter 15, amended April 5, 1996.

> Definition of "dune": An emergent mound, hill or ridge of sand, either bare or vegetated, located on land bordering the waters of the Gulf of Mexico. Dunes are naturally formed by the windward transport of sediment, but can also be created via man-made vegetated mounds. Natural dunes are usually found adjacent to the uppermost limit of wave action and are usually marked by an abrupt change in slope landward of the dry beach. the term includes coppice mounds, foredunes, dunes comprising the foredune ridge, backdunes, swales, and man-made vegetated mounds. 31 TAC §15.2

Each commissioners court of a county that has within its boundaries a mainland shoreline (a shoreline fronting on the open Gulf of Mexico that is not located on a barrier island of peninsula), a barrier island, or a peninsula must establish a dune protection line for the purpose of preserving sand dunes. §63.011

The dune protection line is filed with the clerk of the county or municipality and with the Commissioner of the GLO. §63.014

Critical Dune Areas

The commissioner of the land office, in his role as trustee of the public land of this state, shall identify the critical dune areas within 1,000 feet of mean high tide that are essential to the protection of state-owned land, public beaches, and submerged land. The commissioner shall promulgate rules for the identification and protection of critical dune areas. §63.121

The GLO has identified critical dune areas as "all dunes and dune complexes located within 1,000 feet of mean high tide of the Gulf of Mexico." 15 TAC §15.3(e)

Conduct Prohibited

Unless a permit is properly issued authorizing the conduct, no person may damage, destroy, or remove a sand dune or portion of a sand dune seaward of a dune protection line or within a critical dune area or kill, destroy, or remove in any manner any vegetation growing on a sand dune seaward of a dune protection line or within a critical dune area. §63.091

Permit for Certain Activity Prohibited

No permit may be issued for:

- operation of a recreational vehicle on a sand dune seaward of the dune protection line
- any activity in a critical area inconsistent with rules promulgated by the commissioner

Permit Not Required

No permit is required for:

- grazing livestock
- production of oil and gas
- recreational activity other than the operation of a recreational vehicle

Dune Protection Standards, §15.4

Acts prohibited without a dune protection permit:

No person shall damage, destroy or remove a sand dune or any portion of a sand dune seaward of the dune protection line or within a critical dune area or kill, destroy or remove in any manner any vegetation growing on a sand dune seaward of a dune protection line or within a critical dune area. 31 TAC §15.3(s)(1)

Beachfront Construction Standards, §15.5

Acts prohibited without a beachfront construction certificate:

No construction on land adjacent to and landward of public beaches and lying in the areas either up to the first public road generally parallel to the public beach or to any closer public road not parallel to the public beach, or to within 1,000 feet of mean high tide, whichever is greater, that affects or may affect public use of and access to and from public beaches...31 TAC §15.3(s)(3)

Concurrent Dune Protection and Beachfront Construction Standards, §15.6

Certification of Local Government Dune Protection and Beach Access Plans, §15.11

The GLO reviews and certifies, by rule adoption, local government dune protection/beach access plans.

Enforcement

The local government reviews the application for the dune protection permit and the GLO receives a copy at least ten days before the public hearing on the application. The GLO may submit comments regarding the effect of the proposed activity on the dunes that protect the state-owned land, shores, and submerged land.

The attorney general, individually or at the request of the commissioner (of the GLO), or any county attorney, district attorney, or criminal district attorney shall file in district court of Travis County, or in the county in which the violation occurred a suit to obtain either a temporary or permanent court order or injunction to prohibit and remedy any violation of this chapter or any rule, permit, or order under this chapter and to collect damages to natural resources injured by the violation and to recover civil penalties. ,

Liable for a civil penalty of not less than $50 nor more than $1000. Each day that a violation occurs or continues is a separate violation. §63.181

Public Beach Access

Texas Natural Resources Code, Chapter 61, Subchapter B, "Use and Maintenance of Public Beaches"
Open Beaches Act, §61.001 et seq.

Definition of "public beach:" ...any beach bordering on the Gulf of Mexico that extends inland from the line of mean low tide to the natural line of vegetation bordering on the seaward shore of the Gulf of Mexico, or such larger contiguous area to which the public has acquired a right of use or easement to or over by prescription, dedication, or estoppel, or has retained the right by virtue of a continuous right in the public since time immemorial as recognized by law or custom. This definition does not include a beach that is not accessible by a public road or public ferry as provided in Section 61.021 of this code. Texas Natural Resources Code, §61.013(c).

"Line of Vegetation:" to determine the "line of vegetation" in any area of public beach in which there is no clearly marked line of vegetation (for instance, a line immediately behind well-defined dunes or mounds of sand and at a point where vegetation begins) recourse shall be to the nearest clearly marked line of vegetation on each side of the unmarked area;

the "line of vegetation" for the unmarked area shall be the line of constant elevation connecting the two clearly marked lines of vegetation on each side;

if the elevation of the two points on each side of the area are not the same, the extension defining the "line of vegetation" shall be the average elevation as between the two points, but if there is no clearly marked line of vegetation, the "line of vegetation" shall not extend inland further than 2000 feet from the seaward line of mean low tide. §61.016

Rules related to access to public beaches

Commissioner shall promulgate rules on the following:

- acquisition by local governments or other appropriate entities or public dedication of access ways sufficient to provide adequate public ingress and egress to and from the beach...
- protection of the public easement from erosion or reduction caused by development or other activities on adjacent land and beach cleanup and maintenance
- local government prohibitions of vehicular traffic on public beaches, provision of off-beach parking, and other minimum measures needed to mitigate for any adverse effect on public access and dune areas
- imposition of beach access, user, or parking fees and reasonable exercises of the police power by local governments with respect to public beaches
- contents and certification of beach access and use plans and standards for local government review of construction on land adjacent to and landward of public beaches, and
- construction on land adjacent to and landward of public beaches and lying in the area either up to the first public road generally parallel to the beach or any closer public road not parallel to the beach, or to within 1,000 feet of mean high tide, whichever is greater §61.011(d)(1)-(6)

Construction Prohibited

No construction allowed landward of and adjacent to a public beach within the area described in §61.011(d)(6) ...that will or is likely to affect adversely public access to and use of the public beach. §61.013

Beach Access and Use Plans

§61.015

Regulations at 31 TAC chapter 15

Enforcement

The attorney general, individually or at the request of the commissioner (of the GLO), or any county attorney, district attorney, or criminal district attorney shall file in district court of Travis County, or in the county in which the property is located, a suit to obtain either a temporary or permanent court order or injunction, either prohibitory or mandatory, to remove or prevent any improvement, maintenance, obstruction, barrier, or other encroachment on a public beach, or to prohibit any unlawful restraint on the public's right of access to and use of a public beach or other activity that violates this chapter.

Enforcement

liable for a civil penalty of not less than $50 nor more than $1000 . Each day the violation occurs or continues is a separate violation. §61.018

Coastal Erosion

Texas Natural Resources Code, Chapter 33, Subchapter H, "Coastal Erosion." Sections 33.601 through 33.604

The GLO is the lead agency for the coordination of coastal erosion avoidance, remediation and planning. The commissioner shall, in coordination with state and federal agencies and local governments, promulgate rules, recommendations, standards and guidelines for erosion avoidance and remediation and for prioritizing critical coastal erosion areas. §33.601

Coastal Erosion Projects

The GLO shall engage in erosion demonstration projects and studies in conjunction with other state agencies, local governments, and federal agencies, including the U.S. Army Corps of Engineers. The projects shall address the feasibility, cost, and financing of different methods of avoiding, slowing, and remedying coastal erosion. List of types of projects identified at §33.602.

Construction Limitations

Local governments shall not issue a permit or certificate allowing construction of an erosion response structure. Permits for retaining walls are subject to §15.6(c)(1)and (2). 31 TAC §15.6(c)

Local governments shall not issue a permit authorizing construction of a retaining wall within the area 200 feet landward of the line of vegetation or in the area within 200 feet landward of the line of vegetation. 31 TAC §15.6(c)(1)&(2)

Construction in flood hazard areas. Local government permits and certificates must comply with Federal Emergency Management Administration's (FEMA) regulations governing construction in flood hazard areas.

Construction in Eroding Areas

Structures built in eroding areas:

- shall be elevated on pilings in accordance with FEMA minimum standards or above the natural elevation
- structures located on property adjacent to the public beach shall be designed for feasible relocation

- if consistent with the requirements of the National Flood Insurance Program, may be constructed with breakaway or louvered walls for a storage area no larger than 300 square feet
- may be altered or paved only the ground within the footprint of the habitable structure (however, gravel or crushed limestone may be used to stabilize driveways.

31 TAC §15.6(f)

Coastal Wetlands

Texas Water Code, Chapter 11, Subchapter J, "Wetlands."
Section 11.502

Definition of "wetlands:"

(1) The definition of the term "wetlands" within the State of Texas, for purposes of the Clean Water Act, 33 U.S.C. 1311, 1344; the Erodible Land and Wetland Conservation and Reserve Program, 16 U.S.C. 3801-3845; the Emergency Wetlands Resources Act of 1986, 16 U.S.C. 3901-3932; the National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370a, all statutory foundation for the Federal Wildlife Service's National Wetlands Inventory mapping, including the Water Bank Program for Wetlands Preservation, 16 U.S.C. 1301-1311; the Water resources development project (wetland areas), 42 U.S.C. 1962d-5e; and the Migratory Bird Conservation Act, 16 U.S.C. 715-715r; and all Texas laws, rules, and regulations adopted pursuant to Chapter 2001, Government Code and interpretation and implementation of any kind whatsoever of both federal and state laws by agencies of the state, including any amendment or revision thereto, relating to wetlands, means an area (including a swamp, marsh, bog, prairie pothole, or similar area: having a predominance of hydric soils that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances supports the growth and regeneration of hydrophytic vegetation.

(2) The term "hydric soil" means soil that, in its undrained condition, is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation.

(3) The term "hydrophotic vegetation": means a plant growing in: water or a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.

(4) The term "wetlands" does not include:

(A) irrigated acreage used as farmland;

(B) man-made wetlands of less than one acre;

(C) man-made wetlands not constructed with wetland creation as a stated objective, including but not limited to impoundments made for the purpose of soil and water conservation which have been approved or requested by soil and water conservation districts.

Section 11.506, Conflict between State and Federal Definitions

If the state definition conflicts with the federal definition in any manner, the federal definition prevails.

Wetlands Mitigation

V.T.C.A. Article 5421u.

Definition of "Mitigation Bank"

§6.01 Definitions...

(3)"Mitigation bank" means a parcel of land which has undergone or is proposed to undergo those physical changes necessary to create and optimize the acreage and quality of wetlands habitat on the site for the express purpose of providing mitigation credits to offset adverse impacts to wetlands form approved projects elsewhere.

...

§6.02 Actions to comply with federal requirements

(a) Any state agency and all political subdivisions, with the approval of the General Land Office, are hereby authorized to take all necessary and reasonable actions to comply with federal requirements for the establishment and maintenance of a mitigation bank, including but not limited to:

...

Texas state agencies have entered into a Memorandum of Agreement related to the creation and operation of mitigation banks.

On the federal level, the U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers, the National Marine Fisheries Service, the Natural Resources Conservation Service, and the National Oceanic and Atmospheric Administration published guidance for mitigation banks. The proposed guidance was published in the November 28, 1995 edition of the Federal Register.

Oil Spill Prevention and Response

Report all Oil Spills Immediately
1-800-832-8224

Texas Natural Resources Code, Chapter 40, "Oil Spill Prevention and Response."
Regulations at 31 TAC chapters 19 and 21

<u>Facility Discharge Prevention and Response Certificate</u>

A facility that handles oil is required to obtain a discharge prevention and response certificate. The certificate is issued upon the GLO's acceptance of a discharge contingency plan. There are currently 591 facilities along the Texas coast that have submitted approved contingency plans. See 31 TAC §§19.11, 19.12, 19.13, 19.14, 19.15,

A facility may request a "jurisdictional review" for a determination of the necessity of obtaining a certificate. The GLO will consider the type and quantity of the oil handled, the distance to coastal waters, the topography, secondary containment, history of past spills.

Vessel Contingency Plans

Any vessel capable of carrying 10,000 gallons of oil as fuel or as cargo are subject to regulation under OSPRA. Because so many of the vessels transporting oil into Texas ports are foreign flag vessels, the GLO has modeled its requirements on International Maritime Organization (IMO) standards. See 31 TAC, subchapter E, §§ 19.60 through 19.63. Each vessel that enters Texas waters is required to submit a discharge contingency plan to the GLO.

Pursuant to OSPRA, the GLO accepts contingency plans submitted under the federal Oil Pollution Act, 33 U.S.C.A. §2701 et seq. and under the IMO regulation 26 for purposes of compliance with the plan requirement. The GLO has been a strong advocate of the "one plan" concept. The GLO position is that it is more effective to have one contingency plan that is accepted by all state, federal and international entities than to have several different plans for each vessel of facility that is required by various state and federal laws to have a plan. This concept but is gaining acceptance for its practicality.

GLO Enforcement Powers under OSPRA

Suspension of Certificate

The GLO may suspend a facility's discharge prevention and response certificate when the GLO finds: that the facility does not have a discharge prevention and response plan or when the entity's preventive measures or containment and cleanup measures are inadequate. Suspension occurs after notice and hearing and is effective until OSPRA requirements are met. OSPRA §40.113 and 31 TAC §19.15

Penalties

The GLO may issue penalties for a variety of violations under OSPRA. See generally section 40.251. Of particular note is the authority to assess a penalty for the mere fact of an oil spill, i.e.

> A person responsible for an unauthorized discharge of oil shall be subject to a civil penalty of not less than $250.00 nor more than $25,000 for each day of the discharge, or not more than $1,000.00 per barrel of oil discharged.

Most of the penalties assessed to date have been for this violation; penalties have also been assessed for failure to report a spill, and for late reporting. The regulations require a spill to be reported within one hour of discovery. (31 TAC §19.32)

Audits, Inspections and Drills

The GLO regularly conducts audits and inspections of vessels and facilities to determine their compliance with OSPRA and their state of readiness for response to an oil spill. An audit is a comprehensive review of all of the requirements of

OSPRA, while an inspection is designed to focus on particular areas of compliance as, for example, whether the oil spill response personnel have been trained pursuant

to the requirements of the National Contingency Plan. (40 CFR Part 300). Audits or inspections may be unannounced. See OSPRA §40.116 and 31 TAC §§19.3 and 19.18.

Texas Automated Bouy System

The GLO Division of Oil Spill Prevention and Response has developed a computer model for predicting the path of spilled oil. An integral part of this system is the real time data generated through the Texas Automated Bouy System (TABS), a program originally funded by the Division's Research and Development Section. TABS buoys are deployed along the Texas coast and provide real time measurements of currents. This system has already proved its usefulness in recent spills in Galveston Bay. Increased interest from the federal government and the private sector make it likely that the system will be expanded. For more information about the system, please contact Dr. Robert "Buzz" Martin at 512/475-1581.

Bioremediation Research

The GLO Division of Oil Spill Prevention and Response has an active Research and Development section. Currently, there are two significant projects related to the bioremediation of oil contaminated environments.

- Parkers Cove Bioremediation Test Facility: This research project, located in a privately owned marsh area adjacent to the San Jacinto River, will measure the efficacy of different types of bioremediation techniques. Addition of stimulants and biological organisms will be compared to control areas. The GLO is in the process of obtaining permits which will allow the discharge of oil into the area for research purposes. (This is the first time the U.S. EPA is granting a permit to spill oil in U.S. waters for research.) The project is being conducted by principal investigator Dr. James Bonner of Texas A&M University.
- Coastal Oil Spill Simulation System (COSS): A joint project of the Marine Spill Response Corporation and the GLO, this first of its kind facility is under construction at the Central Power and Light's Barney Davis Power Plant in Nueces County. The projects will contain nine test tanks which can simulate different coastal environments and different kinds of wave action. This is the intermediate step required to move bioremediation research from the laboratory to the field. Because of its ability to simulate the coastal environment, the COSS will allow scientists to determine the optimum type of bioremediation in particular environmental conditions.

For more information about bioremediation research and other research and development projects, please contact Robin Jamail, Director of Research and Development at 512/475-1593.

Natural Resource Damage Assessment

OSPRA, Tex. Nat Res. Code, §40.107
Regulations at 31 TAC, chapter 20

Claims for damages to natural resources that occur as the result of an oil spill may be pursued by state and federal natural resource trustees. This is a statutory cause of action under both the federal Oil Pollution Act and OSPRA (see section 40.107). The Texas natural resource trustees are: the General Land Office, the Parks and Wildlife Department and the Natural Resource Conservation Commission.

The federal natural resource trustees active in oil spill claims are the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration. The state and federal trustees work together in pursuing claims from oil spills in Texas and have all signed an MOA agreeing to coordinate their natural resource damage assessment work.

A natural resource damage assessment is not conducted after every oil spill. Trustees consider the type of oil, the physical impact on natural resources, the likelihood of natural recovery and other site specific factors prior to deciding to initiate a damage assessment.

The Damage Assessment Process

1. Field Investigation: an actual on the ground review of the extent of the oil spill, the types of resources impacted directly and indirectly
2. Notice of Intent: if the trustees determine that further study and investigation are required, they publish a notice of intent to perform an assessment
3. Type of Assessment: Expedited, Comprehensive, Negotiated
4. Injury determination: study and analysis of the natural resources that actually were injured from the oil spill; injury includes any adverse physical, chemical or biological change and includes things such as behavioral changes and effects on reproduction
5. Injury Quantification: the extent of the injury and the likelihood of recovery of the injured resource; in this phase the trustees try to determine the quantity of habitat affected
6. Restoration Planning: the trustees evaluate alternative restoration, rehabilitation, replacement techniques that will speed recovery of the injured resources; trustees may also consider the acquisition of equivalent resources for the public benefit
7. Trustees select and implement the most feasible, cost effective alternative.

Role of the Responsible Person

In Texas, the trustees are required to invite the responsible person to participate in the assessment process. The responsible person is liable not only for the damages to natural resources, but also for the trustees' actual costs in conducting the assessment. In practice, the trustees and the responsible person enter into an agreement regarding the procedures and methodologies that will be used to analyze the nature and extent of the injury. Each participant agrees to share all data and information collected and to refrain from separate studies. State and federal trustees and representatives from oil companies and vessel owners and insurers have agreed upon a model agreement for conducting a joint, cooperative natural resource damage assessment. Texas is the only state that has damage assessment regulations that require the participation of the responsible person.

During the course of the assessment, trustees and responsible persons may enter into stipulations wherein they agree that the methodologies used were reliable and appropriate and they agree not to challenge the use of those methodologies in the event that litigation ensues. The joint cooperative assessment process provides several benefits for all parties. They are:

- less likelihood of duplicative studies; neither the trustees nor the responsible person has incentive to conduct separate studies since all data and information is shared upon its production
- more rapid initiation of restoration, the primary goal of damage assessment
- less likelihood of litigation; the statute requires the trustees and the responsible person to mediate any disputed issues at the end of the assessment; the mediation is a prerequisite to litigation

Natural Resource Inventory Program

OSPRA 40.107

This project was established to obtain and centralize data related to the physical, chemical and biological characteristics of coastal natural resources. It is an effort to understand baseline environmental conditions against which damage to natural resources can be measured. The project is a cooperative effort of the Texas Parks & Wildlife Department, the Texas Natural Resource Conservation Commission, the General Land Office, and other state agencies and public and private universities.

NRI On-Line This geographic information system requires a GIS application; ArcView 1.0 can be downloaded for free at this site. It contains

data relating to the properties of natural resources in designated coastal areas.

http://www.nri.state.tx.u./nri/

Transboundary Resource Inventory Project

TRIP Web Page http://www.glo.state.tx.us/infosys/gis/trip

The Transboundary Resource Inventory Project (TRIP) is a regionally-based initiative which seeks to measure, map, and make available on the Internet, data on the transboundary resources of the United States-Mexico border. Natural resources like airsheds, aquifers, surface waters, hydrocarbons, ecosystems and renewable energy resources will be measured and mapped within an area extending along an approximately 200 mile wide border along the international boundary.

Representatives from the Arizona, California, New Mexico, and Texas and other state and federal agencies and institutions (public and private) have organized to recommend standards for development of the project. Similarly representatives from the Mexican border states are participating in TRIP meetings and are organizing among themselves and their federal government and other institutions.

The TRIP will be a GIS based application that will be useful to a wide range of management, research and planning initiatives. Further it will provide for a method to make binational data compatible.

TRIP Milestones:

- 10/10/95 Presidents Zedillo and Clinton meet and agree to undertake an environmental survey of the border
- 12/15/95 TRIP Board has its first meeting in Las Cruces
- 1/30/96 TRIP holds binational User Workshop in San Diego
- 3/29/96 U.S. and Mexico officials announce binational aerial photography initiative to create a common digital base map of the border region

<u>TRIP Pilot Projects</u>

There are four demonstration project underway:

- Arizona-Sonora Desert Region
- Laguna Madre
- Paso del Norte
- Tijuana River Watershed

The GLO is one of the founding members of TRIP and Tyrus Fain serves as the TRIP General Secretary. For more information on TRIP and ongoing pilot projects, contact him at 512/305-8996

Recycling
Texas Health and Safety Code, Subchapter N. Waste Reduction Programs
§361.421 et seq.

The Commissioner of the GLO, the Chairman of the Texas Natural Resource Conservation Commission, and the executive director of the Texas Department of Commerce constitute the Recycling Market Development Board. The Board is required to:

1. identity existing economic and regulatory incentives and disincentives for creating an optimal market development strategy
2. analyze market development implications of state policies and existing and potential markets
3. examine and make policy recommendations regarding economic policies, tax incentives, availability of financial capital, enterprise zones, managerial and technical assistance, job-training, research and development, government procurement policies, educational programs and public health and safety regulatory policies.
4. establish a comprehensive statewide strategy to expand markets for recycled products
5. provide information and technical assistance to small and disadvantaged businesses, chambers of commerce, educational institutions, etc.

The GLO provides research and assistance to the Recycling Market Development Board. See §361.423.

The GLO Recycling Division works with the Texas Corporate Recycling Council, a not-for profit organization that promotes awareness of recycling. The Council focuses on strategies to reduce waste, to create stable markets for recyclable goods and to develop a recycling infrastructure. In addition, the Division sponsors the annual "Buying into the Loop" conference that promotes recycled goods.

E-Source: an on-line data base and bulletin board system developed and maintained by the Recycling Division. This source provides the latest information on markets for recyclable goods, vendors of recycled products, new products and environmental conferences and events. Call the toll-free modem for access at 1-800-831-8826

Alternative Fuels
Texas Natural Resources Code, Subchapter J. §113.281 et seq.

The Alternative Fuels Council consists of the Commissioner of the GLO, the members of the Railroad Commission, the chair of the General Services Commission, and the Chair of the Natural Resource Conservation Commission.

The council is charged with coordinating a comprehensive program to support the use of environmentally beneficial alternative fuels.

The Council administers the Alternative Fuels Conversion Fund which can make loans or grants to finance activities supporting the use of compressed natural gas, liquefied natural gas, liquefied petroleum gas, methanol or methanol/gasoline blends of 85% or greater, ethanol or ethanol/gasoline blends of 85% of greater or electricity.

The Council is also authorized to make loans and grants to support conversion or infrastructure projects to promote the use of environmentally beneficial fuels or for other purposes consistent with U.S. Department of Energy regulations and policy.

The Alternative Fuels Division sponsors an annual conference to promote technological innovations and to encourage development and sue of alternative fuels. The GLO is actively involved in research efforts to expand the use of windpower in Texas.

Texas Property Rights Law and Takings Issues

"To Kill a Mockingbird"

Takings and Texas Property Rights Legislation

Pete Schenkkan

6/1996

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"Citizens' Suits Under The Endangered Species Act," 26 TEX. ENV'TL L. J. 4 (1995).

"The Edwards Aquifer: Hydrology, Law, Regulation And Politics," 10 HYDROLOGICAL SCIENCE AND TECHNOLOGY 126 (Am. Inst. of Hydrology 1994).

"Convertible Oil & Gas Interests After *Southland Royalty* and *Phillips*," 24 ROCKY MT. MIN. L. INST. 547 (1978).

"Power In The Marketplace Of Ideas: The Fairness Doctrine And The First Amendment," 1975 TEXAS L. REV.

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TAKINGS AND TEXAS PROPERTY RIGHTS LEGISLATION

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TAKINGS AND TEXAS PROPERTY RIGHTS LEGISLATION

by Pete Schenkkan[1]

I. INTRODUCTION

Recent U.S. Supreme Court decisions, a new Texas statute, and pending federal legislation have called sharply renewed attention to the question of when regulation "goes too far" in destroying the value of private property, and should require compensation.

The question is an important and difficult one. Economics teaches us that, when actions on private property have harmful effects on others that cannot be captured in the costs facing the owner ("externalities"), society's overall prosperity suffers. As an example, asking air-breathers in Houston to evaluate the harms associated with auto and petrochemical emissions, and to negotiate the socially optimal balance between such harms and the economic benefits associated with auto transportation and petrochemical industry employment, is completely impractical. The result of relying on such negotiations is too much emissions.

Law addressed the externalities problem long ago in the nuisance doctrine, but the information and transactions costs of nuisance litigation make it impracticable for most environmental matters. Consider the same example: asking each Houston air-breather to file nuisance actions over emissions to which millions of sources contribute is fanciful.

In short, either we regulate, or we suffer excessive externalities.

On the other hand, economics and public choice doctrine teach that people will use government to improve their economic advantage at other people's expense, and cannot be counted on to stop doing so at the socially optimal point. If regulation is perceived as "free" to its beneficiaries, they will impose too much of it, unless those who bear the costs have enough political weight to block them.

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[1] I have borrowed very liberally from Alan Haywood and Terry Bray's paper "Regulatory takings - Rights, Remedies and Relief" for the State Bar's 1996 Advanced Real Estate Law Course. Part II and the beginning of Part III is mostly theirs. My principal changes were intended to change the focus from local land use regulation to statewide environmental regulation.

Law tries to deal with this problem through a variety of means. Constitutional law structures the political process. Administrative law structures the administrative process to temper the likelihood of irrational regulation. Another way is through takings-compensation requirements, either constitutional or statutory.

Takings-compensation has severe problems as a tool for addressing excessive regulation in a complex and interdependent society. It requires courthouse litigation over matters in which courts lack expertise, staff and accountability. It works best in the context to which it originally applied: eminent domain takings of specific pieces of property, by deed or by physical invasion. It works less well for somewhat broader regulation, such as local land-use regulation, e.g., city zoning. It works worst in the context on which this conference is focused. It works very badly where government tries to regulate broadly (nationwide, or statewide, or in a large region) to achieve a socially-optimal level of restrictions on harmful side-effects of otherwise beneficial private activities. In such cases, both the benefits of regulation and its costs will vary widely from fact situation to fact situation. The whole point of regulation is to deal with problems for which it is not cost-effective to make case-specific decisions: situations where we need a rule. But to decide whether regulation has "gone too far," you must have a case-specific decision process.

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), the first modern takings case, explains the problem. In Penn Central, the U.S. Supreme Court upheld a law that prohibited the construction of a 55-story office tower on top of Pennsylvania Station. The Court explained:

> [W]hat constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the 'Fifth Amendment's guarantee' ... [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,' ... this Court, quite simply has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. (citations omitted.)

Id. at 124-125. Rejecting the owners' claim for compensation for loss of use of airspace above the building, the Court quoted Justice Holmes in Pennsylvania Coal Co. v. Mahon:

> '[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law' ... and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values.'

Id. at 124.

Many of the results, therefore, of recent developments are readily predictable. There will be more litigation over regulatory takings. Most of it will be unsuccessful. There will be little correlation between the occasional successes and the economic merits. There will be less ambitious regulation. There will be little or no correlation between the decisions to regulate less and the economic merits.

II. REGULATORY TAKINGS: THE POLICE POWER AND "GOING TOO FAR"

> *No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*
>
> ***Fifth Amendment, United States Constitution***

A. U.S. Supreme Court Takings Jurisprudence

1. DUE PROCESS AND TAKING

It is now axiomatic that all property is subject to the exercise of the government's political power to prohibit uses and development that are injurious to the "public health, safety and general welfare" and to impose regulations in the "public interest." Although now taken for granted, this precept was not always a foregone conclusion. The often cited landmark decision of the U.S. Supreme Court in Mugler v. Kansas, 123 U.S. 623 (1887), was rendered following over 100 years of American jurisprudence generally allowing a property owner to use his property as he saw fit. The court in Mugler ruled that the government has the power

to regulate the use of property; the corollary issue that remained is whether the exercise of that power can result in a "taking" of one's property requiring compensation for the loss under the Fifth Amendment of the United States Constitution. The U.S. Constitutional analysis is thus two-fold:

a. Does the regulation deprive the person of his property without due process of law? (in which event the regulation is constitutionally invalid), and

b. If the regulation is valid, does it effect a taking of the person's property without just compensation? (in which event the government is required to pay for the loss).

2. POLICE POWER

In Mugler, the U.S. Supreme Court upheld the validity of a state law banning the production and distribution of alcoholic beverages as a "common nuisance." The Kansas legislature, in apparent response to the "Temperance Movement" then holding sway, required the mandatory closure of two previously permitted breweries based on a determination that such use was injurious to the health, safety and morals of the Victorian Kansas public. The U.S. Supreme Court sustained the constitutionality of the statute as a proper exercise of police power, and held that the power of the state to prohibit such a "noxious use" could not be "burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain." (Mugler, 123 U.S. at 669.)

Almost thirty years later, the U.S. Supreme Court elaborated on the power of government to prohibit nuisances in Pierce Oil Corp. v. City of Hope, 248 U.S. 498 (1919). In an unanimous opinion for the Court, Justice Holmes declared that: "The [police] power is a continuing one, and a business lawful today may in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good." (Pierce Oil, 248 U.S. at 500.)

The second landmark U.S. Supreme Court decision related to the regulation of land use that admittedly did not amount to a nuisance. In Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Court made reference to the process and affects of urbanization in upholding a local zoning ordinance as a legitimate exercise of the police power. Changes that had occurred in connection with the

urbanization of America during the lad half of the Nineteenth Century warranted governmental interference with previously unregulated land use.

> Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect to the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even a half century ago, probably would have been rejected as arbitrary and oppressive. (Euclid at 386-387.)

3. REGULATORY TAKINGS

Police power regulatory authority is not unlimited. In Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922), Justice Holmes wrote the famous (or infamous) pronouncement that "...[W]hile property may be regulated to a certain extent, if a regulation **goes too far**, it will be recognized as a taking." (Pennsylvania Coal at 415.) If the regulation is a taking, payment of compensation is required. Although now quoted in virtually all opinions and commentaries involving federal takings jurisprudence, it was over half a century after this pronouncement in 1922, and 100 years after Mugler, before the Court found that a land use regulation crossed the line and was either invalid as exceeding the scope of the police power (Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987)) or required compensation (First English Evangelical Church v. County of Los Angeles, 482 U.S. 304 (1987).)

4. RECENT FEDERAL TAKINGS CASES

Countless articles have been published reviewing, analyzing and commenting on recent U.S. Supreme Court decisions relating to "regulatory takings."

The explosion of Federal takings analyses resulted from three decision of the U.S. Supreme Court in 1987, often referred to as the "Trilogy": Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 484-485 (1987), First English, and Nollan. Since the Trilogy, the U.S. Supreme Court has further refined its attempts to draw the line between "mere" regulation and a regulation that "goes too far" and thus results in a taking. See, Lucas v. South

Carolina Coastal Council, 505 U.S. 1003 (1992); and Dolan v. City of Tigard, 114 S.Ct. 2309 (1994). I will not attempt to summarize or repeat those discussions, but rather will merely extract from these decisions the guidelines that have been utilized by the Court to determine whether a regulation is a proper exercise of the authority or "goes too far."

First, there must be a **legitimate public interest** that is being furthered by the regulation. Nectow v. Cambridge, 277 U.S. 183, 188 (1928); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Keystone, at 484-485; Lucas, at 1016; and Dolan, at 2316.

Second, the regulation must **substantially advance** that legitimate public interest. Nectow, at 188; Penn Central Transp. Corp. v. City of New York, 438 U.S. 104, 127 (1978); Agins, at 260; and Nollan, at 834.

Third, there must be an **essential nexus** between the legitimate public interest being advanced and the proposed regulation. Nollan, at 825.

Fourth, the regulation must not deny the owner **all economically viable** use of the property. Lucas, at 1019.

Fifth, if the regulation imposes a condition or "exaction" to be satisfied by the property owner, there must be a **rough proportionality** between the exaction and the amount of "harm" being done. Dolan, at 2319.

B. Texas Supreme Court Takings Jurisprudence

While much has been written with respect to the U.S. Supreme Court decisions, relatively little attention has been paid to Texas Supreme Court takings jurisprudence. This is particularly surprising in view of the broader scope of the Texas Constitution's prohibition in Article I, section 17 that "No person's property shall be taken, **damaged** or destroyed or applied to public use without adequate compensation being made..."

1. POLICE POWER

Eight years after the U.S. Supreme Court sustained local zoning regulations in Euclid, the Texas Supreme Court held that the City of Dallas' zoning ordinance was valid exercise of police power. In Lombardo v. City of Dallas, 73 S.W.2d 475 (Tex. 1934), the Court enunciated now familiar concepts: All property is held

subject to the valid exercise of the police power. The police power includes the enactment of regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. The police power has limitations and may not invade or impair fundamental liberties. Only a **public necessity** can justify the exercise of the police power. The regulation must have a **real, substantial relation** to the public necessity. The regulation must bear a **fair relationship** to the object sought to be obtained. The means adopted by regulation must be **reasonably necessary and appropriate** for the accomplishment of a legitimate public purpose. The regulation must be **reasonable in its operation** on the persons it affects.

In hindsight, the Texas Supreme Court outlined fundamental concepts that would later be echoed in the U.S. Supreme Court's guidelines: there must be a "legitimate public interest" that is "substantially advanced" by the regulation, which must have an "essential nexus" to that public interest; the regulation must not deny "all economically viable use;" and the burdens it imposes must have a "rough proportionality" on affected property owners.

It is noteworthy that the Texas Supreme Court in Lombardo discussed at some length the needs justifying, and benefits resulting from, zoning regulations. Among other things, the Court cited "the coming of the automobile, bus and electric railways" as eliminating the need to have factories and business enterprises located within or adjacent to neighborhoods, and concluded that to deny the validity of the prohibition in residential areas of commercial activities that "necessarily contribute to the congestion of traffic and its attendant dangers, would be a failure to apply common sense to modern city life." Lombardo, at 481-482. Moreover, the Court approvingly quoted its sister courts in California and Illinois, which had already recognized that the establishment of single family residence districts furthered the community's welfare since such districts "prevent congestions of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires, and the enforcement of traffic and sanitary regulations." Lombardo, at 483. Thus, the Texas courts, like the federal courts, recognized that the urbanization of America requires regulation of private property use to prevent some private property owners from unreasonably harming others.

The Texas Supreme Court has repeatedly refused to formulate tests or guidelines for drawing a line between the competing and

conflicting doctrines of the exercise of police power (for which compensation is not required), on the one hand, and the exercise of the power of eminent domain (for which compensation is required) on the other. As summarized in City of Austin v. Teague, 570 S.W.2d 389, 391 (Tex. 1978):

> The City seeks to escape liability for damages by its contention that the denial of a permit was an exercise of its "police power." Plaintiffs, on the other hand, say that the Texas Constitution entitles them to damages for the City's exercise of the power of "eminent domain." Tex. Const. art. I, § 17. The labels are not helpful. These two doctrines, - police power and eminent domain - merge at so many places when applied to specific problems, that the legal battlefields have been variously termed a "**sophistic Miltonian Serbonian Bog**," ... a "**crazy-quilt pattern**," ... "**manifest illusoriness** of distinctions," ... producing decisions that are "**conflicting, and often ... irreconcilable in principle.**" ... It is for that reason this court has in three decisions rejected the dichotomy, holding that one's property may not be taken without compensation under some circumstances even in the exercise of the police power. (citations omitted and emphasis added.)

2. EARLY TEXAS CASES

As early as 1889, the Texas Supreme Court recognized the significance of the additional word "**damaged**" in Article I, Section 17 of the Texas Constitution. The first of what could be called the nineteenth century "Texas Trilogy" is Trinity & S. Ry. Co. v. Meadows, 11 S.W. 145 (Tex. 1889). The Texas Supreme Court concluded that the question in Texas is not whether an actual taking is required for the recovery of damages since "[t]he insertion of the words 'damaged or destroyed' in the section quoted (Art. I, § 17) was doubtless intended to obviate this question, and to afford protection to the owner of property, by allowing him compensation, when by the construction of a public work his property was directly damaged or destroyed, although no part of it was actually appropriated." Meadows, at 146. Notably, however, the Court held that, if the construction of the railroad near plaintiff's mill was done in a skillful and proper manner," there was no compensable taking even if the construction did damage the mill.

In Gulf, C. & S.F. R.R. Co. v. Eddins, 60 Tex 656, 663 (1894), the Court noted that those words were not in the Constitution of 1869, but were added in the Constitution of 1876:

> To entitle the party to compensation under our present constitution, it is not necessary that his property shall be destroyed, nor is it necessary that it shall be even taken. It is sufficient to entitle him to compensation that his property has been damaged. The fact of being damaged entitled him to the protection extended by this constitutional provision, as fully as if his property had actually been taken or destroyed. (emphasis by the Court.)

Moreover, under this analysis, if the property is rendered "somewhat impaired" and "somewhat less valuable," it is sufficient for entitlement to compensation. Eddins, at 663. How much is "somewhat"? The Eddins court emphasized that a compensable taking will be found only where the injured party's use of property "is very greatly impaired, and the injury in this respect is one special in its character, and not one common to the entire community at large...."

One year after Eddins, in Gulf, C. & S.F. R'y v. Fuller, 63 Tex. 467, 469 (1895), the Texas Supreme Court again pointed out that the language in the Texas Constitution is broader.

3. MORE RECENT TEXAS REGULATORY TAKINGS CASES

These early Texas cases were decided in the *laissez faire* era, and involved public improvement projects and not "regulatory takings." But in DuPuy v. City of Waco, 396 S.W.2d 103, 108 (Tex. 1965), the Texas Supreme Court confirmed that "our refusal to compartmentalize an exercise of sovereignty as either police power or eminent domain for resolution of problems arising under Article 1, Sec. 17, of the Constitution rests upon the manifest illusoriness of distinctions between them." Citing Eddins, Fuller, and Meadows, the Court confirmed that:

> It is settled that a direct physical invasion of property is not required under the present provisions of Article 1, Sec. 17, of the Constitution of Texas to entitle an owner to compensation.... It was the injustice of requiring an actual taking that explains the inclusion for the first time in the Constitution of the requirement

> that compensation be paid for the damaging of property for public use. DuPuy, at 108.

The Court held that impairment of highway access rights that left the owner abutting a cul-de-sac constituted a compensable injury not common to the public.

In contrast, in State v. Schmidt, 867 S.W.2d 769 (Tex. 1993), a unanimous court rendered judgment against the landowners, with eight justices joining in Justice Hecht's opinion that diminution of value due to diversion of traffic and lessened visibility was not compensable.

In Felts v. Harris County, 915 S.W.2d 482 (Tex. 1996), the Texas Supreme Court again emphasized the importance of the additional "damaged or destroyed" language in the Texas Constitution, and noted that twenty-two other states have constitutional provisions for providing compensation when property is "damaged" as well as taken. The Court cited Fuller, Eddins, and DuPuy, in noting that an actual taking or physical appropriation is not required under the Texas Constitution. At issue in Felts was whether the property owners were entitled to compensation for increased roadway traffic noise resulting from a roadway constructed adjacent to their property. The court found there was no special damage to the Felts' property not suffered by the community in general, and therefore, the owners were not entitled to compensation:

> ... generally, noise emanating from a roadway has similar impact on the community as a whole. That is, all properties surrounding a new roadway suffer some increase in traffic noise. Similar damages experienced by all or most of the properties in a given community or section is the quintessential notion of community damage. Those properties closer to the roadway may experience a greater increase than those further away. The fact that some damages may be greater if the property is in closer proximity to the roadway does not suffice to render such damages constitutionally compensable under Article I, Section 17.

915 S.W.2d at 485.

The Court added in footnote 4, however, that it "was not prepared to conclude that damage attributable to traffic noise can never be compensable" and that "[u]nder exceptional circumstances, traffic

noise may be so significant that it severely impacts the ownership interest in the property." Felts, at 221. In other words, does it "go too far"?

An opportunity to address the issue of "regulatory takings" was presented to the Texas Supreme Court in City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978). The City of Austin denied a "water development permit" required for the development of the property because "local residents" appeared before the city council and requested that the city take steps to have the property preserved as a "scenic easement" to protect the southern approach to downtown Austin. The property owners sued the city for damages claiming the city's actions constituted a taking of their property. The Court reviewed the Texas takings jurisprudence because the city sought to "escape liability for damages by its contention that the denial of the permit was an exercise of its 'police power'." (Teague, at 391.) The Court found that the facts justified compensation to the property owners.

The Court invoked "still another test which is sometimes helpful. It allows recovery of damages when the government's action against an economic interest of an owner is for its own advantage." Teague, at 393. The Court cited a "recent application of this test" by the San Antonio Court of Appeals in San Antonio River Authority v. Garrett Brothers, 528 S.W.2d 266 (Tex. Civ. App. - San Antonio, 1975, **writ ref'd n.r.e.**). There, the court of appeals stated:

> The social desirability of leaving government free to seek its own enrichment at the expense of those whom it governs under the guise that it has the power to regulate harmful conduct is not readily apparent... To permit government, as a prospective purchaser of land, to give itself such an advantage is clearly inconsistent with the doctrine that the cost of community benefits should be distributed impartially among the members of the community. Garrett Brothers, at 274.

The Texas Supreme Court concluded that the City of Austin, by denying the permit, had acquired by indirection the desired scenic easement at no cost, and had singled out the property owners to bear all of the cost for the community benefit. Thus, the property owners were entitled to damages. At the same time, however, the Court reversed a jury finding of the value of plaintiffs' loss of use during the period of the city's wrongful denial of the permit, as speculative, and remanded for retrial of actual damages,

apparently referring to the costs of "seeking and obtaining the permit to which they were entitled."

The issue of the validity of a municipal ordinance as a "regulatory taking" was also presented in City of Brookside Village v. Comeau, 633 S.W.2d 790 (Tex. 1982), **cert. denied** 459 U.S. 1087 (1982). The city's ordinance regulated mobile homes in a different manner than structures built on-site. The Court determined that the regulation had a substantial relationship to the protection of the general health, safety or welfare of the public, and held that it was a valid exercise of the police power. Brookside, at 79.

The Court relied heavily on the presumption of the validity of ordinances and on the "extraordinary burden" placed on the party challenging an ordinance to demonstrate that "no conclusive or even controversial or issuable fact or condition existed" that could authorize the passage of the ordinance. Brookside, at 792-793, citing Thompson v. City of Palestine, 510 S.W.2d 579 (Tex. 1974).

The issue of "regulatory takings" was again presented at the municipal level in City of College Station v. Turtle Rock, 680 S.W.2d 802 (Tex. 1984). A real estate developer challenged the constitutionality of a city ordinance requiring the dedication of parkland (or the payment of a fee in lieu of the dedication) as a condition to subdivision plat approval. The Texas Supreme Court upheld the validity of the ordinance. Turtle Rock is generally thought to support the validity of various "exactions" imposed by government as conditions for the development of real estate. A closer review of the decision, however, reveals a much more limited result. The Texas Supreme Court stated "[w]e **merely** hold that College Station's park land dedication ordinance is not unconstitutionally arbitrary or unreasonable **on its face**." Turtle Rock, at 806 (emphasis added). The Court reversed the court of appeals' holding that all parkland dedication ordinances are *per se* invalid. In addition, the Court again invoked the presumption favoring the reasonableness and validity of ordinances, and the "extraordinary burden" resting on the party attacking an ordinance. Turtle Rock, at 805.

Applying these principles, the Court noted (1) that the concept of public welfare has a broad range, (2) that reasonable minds may differ whether the ordinance had a "substantial relationship" to the public health, safety and welfare, and (3) that the fees payable in lieu of actual dedication were restricted for use to acquire parkland in furtherance of the legitimate goal of providing parks to meeting the needs created by the development.

The Court concluded that, unlike Teague, the developer's property was not rendered "wholly useless" nor did the ordinance requirements cause a "total destruction" of the entire value of the property.

The ordinance at issue in Turtle Rock required that the funds paid by the developer in lieu of dedication of parkland actually be used within a reasonable time period to acquire parkland. The Court found this requirement significantly distinguished the College Station ordinance from the Missouri City parkland ordinance that had been held to be unreasonable and unconstitutional in Berg Development Co. v. City of Missouri City, 603 S.W.2d 273 (Tex. Civ. App. - Houston [14th Dist.] 1980, **writ ref'd n.r.e.**).

Some read the Texas Supreme Court's use of the "wholly useless" language in Turtle Rock, evoking the Federal takings jurisprudence of Lucas, to be a rejection of the proposition that any damage requires compensation. But the effect of the ordinance as applied to the property owner, and therefore, the invocation of the "damage" provision of Article 1, Section 17, was not presented in Turtle Rock. Indeed, the Texas Supreme Court expressly left this issue to be raised at a later date by stating:

> It is possible, of course, that the ordinance may be unduly harsh or create a disproportionate burden in the case of **a particular subdivision or developer.**" (emphasis added) Turtle Rock, at 806.

This brief review of Texas takings jurisprudence suggests the following principles. In regulatory takings cases, Texas courts will invoke the presumption of validity of ordinances, and will impose an "extraordinary burden" for a facial attack on the constitutionality of a regulatory ordinance. On the other hand, Texas courts will continue to enforce the Texas Constitution and require compensation to the owner if the effect of the ordinance as applied damages the property, if the benefit to the public creates a sufficiently disproportionate burden on the property sufficiently different from the burdens shared by others affected. In other words: if it "goes too far."

The Supreme Court's reluctance to find that even city ordinances imposing higher degrees of noise or lower visibility or parkland dedication on some individuals "go too far" suggests that it is unlikely to find compensable regulatory takings as a result of statewide rules issued by environmental agencies, or of denials of or conditions on permits pursuant to a procedurally proper

implementation of statewide regulation, when addressing the questions under Article I, Section 17.

The Texas Supreme Court's latest ruling on regulatory takings is its decision today (June 28, 1996) in Barshop v. Medina County Underground Water Conservation District. Unanimously, the Court rejected a facial takings challenge to the Edwards Aquifer Authority statute (slip opinion at Part V, pp. 13-20), in the course of rejecting all other facial attacks on the statute.

III. STATUTORY PRIVATE PROPERTY RIGHTS ACTS

A recent article regarding federal and state legislative initiatives to protect private property rights summarizes:

> Takings legislation implicitly assumes that the Fifth Amendment to the U.S. Constitution, as currently understood and implemented, does not adequately protect private-property rights. First, it can be expensive and time-consuming to litigate a Fifth Amendment takings claim. Second, proponents of takings legislation argue, interpretations of the Fifth Amendment that courts have developed over the last two centuries have been unreasonably narrow, and accord excessive deference to governmental regulation. A correct interpretation -- legislatively implemented, if necessary -- would significantly limit the government's power to regulate property without paying just compensation.

Coursen, "Property Rights Legislation: A Survey of Federal and State Assessment and Compensation Measures," 26 Environmental Law Reporter 10239 (1996).

The courts have likewise acknowledged the current dilemma. For example:

> This case represents in sharp relief the difficulty that current takings law forces upon both the federal government and the private citizen. The government here had little guidance from the law as to whether its action was a taking in advance of a long and expensive course of litigation. The citizen likewise had little more precedential guidance than faith in the justice of this case to sustain a long and costly suit in several courts. There must be a better way to balance legitimate public

> goals with fundamental individual rights. Courts, however, cannot produce comprehensive solutions. they can only interpret the rather precise language of the fifth amendment of our Constitution in very specific factual circumstances. To the extent that the constitutional protections of the fifth amendment are a bulwark of liberty, they should also be understood to be a social mechanism of last, not first, resort. Judicial decisions are far less sensitive to societal problems than the law and policy made by the political branches of our great constitutional system. At best, courts sketch the outlines of individual rights; they cannot hope to fill in the portrait of wise and just social and economic policy.

Bowles v. United States, 31 Cl. Ct. 37 (1994).

Two general types of legislation have evolved. The "assessment" approach requires government to determine the impact that proposed regulations will have on private property. The "compensation" approach provides a legislated remedy, separate from any constitutional claim, for regulations that diminish private property values more than a "trigger" amount. In each instance, the focus is on the impact of the regulation on individual property rights. When the impact is sufficient, the government must either withdraw or modify the proposed regulation or pay the property owner for the reduction in value.

(1) Federal Initiatives. Although numerous bills have been introduced, no federal takings legislation has yet been enacted. In 1988, President Reagan issued an Executive Order that directed federal agencies to assess the likelihood that proposed action would result in a taking of private property. Executive Order 12630, 53 Fed. Reg. 8859 (March 18, 1988). Proposed legislation followed that would have codified the assessment process contemplated in Executive Order 12630. See, for example, S. 50 and H.R. 1572, 102d Cong., 1st Session (1991). Legislative proposals multiplied and intensified in 1995. Compensation bills (H.R. 925 and H.R. 9, 104 Cong., 1st Sess. (1995)) that requires both assessments and compensation has cleared committee in the Senate. A thorough review of these initiative, including an interesting commentary concerning potential issues for litigation, is set forth in the Coursen article cited above at pages 10242-10246.

(2) State Initiatives. State legislatures have also been active in the property rights arena. See the Coursen article cited above at pages 10246-10251.

The Texas response is embodied in the Private Real Property Rights Preservation Act (S.B. 14) passed in 1995 and codified at §§ 2007 et seq. of the Texas Government Code. A property owner may seek relief from actions by any governmental entity that result in at least a 25 percent reduction (the "trigger" amount) in value. § 2007.002(5). The general remedy for such action is invalidation of the regulatory restriction. § 2007.023(b). The government entity may elect, however, to continue the restriction but them must pay compensation for the resulting monetary damages. § 2007.024(c).

This state statute, as is widely known, grew out of opposition, fanned by Take Back Texas, to the specter of a (non-existent) federal action: a supposed "secret plan" by the U.S. Fish and Wildlife Service to designate numerous counties as critical habitat of the golden-cheeked warbler and black-capped vireo under the Endangered Species Act. Of course a Texas statute cannot require the federal government to compensate for federal regulatory action that is valid under the federal Constitution. So the statute is a completely ineffectual response to a manufactured threat!

As a restriction on state regulation, the statute is also cynically crafted: it purports to allow a state agency to proceed with a rule only if it pays compensation to those landowners affected by more than the trigger amount -- but appropriates no money to state agencies to pay such compensation.

The Act broadly defines a "governmental entity" to include all executive branch boards and agencies and all political subdivisions. § 2007.002(1).

As a result of a tide of lobbying by Texas cities and other entities, the Act excludes actions by municipalities (except for nonuniform action in a municipality's extraterritorial jurisdiction), various nuisance, waste prevention, and public health and safety threats, and other generally similar special situations. § 2007.003(6). For the same kinds of political reasons, the statute contains enough exemptions to drive numerous statewide agency trucks through. Some are very large: §2007.003(b)(4) excepts actions "reasonably taken to fulfill an obligation mandated by federal law." A relatively short 180-day

limitations period is specified. § 2007.021(a). Whether the governmental action results in a taking and what are the resulting monetary damages are questions of fact § 2007.023(a), § 2007.024(b)), and the prevailing party is entitled to recover attorney's fees and court costs (§ 2007.026).

An assessment process is also required for proposed governmental actions covered by the Act. The governmental entity must prepare a takings impact assessment with detailed information and analysis (§ 2007.043), and publish a notice of the proposed action that must include a summary of the assessment (§ 2007.043). If a required assessment is not prepared, the governmental action is void. § 2007.044(a).

Since it only became effective in late 1995, there has been little actual experience with Act to the point. The attorney general is required to promulgate guidelines "to assist governmental entities in identifying and evaluating those governmental actions described [in the Act] ... that may result in a taking." § 2007.041(a). The guidelines were issued in early 1996, and are published at 21 Tex. Reg. 387 (Jan. 12, 1996). The guidelines are more or less useless. They follow and simply repeat the statutory provisions and acknowledge the obvious: the Act "raises complex and difficult issues in emerging ares of law, public policy, and government." Guidelines, § 1.17. See, "AG's Takings' Guidelines Don't Offer Much Guidance," Texas Lawyer, January 29, 1996, at p.4. The Texas Natural Resource Conservation Commission also has prepared its own "Senate Bill 14 Guidance Document for Takings Impact Assessments for Rules," which sets forth an assessment process and a two-page checklist.

To the great chagrin of Take Back Texas, the first attempt to invoke the Act comes from landowners harmed by the environmental effects of activity permitted by the TNRCC. In Accord Agriculture, Inc. v. Texas Natural Resource Conservation Commission, No. 96-00159, District Court of Travis County, Texas, 353rd Judicial District, the plaintiff is an organization of property owners who object to TNRCC rules regarding confined animal feeding operations ("CAFO") and to the issuance of a CAFO permit to a pig farm. Under the rules, the plaintiff notes only the prospective permittee may file a contested takings case under Section 2007.022 of the Act! Adjacent landowners who might be adversely affected by the activity of the permittee cannot do so. Since the adjacent landowners' property will be damaged as result of TNRCC's issuance of a permit, and since the activity causing the damage could not occur but for the permit, TNRCC caused the damage and the Act entitled the

adjacent landowners to seek relief from the agency under the literal language of the statute. The Accord plaintiffs note that the statute applies expressly to permits, and only requires that the agency action be "a producing cause" (not "the proximate cause") of the required reduction in value of "affected real property". On its face, a government agency permit to a pig farm is a "producing cause" of harm to downwind and downstream landowners.[2] If the statute were construed as entitling only permittees, not adjoining landowners, to compensation for harm caused by state agency action, plaintiffs rather plausibly allege, the statute would violate the open courts and due course of law provision of the Texas Constitution.

As one of the Act's most active outside lobbyist-supporters stated in September 1995, its most predictable effect is the creation of "a lot of new uncertainties" and opportunities to litigate them. Among these are some remarkable administrative and constitutional law problems. I will highlight six.

1. **Contested Takings Cases?**

Where a state agency may have effected a taking, § 2007.022 gives private real property owner the option of bringing a contested case before state agency to determine whether a taking as defined in the statute has occurred. This creates the potential for some spectacularly speculative "evidentiary" hearings. Consider, for example, a TNRCC permit hearing. Those who have "enjoyed" dueling experts on ground water pollution plumes can now also look forward to dueling real estate appraisers.

2. **Judicial Review of Contested Takings Decisions?**

Under the literal terms of §2007.025(b), judicial review of a state agency's contested case regulatory taking decision would be de novo, and indeed tried to a jury! Judicial review may be substantial evidence, if the statutory text is acknowledged but de novo is deemed to be an unacceptable hybrid form of review. Compare Southwestern Bell Telephone v. PUC, 571 S.W.2d 503 (Tex.

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[2] "Take Back Texas" replies noted that the Act applies only to the property that is "the subject of the governmental action." But of course neighboring land is part of the "subject of the governmental action" when an agency is making a permitting decision that is intended, by statute, to consider the applicant's off-site air or water pollution effects.

1978) (statutory provision that confiscation review in utility ratemaking contested cases be de novo was unconstitutional; review would be substantial evidence) with Texas Workers' Compensation Commission v. Garcia, 893 S.W.2d 504 (Tex. 1994) (de novo provision in workers comp review statute not constitutional).

3. **Contested Case or Rulemaking?**

The statutory definition of "taking" in S.B. 14 includes any "governmental action" not specifically excepted. "Governmental actions" include rules and permits. §2007.003(a)(1) and (4).

This means one class of potential interested persons, real property owners, can force a statewide agency to hold a contested case even if the agency wants to act by rulemaking!

4. **Is Prosecution Now a Contested Case?**

Under its literal terms, §2007.003(a)(4) makes an enforcement decision to issue a citation a potential contested case over takings. One is hard-pressed to imagine a more peculiar way to ignore separation of powers!

5. **Swiss Cheese Rules?**

A governmental entity that loses a takings case is supposed to choose between rescinding the governmental action as it applies to the prevailing real property owner or paying her damages. §2007.024. This creates the prospect of "rules" with exceptions only for owners of large, substantially affected real property interests or with compensation only for such owners.

6. **Constitutionality?**

The Texas Constitution protects all types of rights, privileges, immunities and interests. S.B. 14 singles out one type for special protection: real property. No rational basis for this special treatment is stated in the statute. None is readily imaginable.

Toxic Tort - Case Management Orders

"Dances with Wolves"

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TOXIC TORT - CASE MANAGEMENT ORDERS

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PART ONE -- TOXIC TORT LITIGATION

I. What is a toxic tort?

A. "Tort" defined

A legal wrong committed upon the person or property independent of contract. It may be either (1) a direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; (3) the violation of some private obligation by which like damage accrues to the individual. BLACK'S LAW DICTIONARY 1489 (6th ed. 1990).

Examples: Accidents such as car wrecks and slip-and-falls

Malpractice

Intentional wrongs such as assault and battery

Products that cause injuries

B. "Toxic tort"

In general, a toxic tort is a tort that involves toxic substances. The Texas Civil Practice & Remedies Code Ann. §33.013(c)(3) (West Supp. 1995) defines "toxic tort" as:

> Toxic tort means a cause of action in tort or for breach of implied warranty under Chapter 2, Business & Commerce Code, arising out of exposure to hazardous chemicals, hazardous wastes, hazardous hydrocarbons, similarly harmful organic or mineral substances, hazardous radiation sources and other similarly harmful substances (which usually, but need not necessarily, arise in the work place), but not including any "drug" as defined in Section 81.001(3), Civil Practice & Remedies Code.

II. Typical situations which give rise to toxic tort litigation

A. Occupational Exposures

A plaintiff may claim that he or she was exposed to chemicals, hazardous wastes, or other substances in the work place. Workers at plants or other industrial facilities often work with chemicals in the manufacturing processes used at such plants or industrial facilities. Defendants are usually the manufacturers or sellers of the chemicals, hazardous wastes, or other substances to which the plaintiffs claim exposure. An employer subscribing to workers' compensation insurance is not liable to an injured employee in most circumstances.

B. Environmental Exposures

A plaintiff may claim that he or she was exposed to chemicals, hazardous wastes, or other substances which a defendant somehow released into the environment. For example, a plaintiff may claim exposure to chemicals that a defendant allegedly released into the air, drinking water, ground water, or soils. Such releases may be from a plant or other industrial facility, from a vehicle used to transport such chemicals, from a storage or disposal site, or from any number of potential sources. These lawsuits often include claims for both personal injuries and for property damages.

C. Products

Plaintiffs may claim that they were exposed to a chemical substance through a defect in a product. For example, a plaintiff might allege that the product emitted a toxic substance or that the product was composed of a toxic substance.

III. Typical damages sought

Personal injury claims often involve claims of past or present injuries, and/or increased risks of future illnesses or injuries, and/or for medical monitoring to attempt to predict or minimize a future potential illness. Property damage claims often involve claims that personal property (*e.g.*, cars) or real property have been damaged by the alleged exposure, or that real property has or will depreciate in value due to the alleged actual contamination, nearness to the site or because of an alleged stigma.

IV. Theories of liability

Toxic tort suits usually proceed under one or more of the following general legal theories:[1]

> NEGLIGENCE - (1) the defendant owed a duty to plaintiff to use ordinary care to avoid injuring plaintiff under the circumstances, (2) the defendant failed to use ordinary care, thereby breaching the duty, (3) the plaintiff proximately suffered damages as a consequence of the breach of duty.
>
> GROSS NEGLIGENCE - Proof of negligence is made plus a showing that the defendant acted with conscious and willful indifference to the rights and safety of the plaintiff. Punitive damages may be recovered.
>
> STRICT PRODUCTS LIABILITY - The plaintiff is injured by a product which is found to be defective and unreasonably dangerous.

[1]The particulars of these theories often vary from state to state.

ULTRA-HAZARDOUS ACTIVITY LIABILITY - The defendant engages in an activity that cannot be conducted in a reasonably safe manner. As such, the defendant is legally responsible for all damages caused by its activity (e.g., blasting).

INTENTIONAL TORT - The defendant intentionally causes some injury to the plaintiff (e.g., the defendant sends the plaintiff into a area tainted with toxic substances with the knowledge that it is substantially certain that the plaintiff will be exposed to the toxic substances).

TRESPASS - The defendant causes a toxic substance to enter upon the plaintiff's land (e.g., chemicals migrate into the plaintiff's soil).

NUISANCE - The defendant engages in some activity such that the plaintiff's reasonable use and enjoyment of his land is substantially impaired (e.g., toxic odors).

BREACH OF WARRANTY - The defendant breaches an express or implied warranty which causes a toxic injury to a plaintiff (e.g., a product is warranted to be safe but it is made of a toxic substance or a residence is warranted to be suitable for residential use).

DECEPTIVE TRADE PRACTICES - The defendant commits some act defined to be a deceptive trade practice under the state's law.

FRAUD/MISREPRESENTATION - The defendant knowingly misrepresents a material fact which the plaintiff relies upon to his detriment (e.g., a real estate company misrepresents the land use surrounding a neighborhood).

V. Common Defenses

STATUTE OF LIMITATIONS - The period in which the law allows the plaintiff to file suit has expired. In general, this period begins when the plaintiff is "injured." In the context of toxic tort suits, it may be difficult to determine when the plaintiff was injured or was able to perceive the injury. As such, the statute of limitations defense is often governed by the "discovery rule." In this situation, the issue is determining the date when the plaintiff discovered, or should have discovered, her injury.

COMPARATIVE RESPONSIBILITY - The plaintiff failed to use ordinary care and this failure proximately caused or contributed to the plaintiff's damages. The plaintiff's recovery may then be reduced or barred altogether.

VI. Common issues presented

A. Identification of the toxic substances

Sometimes there will be no controversy over the particular chemical alleged to have caused the injury. In a typical long term environmental release or explosion case, however, hundreds of chemicals may have been released into the environment. Several, if not many, companies may have been involved in the manufacture, shipment, or sale of the chemicals. As such, it is imperative to determine what chemicals were present at the time of the alleged exposure.

B. Connecting the toxic substances to the Defendant

For liability to be imposed upon a defendant, the defendant must be connected to the toxic substance in a culpable manner. That is, the defendant may be liable for the plaintiff's injuries only if the defendant acted in a manner in which the law imposes legal responsibility.

For example, a plaintiff exposed to a toxic substance will often have difficulty ascertaining who manufactured or controlled the toxic substance. In waste-site litigation, a number of potential defendants may have sold or disposed of substances at the site. The plaintiff will usually have to show that each defendant is legally responsible for the toxic substance injuring the plaintiff.

C. Proving a causal link between the toxic substance and the injury

Generally, one of the most hotly contested issues in toxic tort litigation is causation. Parties often vigorously dispute the extent, length, manner, magnitude and whether an alleged exposure to chemical substances even occurred.

In general, the plaintiff has the burden of establishing some harmful exposure to a chemical, hazardous waste, or other substance which the defendant manufactured or sold. It is fundamental that a chemical, hazardous waste, or other substance cannot cause a personal injury in a person in the absence of some exposure to that chemical, hazardous waste, or other substance. Accordingly, the starting point in a causation analysis in a toxic tort case is often whether a plaintiff has sustained <u>any</u> exposure to the chemicals, hazardous waste, or other substances at issue. Beyond this issue, a plaintiff must prove that he has had some exposure at a sufficient level or concentration that has caused some past, present, or potential future personal injury.

Much expert testimony in toxic tort litigation focuses on exposure issues. In some cases of long-term, extremely low level potential exposures, experts may focus on whether a plaintiff had any exposure to the chemicals, hazardous wastes, or other substances, and if so, whether such exposures were at a level or concentration sufficient to cause any personal injury. Even in cases in which some exposure is apparent, experts will often disagree as to whether such exposures were at a level

or concentration sufficient to cause any personal injury. Such expert testimony often includes analysis of:

- Work place engineering design and controls which may have allowed or minimized exposures;

- Protective clothing and gear;

- Data from testing or sampling of air, drinking water, ground water, soils, or workplace surfaces;

- Data from medical examinations, including testing of human tissues, blood, urine, or breath; and

- Environmental modeling.

VII. Use of Expert Testimony

A. Selection of Experts

The following are some factors to consider in selecting an expert witness:

1. Expertise

One should always attempt to hire the leading expert in the field, or an expert with a prestigious background and experience in the field of testimony.

2. Availability

The most qualified experts will be ineffective and will hurt your case if they are unavailable to devote the requisite time to the case. Always obtain a commitment from experts at the time of retention that they have the time to undertake the project.

3. Prior testimony

It is very important to consider the prior testimony of an expert. Experts who have testified in a number of trials are subject to being characterized as "hired guns" who will say anything. Further, an expert may have testified to some position in prior litigation that contradicts his testimony in the present case. In the initial interview with the expert, always ask how many times the expert has testified, and what percentage of those times was for plaintiffs and what percentage was for the defense.

4. Communication abilities

The expert's primary function is to talk to the jury. As such, it is imperative that the expert have adequate communication skills. Superior courtroom presence and communication skills may make up for an average resume.

5. Geographic proximity to the case

The jury is often suspicious of an expert who has travelled great distances to testify at the trial. Further, the expert can be impeached with the argument that his testimony is so questionable that the party offering it could not locate an expert with the same testimony in the local vicinity. In consequence, unless the expert is a leading figure in the field, it is usually best to hire experts from the surrounding area.

B. How to locate an expert

The most common ways of locating an expert are through:

other attorneys
professional organizations
referral services
universities
toxic tort cases or reporters
your client (if it is defendant who has been involved in toxic tort litigation before)
other experts
government agencies
scholarly publications on the issues presented in the litigation

C. Pretrial use of experts

1. Investigation

An expert can be of vital assistance in the pretrial acquisition of facts. Shortly after the lawsuit is filed, a defendant should hire at least one expert to identify the pertinent factual issues and to collect and preserve the facts. It is often a good idea for the plaintiff to consult with an expert or experts prior to filing a lawsuit, and may actually be required in some instances and jurisdictions.

2. Discovery preparation

In crafting a discovery plan, an expert can be of great help. Specifically, the expert can assist in the acquisition of facts relevant to causation, damages, and standard of care. An expert can help identify the type of information and discovery that needs to be obtained from the opposition.

3. Educating the attorney

It is very rare than an attorney is sufficiently familiar with science and medicine to fully appreciate all the issues presented in every toxic tort case. As such, one should use an expert to acquire a working understanding of the principles and theories at work in the particular case.

D. Admissibility of expert testimony

1. ***Frye v. United States***, 293 F. 1013, 1014 (D.C. Cir. 1923).

Under ***Frye***, expert scientific testimony was not admissible if it lacked "general acceptance in the particular field in which it belonged." Applying this principle, the court held that testimony regarding the results of a lie detector test was inadmissible. The ***Frye*** test was adopted in the federal circuits and in most state courts as the common law rule governing the admissibility of scientific evidence. The ***Frye*** test was often criticized for being unduly restrictive and difficult to apply.

2. ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 113 S.Ct. 2786 (1993).

In ***Daubert***, the United States Supreme Court addressed whether the ***Frye*** test survived the passage of the Federal Rules of Evidence. The issue presented was whether testimony that a morning sickness drug -- Bendectin -- caused birth defects was admissible even though the theory underlying the testimony was not generally accepted within the scientific community. After concluding that the Federal Rules of Evidence embraced a liberal standard of admissibility, the United States Supreme Court unanimously held that the adoption of the Federal Rules of Evidence overruled the ***Frye*** test. The ***Frye*** test was replaced with an inquiry into the evidence's relevance and reliability. *Id.* at 2794.[2]

This new test is derived from the language of Fed. R. Evid. 702.[3] The test has two preliminary requirements which are to be satisfied pursuant to Fed. R. Evid. 104(a):[4]

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[2]Chief Justice Rehnquist and Justice Stevens dissented from the majority's description of the new standard of admissibility.

[3]Fed. R. Evid. 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[4]*See* ***Daubert***, 113 S.Ct. 2796 n.10. Rule 104(a) provides:

- The expert's testimony must be based upon **scientific knowledge**. *Id.* at 2795. "Scientific" means grounded in the methods and procedures of science. *Id.* "Knowledge" means pertaining to a body of known facts or to a body of ideas inferred from such facts or accepted as truths on good grounds. *Id.* Further, knowledge connotes more than a subjective belief or unsupported speculation but it need not be known to a certainty. *Id.* Overall, "in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by a scientific method." *Id.* If it is shown that the expert's testimony pertains to scientific knowledge, the evidence satisfies the requisite standard of reliability. *Id.*

- The scientific evidence must be **helpful** by assisting the trier of fact to understand the evidence or to determine a fact in issue. *Id.* at 2795. This concern is grounded in relevance. *Id.* The inquiry is described as one of "fit." *Id.* at 2796. That is, the scientific knowledge must "fit" with the purpose for which it is offered. *Id.* For example, testimony regarding the phases of the moon pertains to scientific knowledge, but it does not fit with an inquiry into whether a person was likely to behave irrationally on a certain night. *Id.* In other words, such evidence is not helpful to the jury.

After these initial hurdles are crossed, **four nonexclusive factors** should be considered:

- whether the scientific theory can be or has been tested (termed "falsifiability"),
- whether it has been subject to peer review and publication,
- what the evidence's known rate of error is and the existence and maintenance of standards controlling the technique's operations, and
- whether the evidence has a particular degree of acceptance in the relevant community.

Id. at 2796-98. No factor is dispositive and all factors should be applied flexibly. Id. at 2797-97. In general:

> Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except with respect to privileges.

The court is not limited to considering admissible evidence in reaching a determination on the admission of evidence. ***Bourjaily v. United States***, 483 U.S. 171 (1987) (holding that the Federal Rules of Evidence overruled the common law "boot strapping" principle of ***Glasser v. United States***, 315 U.S. 60 (1942). Further, pertinent matters to admissibility must be established by a preponderance of the proof. *Id.*

> [The] overreaching subject [of the inquiry] is the scientific validity -- and thus the evidentiary relevance and reliability -- of the principles that underlie a proposed submission. The focus, of course, must be **solely on the principles and methodology**, not on the conclusions that they generate.

Id. at 2797 (emphasis supplied).

Overall, it appears that ***Daubert*** changed the law by adding new factors onto the ***Frye*** test. That is, ***Frye*** focused solely upon general acceptance as the determinative factor in admitting evidence. With ***Daubert***, courts must take a broader approach which focuses not only upon scientific acceptance but upon the methodology and reasoning employed in the theory.

E. Operating under *Daubert.*

1. *Scientific knowledge*

This issue will arise when the testimony pertains to fields that are questionable. For example, certain areas of psychology, biology, and medicine fall within this area.

2. *Helpfulness*

In general, the party seeking to exclude the evidence should contend that the testimony does not assist the jury, because it is not relevant to any issue in controversy.

3. *Methodology*

The party seeking to admit evidence should stress the soundness of the methodology employed. For example, the proponent should clearly delineate the principles the theory rests upon, the testing performed, the controls employed, and the rate of error or confidence level. The party seeking to exclude the evidence should attack the underlying methodology wherever possible.

4. *Acceptance*

The party seeking to admit evidence should make every attempt to demonstrate that the theory has been published, commented upon by others within the field, and accepted by many. If these areas are lacking, the proponent should carefully explain why the theory has not been subject to extensive testing, publication, and peer review.[5] The party seeking to exclude the evidence should show that the

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[5]*See* ***Daubert***, 113 S. Ct. at 2797 ("... in some instances well-grounded but innovative theories will not have been published ... Some propositions, moreover, are too particular, too new, or of too limited interest to be published.")

theory has been considered by the field for a substantial period of time and few if any within the field have accepted the theory.

5. *Sufficiency*

Even if scientific testimony is found **admissible**, the opponent of such evidence may attack the evidence's **sufficiency** with a motion for summary judgment or directed verdict. ***Daubert***, 113 S.Ct. at 2798. *See also* ***In re Joint Eastern & Southern Dist. Asbestos Lit.***, 52 F.3d 1124, 1132-37 (2nd Cir. 1995) (reversing trial court's judgment as a matter of law on issue of causation); ***Conde v. Velsicol Chemical Corp.***, 24 F.2d 809, 812-814 (6th Cir. 1994) (affirming trial court's entry of summary judgment on the issue of causation).

F. E.I. DuPont de Nemours and Co., Inc. v. Robinson.

The Texas Supreme Court has adopted ***Daubert's*** reasoning. ***See E.I. DuPont de Nemours and Co., Inc. v. Robinson***, 38 Tex. Sup. Ct. J. 852, 858 (Tex. June 15, 1995) (pending on motion for rehearing). The court added two factors to ***Daubert's*** four non-exclusive factors:

- The extent to which the technique relies upon the subjective interpretation of the expert,[6] and

- The non-judicial uses which have been made of the theory or technique.[7]

In addition, the Court held that the proponent of the evidence has the burden of demonstrating its admissibility. *Id.* at 859.

Overall, we should expect a clarification of Texas law on ***Daubert*** rather shortly. In ***Merrell Dow Pharmaceuticals, Inc. v. Havner***, 907 S.W.2d 535 (Tex. App. -- Corpus Christi 1994, writ granted), the Corpus Christi Court of Appeals *en banc* addressed the same issues before the United States Supreme Court in ***Daubert*** and held that the expert testimony was admissible. The Texas Supreme Court granted writ and heard arguments on March 19, 1996.

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[6]This requirement appears to mandate empirical testing. *See* ***S.V. v. R.V.***, 39 Tex. Sup. Ct. J. 386, 410 (Tex. March 14, 1996) (Cornyn, J., dissenting). That is, if the opinion cannot be proven with objective criteria, it will likely fail this requirement. *Id.*

[7]For example, if the theory has only been used in the context of litigation and for no other purpose, it should fail this requirement.

PART TWO -- CASE MANAGEMENT ORDERS

I. Overview

A case management order is "a method for streamlining a case and binding all parties to a procedural schedule that allows for orderly development of the litigation." Arvin Maskin and Peter A. Antonucci, 1 A GUIDE TO TOXIC TORTS 2A-1 (Matthew Bender 1996).

The case management order is a written document signed by the presiding judge. A typical case management order will specify deadlines and delineate certain procedures to be employed in the litigation.

As is addressed below, the case management order should be sought early in the litigation. If possible, both sides should negotiate the terms of the order and attempt to agree on all necessary provisions.

II. Working without case management orders

Without case management orders, a lawsuit is governed by the forum's rules of civil procedure. Generally, relatively early in the case, the Court will enter a docket control order or scheduling order providing the parties with basic scheduling dates based on the then anticipated trial date. These rules and orders are designed to govern relatively simple, single-party litigation.

For example, in a typical case the court will set the following deadlines:

- **Amended pleadings** - Parties are often allowed to amend their pleadings up until shortly before trial. As such, plaintiffs may amend their complaint to assert a radically different theory of liability or a defendant may choose to assert new defenses just before trial.

- **Discovery** - Parties will often be allowed relatively unlimited discovery which may continue until thirty days before trial. Key information requested in interrogatories or requests for production may not be provided until late in the case.

- **Designation of expert witnesses** - Before trial, each party must designate all expert witnesses to be employed at trial. Typically, the rules of civil procedure and docket control orders allow parties to designate experts shortly before trial, leaving little time for expert discovery and rebuttal.

- **Dispositive motions** - Typically, dispositive motions are filed late in the proceeding after long periods of discovery.

III. Why Case Management Orders are Appropriate in Toxic Tort Litigation

A. Massive toxic tort suits involving numerous plaintiffs and multiple defendants are particularly appropriate cases for employing case management orders or structured phased discovery. This is particularly true in cases involving claims of alleged environmental exposure. For instance, the following scenario has occurred in dozens of cases throughout Texas. Hundreds or thousands of plaintiffs file suit alleging environmental exposure to chemicals at or from an active or abandoned chemical plant, storage facility or waste site. Some plaintiffs may have lived near the site for months, others for decades. Some plaintiffs may have lived near the site twenty-five years ago, others last year. The plaintiff group will include plaintiffs who reside hundreds of feet to several miles from the site. Plaintiffs will often claim that they have sustained both personal injuries and property damages as a result of either having been personally exposed to chemicals at or from the site or as a result of having property located in the general vicinity of the site. Plaintiffs' pleadings and initial discovery responses will often list numerous and diverse alleged personal injuries, ranging from ordinary childhood diseases, broken bones, toothaches and allergies to cancer and death as a result of their alleged exposure to chemicals from the site. Plaintiffs will likely allege that they have been injured, or are at risk of future illness as a result of alleged exposure to chemicals through drinking water, surface water, air or soil.

B. The defendants often consist of numerous companies alleged to have had some relationship with the plant or site. For instance, the defendants might include companies that owned and operated facilities at the site, companies that sold chemicals to the owners and operators at the site, companies that transported waste materials to the site and other such types of defendants.

IV. Use of Case Management Orders in Toxic Tort Litigation

A. A case management order or phased discovery procedure allows the plaintiffs, the defendants and the court to obtain relatively early in the procedure important information necessary to narrow the issues, focus their efforts and, perhaps, to reduce the tremendous amount of time and money ordinarily spent by both the parties and the court during the discovery process.

B. In Texas, as in other jurisdictions, case management orders are most often utilized to narrow the issues and expenses relating to the question of what, if anything, the plaintiffs were actually exposed to and what injuries, if any, such exposure may have caused. Without a case management order, the defendants must normally pursue global discovery aimed at all plaintiffs which is extraordinarily time consuming and expensive. Through interrogatories, depositions and document requests defendants have little choice but to try and discover as much information as possible about plaintiffs' medical histories, employment histories and potential other exposures. Defendants then must obtain medical records, employment records, insurance records and the like for all plaintiffs, analyze the records and have them reviewed by experts. Without a case management order, this work and expense would be incurred before a single doctor provided any testimony or plaintiffs produced any other evidence of any causal connection between a plaintiff's alleged illness and the subject site or any chemicals present at the site. At the same time, the plaintiffs would typically conduct extensive and expensive discovery regarding each and every material, chemical or waste present at the alleged site, without the benefit of any evidence that

any such chemical or material either migrated from the site, reached any plaintiff or caused any specific illness or injury sustained by any plaintiff.

The use of a case management order or phased discovery approach will certainly narrow these and other issues, saving time, money and judicial resources.

V. Specific Orders

A. At the outset, the case management order may and probably should stay general, broad discovery. In place of such discovery, the order might require the following disclosures early in the litigation:

1. Plaintiffs should provide the following types of information under oath:

   (a) identify the chemicals to which each plaintiff claims to have been exposed;
   (b) identify the time period of alleged exposure;
   (c) identify the place of alleged exposure;
   (d) identify the nature of the activities which resulted in the alleged exposure (i.e. working, living or attending school in the area);
   (e) identify the alleged pathway of exposure (i.e. drinking water; inhalation; dermal contact)

2. Plaintiffs should produce sworn expert reports regarding medical causation specifying for each plaintiff:

   (a) each specific injury that the subject plaintiff has suffered as a result of exposure to the chemical or chemicals and the date on which such injury was first suffered;

   (b) the chemical or chemicals that in the opinion of the physician caused each such injury, illness, condition or symptom;

   (c) the manner in which the subject plaintiff was exposed to each chemical (i.e. ingestion, inhalation, or skin absorption);

   (d) the duration of time over which the subject plaintiff was exposed to each chemical, including the date(s) of exposure and the total amount of time exposed; and

   (e) all medical and/or scientific data, studies, theories and/or facts relied upon by the physician in forming his or her opinions regarding the subject plaintiff.

Receipt of this information provides all parties and the Court the opportunity to consider an appropriate next step in the process, such as:

   (a) consideration of dispositive motions as to plaintiffs who have been unable to make a prima facie showing on causation;

(b) consideration of dispositive motions as to plaintiffs whose claims are time barred;

(c) dismissal of defendants whose products or materials have not been causally linked with plaintiffs' alleged injuries;

(d) additional discovery to be provided by plaintiffs; or

(e) information plaintiffs will require from defendants before proceeding further.

By limiting early discovery in the case, the court will provide both sides with the opportunity to determine which plaintiffs have some condition or symptom which may be causally related to the subject site. Further discovery can be tailored to those plaintiffs, injuries and chemicals that have been properly placed at issue.

VI. Legal basis for case management orders

A. **Lore v. Lone Pine Corp.** and other case law

Case management orders are a relatively new judicial vehicle for streamlining and managing complex cases. Attached as appendices to this paper are examples of such orders that have been entered by several Texas state court judges.

The classic case for case management orders is ***Lore v. Lone Pine Corp.*, No. L 33606-85 slip op. (N.J. Super. Ct. Law. Div. Nov. 18, 1986).** ***Lone Pine*** involved toxic tort claims brought for alleged exposure from a landfill. The trial court entered a case management order requiring, among other things, that plaintiffs identify the facts underlying their claims of exposure and provide reports of treating physician or other medical experts supporting each plaintiff's claim of injury and causation. The plaintiffs attempted to comply with the request by listing a variety of illnesses such as skin disorders. The plaintiffs failed to provide any medical records or expert reports. Due to this failure, the court dismissed the plaintiffs' claims with prejudice. The court appeared to base its order on two grounds -- the plaintiffs had no evidence to support their claims and the plaintiffs violated a discovery order.

***In re Love Canal Actions*, 547 N.Y.S.2d 174 (N.Y. Sup. Ct. 1989)** - The trial court amended a ten-year old discovery order to impose *Lone Pine* style requirements on plaintiffs. Over the plaintiffs' objections to the propriety of the order, the court observed that the case management order was within its "inherent power to do all things necessary that are reasonably necessary for the administration of justice." On appeal, however, the court's order was modified. Specifically, the appellate court held that the trial court had no authority to order the production of reports of physicians and other medical experts documenting the existence of each injury claimed to have been caused by exposure to the chemicals. The order was modified to require production of reports from all testifying experts along with a statement detailing the subject matter, opinions, and factual basis of each testifying expert. ***In re Love Canal Actions*, 161 A.2d 1169 (N.Y. App. Div. 1990).**

***In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 796-97 (E.D.N.Y. 1980)** - The court imposed an order limiting all litigation to the government contract defense.

***Atwood v. Warner Elec. Brake and Clutch Co.*, 605 N.E.2d 1032 (Ill. App. Ct. 1992)** - The trial court entered orders requiring the plaintiffs to provide expert reports on causation for each injury claimed and to certify that every injury that the plaintiffs were suing for had been identified in the reports. A number of plaintiffs either failed to provide the required report or failed to certify that certain injuries were caused by chemical exposure. As such, the trial court dismissed claims for those injuries with prejudice. The court of appeals affirmed both the certification requirement and the dismissals as within the court's discretion.

***Welty v. Gallagher*, 812 S.W.2d 546 (Mo. Ct. App. 1991)** - The trial court ordered the plaintiffs to identify any medical professionals who had formed an opinion to a reasonable degree of medical certainty that the plaintiffs' injuries were caused by chemical exposure. On appeal, the order was found improper, because the forum's discovery rules required the plaintiffs only to identify the identity of testifying experts. The trial court's order was modified to obligate the plaintiffs to identify all testifying witnesses with an expert opinion on causation.

***Able Supply Co. v. Moye*, 898 S.W.2d 766 (Tex. 1995)** - In a 3,000 plus plaintiff toxic tort case, already pending for years, the Texas Supreme Court held that defendants have a right to timely identification of all medical professionals who attributed the plaintiffs' injuries to toxic exposure. This right is enforceable by mandamus.

***Air Prod. & Chemicals v. Sanderson*, 789 S.W.2d 651, 653-54 (Tex. App. -- Beaumont 1990, orig. proceeding [leave denied])** - In refusing to mandamus a trial court on a case management issue, the court of appeals noted that the trial court held broad discretion to manage complex litigation.

***Eggar c. Burlington Norther R.R.*, No. CV-89-159-BLG-JFB (D. Mont)** - The The court entered a case management order requiring plaintiffs by affidavit to: (1) identify all injuries and chemicals at issue, and (2) link each injury to a particular chemical or chemicals. Further, the order required plaintiffs to provide a scientific or medical opinion of causation which must make specific reference to scientific data or literature forming the basis of the opinion.

***Dolan v. Humacid-McLeod*, No. 95460, 07-02-91 (Cal. Sup. Ct.)** - The court entered a case management order requiring plaintiffs to identify the chemicals to which plaintiffs were exposed, dates and places of exposure, methods of exposure, the nature of the injuries, and the identity of each medical doctor, treating physician, or qualified medical expert to testify as to causation.

B. Federal Court Authority

FED. R. CIV. P. 16 - Expressly provides for case management orders. Counsel should carefully review its provisions before approaching a case management issue.

FED. R. CIV. P. 1 - The Federal Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

FED. R. CIV. P. 11 - By signing the complaint, the attorney "is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, ... the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."

FED. R. CIV. P. 26(f) - The provision requires that the parties meet early in the litigation to develop a proposed discovery plan. The rule obligates the parties to attempt in good faith to agree on a proposed discovery plan.

FED. R. CIV. P. 42(b) - The court may order a separate trial of a dispositive issue. In such a situation, the trial will be limited to a specific issue. Typically, the litigation can be terminated if the jury finds in favor of the defendant on a particular issue.

THE CIVIL JUSTICE REFORM ACT OF 1990, 28 U.S.C. §§ 471-482 (West 1993)

C. Texas Court Authority

TEX. R. CIV. P. 166 - This rule pertains to pretrial conferences. Counsel may contend that a case management order may be premised upon this rule. Aside from its specific provision, the rule provides in sub-part (o) that the pretrial conference may address such "other matters as may aid in the disposal of the action." Moreover, the rule indicates that the court "shall make an order" reflecting the action taken at the conference.

TEX. R. CIV. P. 1 - "The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

TEX. R. CIV. P. 13 - The attorneys signing the petition certify that "to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment.

TEX. R. CIV. P. 174(b) - "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

TEX. GOV'T CODE § 21.001(b) (Vernon 1988) - "A court shall require that the proceedings be conducted with dignity and in an orderly and expeditious manner and control the proceedings so that justice is done."

VII. Consequences of failing to comply with a case management order

Penalties for violations of case management orders vary upon the facts and circumstances. Because a violator is in contempt of court, penalties typically are derived from contempt principles. In ***Lone Pine***, the plaintiffs' claims were dismissed with prejudice. See **Lore v. Lone Pine Corp.**, No. L 33606-85 slip op. (N.J. Super. Ct. Law. Div. Nov. 18, 1986); See also, ***Atwood v. Warner Elec. Brake and Clutch Co.***, 605 N.E.2d 1032 (Ill. App. Ct. 1992).

REFERENCE

Lawrence G. Cetrulo, TORT TORTS Chapter 13 (Clark Boardman 1993)

Michael Dore, TOXIC TORT LITIGATION HANDBOOK (Clark Boardman 1988)

FEDERAL JUDICIAL CENTER'S MANUAL FOR COMPLEX LITIGATION (THIRD) (West 1995)

Arvin Maskin and Peter A. Antonucci, 1 A GUIDE TO TOXIC TORTS Chapter 2A (Mathew Bender 1996)

NO. 90-CV-1251

JANE G. CHOATE	§	IN THE DISTRICT COURT OF
	§	
VS.	§	GALVESTON COUNTY, TEXAS
	§	
AMOCO, ET AL	§	56TH JUDICIAL DISTRICT

AMENDED CASE MANAGEMENT ORDER

On this day came to be considered the Amended Motion for Entry of a Case Management Order of Defendants, AMOCO CORPORATION, AMOCO OIL COMPANY, AMOCO GAS COMPANY, AMOCO PIPELINE COMPANY, AMOCO PRODUCTION COMPANY, and AMOCO CHEMICAL COMPANY, hereinafter "AMOCO". The Court having considered the Motion, is of the opinion that the Motion should be granted.

Therefore, it is ORDERED, ADJUDGED AND DECREED that:

1) Plaintiff file, within 90 days of the entry of this Order the following:

PLAINTIFF'S ACKNOWLEDGED STATEMENT

a) An acknowledged statement specifically describing the circumstances of Joe Choate's alleged exposure to chemicals. If the Plaintiff claims Joe Choate's exposure was a result of general work activities for AMOCO, the statement shall describe the specific chemical or chemicals to which the Plaintiff claims Joe Choate was exposed. The statement will also indicate as to each such chemical: the time period during which Plaintiff alleges exposure; the nature of the work environment and activities which resulted in the exposure; and a

description of the alleged route or routes of exposure (i.e., dermal contact, inhalation or ingestion). If the Plaintiff claims Joe Choate's exposure was a result of a specific incident or incidents, the statement shall include for each such incident: the date and location of the incident; the specific chemical or chemicals involved; a detailed description of the incident; a detailed description of the manner in which that incident exposed Joe Choate to chemicals; and a description of the alleged route or routes of exposures (i.e., dermal contact, inhalation or ingestion). Chemicals shall be identified by chemical name or product name rather than generic name (e.g., "trichloroethylene" rather than "solvents"). This statement shall be signed by the plaintiff and her attorney, and shall be subject to the provisions of Tex. R. Civ. P. 13.

AFFIDAVIT FROM PHYSICIAN

b) An affidavit from a physician stating that in his or her opinion, based on a reasonable degree of medical probability, that Joe Choate suffered injuries as a result of exposure to chemicals. The affidavit shall list: all injuries, illnesses or conditions suffered by Joe Choate that, in the opinion of the physician, were caused by the alleged exposure; shall specify the

chemical or chemicals that, in the opinion of the physician, caused each injury, illness, and condition listed; and shall state the scientific and medical bases for the physician's opinions. Chemicals shall be identified by chemical name or product name rather than generic name (e.g., "trichloroethylene" rather than "solvents")

2) After the Plaintiff's reports have been filed, discovery will be conducted according to the following schedule:

a) Within 60 days after the plaintiff's reports have been filed:

PLAINTIFF'S EXPERT WITNESS LIST

i) Plaintiff will file with the Court a list identifying each person whom they expect to call as an expert witness at the trial and stating: the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; and a summary of the grounds of each opinion. Plaintiff will produce to AMOCO a current curriculum vitae for each person at the time this list is filed. Any person not identified in this list will be permitted to testify as an expert witness on behalf of Plaintiff only by an order of this Court, upon a showing of good cause why expert testimony by such person should be permitted.

PLAINTIFF'S EXAMINATION AND TEST REPORTS

ii) In the event that any expert witness identified by Plaintiff has performed,or caused to have performed, any physical examination, test, review, analysis, or other diagnostic procedure, Plaintiff shall produce to AMOCO the report of each such examination, test, or procedure, together with all underlying raw data, at the time the list of expert witnesses is filed. No expert witness shall be permitted to testify concerning any subsequent physical examination, test, review, analysis or other diagnostic procedure that he or she has performed or caused to have performed unless a report of each such examination, test, or procedure, together with all underlying raw data, is produced to AMOCO at least 60 days before the discovery cutoff set forth in paragraph (e) below.

b) Within 105 days after the Plaintiff's reports have been filed:

DEPOSITIONS OF PLAINTIFF(S)

AMOCO will complete the depositions of Plaintiff, who will be made available for deposition at reasonable times and places as noticed by AMOCO.

c) Within 150 days after the plaintiff's reports have been filed:

DEPOSITIONS OF PLAINTIFF'S EXPERT(S)

AMOCO will complete the deposition of Plaintiff's expert witnesses provided, however, that in the event that any report of any physical examination, test, review, analysis or other diagnostic procedure that any Plaintiff's expert witness has performed or caused to have performed is produced to AMOCO after Plaintiff's list of expert witnesses is filed, AMOCO may depose or redepose such expert witness within 60 days after such report is produced. Plaintiff's expert witnesses will be made available for depositions at reasonable times and places as noticed by AMOCO.

d) Within 165 days after the Plaintiff's reports have been filed:

AMOCO'S EXPERT WITNESS LIST

AMOCO will file with the Court a list identifying each person whom it expects to call as an expert witness at the trial and stating: the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; and a summary of the grounds of each opinion. AMOCO will produce to Plaintiff a current curriculum vitae for each such person at the time this list is filed. Any person not identified in this list will be permitted to testify

as an expert witness on behalf of AMOCO only by order of court upon a showing of good cause why expert testimony by such person should be permitted.

e) Within 225 days after the Plaintiff's reports have been filed:

AMOCO'S EXAMINATION AND TEST REPORTS

AMOCO's medical expert(s) will produce to Plaintiff, reports setting out their findings, including results of all tests made, diagnosis and conclusions.

f) Within 285 days after the Plaintiff's reports have been filed:

DEPOSITIONS OF AMOCO'S EXPERT(S)

Plaintiff will complete the depositions of AMOCO's expert witnesses. AMOCO's expert witnesses will be made available at reasonable times and places as noticed by Plaintiff.

DISCOVERY CUTOFF

g) After the expiration of the time period specified in paragraph f), no further discovery will be conducted. Depositions of fact witnesses, including treating physicians not designated as expert witnesses who are expected to testify at trial, may be taken at any reasonable time prior to this discovery cutoff. Interrogatories, requests for production and requests for

admission may be propounded at any time up to 20 days prior to this discovery cutoff. Nothing contained in the order shall preclude more than one type of discovery from going forward simultaneously, or preclude more than one deposition from being scheduled at the same time, unless the deadline for these depositions has passed.

In the event that any Plaintiff claims any of their individual (and non-derivative) injuries are permanent, progressive or continuing, nothing contained in this Order shall preclude the parties, after the discovery cutoff, from utilizing discovery procedures to obtain and authenticate records from health care providers, educational institutions or employers; nor shall it preclude the parties' expert witnesses from relying on such records in their trial testimony, if such reliance is otherwise permissible under the Texas Rules of Evidence.

(3) Nothing contained herein shall preclude the parties from moving for a modification of this Case Management Order or moving for Further Case Management Orders dealing with the conduct of trial or any other matter not addressed in this Case Management Order.

(4) Plaintiff's case will be dismissed, with prejudice, if Plaintiff fails to produce the information ordered above before the expiration of the deadlines set out in the order.

SCHEDULING ORDER

Discovery shall be conducted according to the following schedule:

Action to be taken:	Date Due
Plaintiff's Acknowledged Statement, and Affidavit of physician filed with the Court. Such date is to be 90 days after the signing of this Order	(Day 0)
Plaintiff's expert witness list filed with the Court.	(Day 60)
Plaintiff's Examination and Test Reports filed with the Court	(Day 105)
Depositions of Plaintiff(s) completed	(Day 105)
Depositions of Plaintiff's Experts completed	(Day 150)
Amoco's Expert Witness List filed with the Court	(Day 165)
Amoco's Examination and Test Reports filed with the Court	(Day 225)
Depositions of Amoco's Expert(s) Completed	(Day 285)
Discovery Cutoff	(Day 285)

SIGNED on this the _____ day of _____, 19____.

_____
JUDGE PRESIDING

MOCO.OIL\CHOATE.ORD

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CAUSE NO. 94-043228

T.L. GIBBS, et al	§	IN THE DISTRICT COURT OF
	§	
V.	§	HARRIS COUNTY, TEXAS
	§	
L.G. LOBIT, et al	§	55TH JUDICIAL DISTRICT

PHASE ONE DISCOVERY ORDER

Came on to be heard the parties' Motions for Case Management Order, and it appearing to the Court that the parties have agreed to certain matters regarding initial discovery, the Court enters this Order under authority of Rule 166 of the Texas Rules of Civil Procedure.

It is therefore ORDERED as follows:

1. Defendants shall provide a joint set of questions to all plaintiffs and intervenors who shall, under oath, provide answers to unobjectionable questions as soon as practicable, but no more than 180 days after receiving the questions.

If there are objections to one or more of the questions, the plaintiffs and intervenors shall file their objections within 10 days after receipt of the questions, and the 180 days to answer shall not begin to run until the objections have been resolved by agreement or Order of the court. Plaintiffs will also provide the data on disk in ASCII format with each responding item numbered sequentially and separated by three hard returns.

2. Plaintiffs and intervenors shall provide a joint set of questions to each defendant, who shall provide answers under oath to unobjectionable questions within 90 days after receiving the questions. If there are objections to one or more of the questions the defendants shall file their objections within 10 days after receipt of the questions, and the 180 days to answer shall not begin to run until the objections have been resolved by agreement or Order of the Court.

V8795 P0129

77534.1

RECORDER'S MEMORANDUM.
This instrument is of poor quality and not satisfactory for photographic recordation; and/or alterations were present at the time of filming.

The questions contemplated in this first set of Joint Questions are as follows: Defendants shall verify and identify:

A. All chemicals, components, agents, particulates and other things disposed of at the Kelley Pits site and produce all versions and revisions of material safety data sheets for same.

B. The dates on and/or during which the chemicals and other things were placed at the Kelley Pits site.

C. The name, address and telephone number of all individuals and other entities who generated the chemicals and other things disposed of at the Kelley Pits site.

D. The quantities of chemicals and other things disposed of at the Kelley Pits site.

E. The name, address and telephone number of all individuals and other entities who placed the chemicals or other things at the Kelley Pits site.

3. Within 45 days from the date the defendants receive Requests for Production, Defendants shall respond to such requests for production which asks for contracts, invoices and other things which reflect the identities of chemicals and other things disposed of at the Kelley Pits site, the dates placed at the Kelley Pits site and the entity placing the chemicals or other things at the Kelley Pits site.

4. Within 45 days from the date the defendant receives Requests for Production, Defendants shall respond to such Request for Production which asks for contracts and other data describing remedial measures and/or actions taken by defendants, explanations of remedial measures, identities of entities which perform the remedial measures and/or actions and dates of remedial actions.

V8795 P0130

5. Medical authorizations of plaintiffs and intervenors shall be delivered to a designated defendant at the time the statements of said plaintiffs and Intervenors contemplated in No. 1 above is provided.

6. No depositions shall be taken during this phase of discovery except as may be necessary to support or oppose Motions for Summary Judgment.

7. During this phase of discovery, the parties agree that deadlines shall be extended by Rule 11 Agreement, when good cause for same exists, without the necessity of filing a Motion for Leave to do so. One attorney representing the defendants as a group and one attorney representing the plaintiffs and intervenors as a group shall be authorized to agree to extensions of time for good cause. If a party does not agree to any such request of extension the party requesting same may file a Motion for Leave. And, upon hearing, the Court may assess costs and attorneys' fees associated with said Motion for Leave to extend time.

8. This Order is intended to provide for orderly and efficient guidelines for the first phase of discovery in this case.

9. All standards, rules and law applicable to objections and Responses to Interrogatories served pursuant to the Texas Rules of Civil Procedure, except limitation as to number of questions, shall apply to questions contemplated in Paragraphs 1 and 2 of this Order. Responses to the questions shall be verified pursuant to the same standards for verifying Responses to Interrogatories set forth in the Texas Rules of Civil Procedure and case law. The parties shall be entitled to use and rely upon at trial, or for any other purpose, answers to questions as though they were Answers to Interrogatories served by another party.

V8795 P0131

No objections are waived by virtue of this Order. The objections to any Discovery Requests or Questions may be set for ~~hearing~~ submission by any party on the first Monday after 10 days notice.

So ORDERED this 3 day of April, 1995.

Kathleen S. Stone
JUDGE KATHLEEN S. STONE

V8795 P0132

4/30/96

Cause No. 94-43228

T.L. GIBBS, et al.	§	**IN THE DISTRICT COURT OF**
	§	
V.	§	**HARRIS COUNTY, T E X A S**
	§	
L.G. LOBIT, et al.	§	**55th JUDICIAL DISTRICT**

SECOND PHASE DISCOVERY ORDER
AND ORDER VACATING TRIAL SETTING

Came before the Court on February 2, 1996, a Status Conference scheduled by the Court, various scheduling matters, and the Motion to Compel and Motion for Second Phase Discovery Order of Defendants:

The Court having heard the argument of counsel and reviewed the filings, it is ORDERED:

1. Any Plaintiff or Intervenor not providing responses to Defendants' Joint List of Requested Information, on or before February 9, 1996 at 5:00pm, shall be dismissed from this cause for want of prosecution, provided that each party affected shall have the right to prior notice and hearing.

2. On or before the sixtieth day after the date by which Defendants have provided answers to Plaintiffs' Interrogatories and Requests for Production, Plaintiffs shall file with the Court and provide to Defendants' counsel affidavits from experts on medical causation.

3. The February 18, 1997 trial setting for this cause is hereby vacated.

4. The next Status Conference is set for July 12, 1996 at 11:00 a.m.

SIGNED this 30 day of April, 1996.

Kathleen D. Stone
THE HONORABLE KATHLEEN STONE

Dat\104\Phase2.ord

4/30/96

JUDGE KATHLEEN S. STONE
55TH DISTRICT COURT
CIVIL COURTS BUILDING
HOUSTON, TEXAS 77002
755 [illegible]

Mr. Jesse R. Pierce
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April 30, 1996

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FAX (713) 331-1717

Mr. J. Michael Black
FAX (713) 227-7404

Mr. Lawrence F. Goldenthal
FAX (713) 224-3271

Mr. Anthony Gunn
FAX (713) 337-4272

RE: Cause No. 94-43278; T.L. GIBBS, ET AL vs. L.G. COBIT, ET AL

Dear Counselors:

Attached please find a copy of the Order(s) that the Judge signed on April 30, 1996 pursuant to the Motion(s) that were pending before the Court.

Sincerely yours,

DAVID
(LAW CLERK - JUDGE STONE)

Defending Criminal Investigations -- Do's & Don'ts

"Dead Man Walking"

Wayne Meissner

Wayne Meissner- Mr. Meissner is a native of Victoria, Texas, and received his law degree from The University of Texas at Austin in 1967. During over three years in criminal prosecution of misdemeanor and felony cases, Meissner served as First Assistant Potter County Attorney in Amarillo, Texas, and First Assistant Travis County Attorney in Austin, Texas. In April, 1971, Meissner joined the Austin law firm of Minton, Burton, and Fitzgerald and became a partner that same year, focusing his practice on the defense of criminal matters in state and federal courts. In 1981, Bill Fitzgerald and Meissner formed their present firm. In addition to his trial practice, Meissner has represented numerous clients in state and federal grand jury investigations involving bank and savings and loan, insurance, environmental, government procurement, and health care fraud issues. As a member of the National and Texas Criminal Defense Lawyers Associations, he is a frequent lecturer before legal, civic, and school groups on constitutional rights and criminal procedure and is an experienced white collar practitioner.

Eighth Annual Texas
Environmental Superconference
"At The Movies"

Defending Criminal Investigations - Do's and Dont's "Dead Man Walking"

Wayne Meissner
Fitzgerald & Meissner, P.C.
812 San Antonio Street, Suite 400
Austin, Texas 78701
(512) 474-4700

August 1-2, 1996
Four Seasons Hotel
98 San Jacinto Blvd.
Austin, Texas

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Environment Criminal Investigations:
How To Comply; How To Respond;
Managing Consequences.
Wayne Meissner

Not unlike the Sean Penn character in the captioned movie, the unfolding scenario is sadly familiar. The company you represent is accused of causing a calamity, and an investigation is launched to gather evidence of environmental violations which could lead to state and/or federal criminal prosecution.

Government action may include investigative demands, grand jury subpoenas, search warrants, arrest warrants, or sealed indictments. Parallel administrative and civil proceedings may require you to respond to suspension, revocation or debarment actions, as well as applications for injunctions and suits for civil monetary penalties, and perhaps shareholder derivative suits. The government investigation/prosecution team may extend its aggressive mode to challenge your very representation of anyone in the matter by raising conflicts issues, or even suggesting that you or your firm could become suspects/targets.

Media involvement is sometimes proportional to the nature of the disaster, the scope of the investigation, and/or the visibility level of the company and its industry niche.

Because criminal prosecution is the major impact weapon in environmental law enforcement, it is real necessary that lawyers counsel their clients on issues of avoidance, or management of any investigation. Therefore, this pedestrian outline of issues and strategies is primarily directed toward the non-criminal law practitioner.

I.

Fundamental Defensive Strategies

Traditionally, criminal law practitioners have only become associated in environmental investigations after folks in moon suits followed by bright media lights have charged through your company gates and hauled off samples and/or people. Because the state regulations and federal sentencing guidelines offer some reward for compliance programs, self-reporting, cooperation and acceptance of responsibility, a pro-active pre-disaster strategy could be designed as follows:

A. 1. Assemble a lawyer team of civil, administrative and criminal law practitioners to craft an effective compliance and auditing program;

2. Counsel with the designated company representatives responsible for enforcing compliance;

3. Conduct informational workshops for key officers, directors and employees.

Such preventative counseling could enhance the possibility of achieving the important objectives of:

B. 1. Confining the scope of any investigation to administrative, and/or civil, rather than criminal remedies;

2. Narrowing the type and number of violations charged;

3. Establishing that any violation was an isolated event caused by mistake or inadvertence;

4. Not done in bad faith;

5. Confining responsibility as low as possible in the corporate chain.

Having a compliance/auditing scheme in place, and having counseled personnel concerning constitutional rights and criminal procedure, and identifying goals, a frame-work for your company's response to any environmental criminal investigation could include:

C. 1. Call your lawyer;

2. Identify the company representative;

3. Conduct internal investigation as soon as possible

a. Cause, scope, photo, measure, sample,

b. Identify materials and equipment,

c. Identify witnesses and debrief;

4. Remind employees of Miranda rights and lawyer availability;

5. Limit media statements.

6. Be prepared to self-report and cooperate.

Company counsel will certainly be scrambling to participate in all of the above, as well as contacting counter-part regulators, investigators and prosecutors to achieve the defined objectives.

Whether the complaint/information source that triggers an investigation is a former employee, consultant, lover, anonymous tipster, required reports, voluntary disclosure, or the result of periodic inspection, the investigative techniques may be "multi-media" and/or sequential. Continuing communication and cooperation between the company and counsel team is essential.

II.

Grand Jury Subpoena Procedure

In an ongoing investigation, the counsel team will try to maintain an open dialogue with prosecutors and their case agents concerning the alleged violations and the human, physical, or documentary basis to support the charges. Time lines should be considered and cooperation may include production of documents or people to be reviewed by the grand jury. In an effort to avoid waiving or breaching privileged information, or unreasonable time frames and to insure proper compliance, your company must consider these steps when the subpoena is served:

1. Call your lawyer;
2. Secure a copy of the subpoena;
3. Assure server of company compliance;
4. Do not surrender documents to server;
5. Do not accompany server.

Generally, counsel team will be allowed ample time to advise testifying witnesses about Fifth Amendment privileges, and immunity options. A cooperative relationship with prosecutors and case agents will likely allow ample time for document location, review, and production.

III.

Search Warrant Procedure

Because of potential criminal charges for obstruction of justice, or interfering with an investigation, as well as related sentencing enhancements, your company will be able to exercise precious little control over the physical execution of a search and seizure action. Company representatives and the counsel team should, in conjunction with designing compliance and

auditing programs, consider formation of a monitoring team to perform these proposed functions:

1. Call your lawyer.
2. Identify company representative in charge.
3. Secure a copy of the search warrant and affidavit.
4. Determine the basis for the search.
5. Ask the officers not to interview any employees until lawyer arrives.
6. Designate a company spokesperson.
7. Call in all managers:
    a. Notify them of search;
    b. Advise them of suspected misconduct;
    c. Advise them that attorneys will be available;
    d. Remind them of Miranda rights.
8. Have managers report above to their employees.
9. Dismiss all non-essential employees.
10. Designate someone in each area searched to inventory all evidence seized.
11. Ask permission to photo all evidence seized.
12. Video and/or photo the search procedure.
13. Note all comments by searchers.
14. Debrief any employee interviewed.
15. Limit statements to media.

IV.

Multiple Representation

As a component of the informational workshops referred to in I. A. 3. above, officers, directors, and employees should be advised of whatever policy the company structures to provide lawyers for targets of the investigation, as well as for witnesses. It is real important for each lawyer to identify their client, and only represent the interests of that client, or disqualification and sanctions could result. For example, corporate counsel is generally a company employee and likely represents the corporate shareholders, and not their friends and colleagues on the board of directors. Likewise, if an outside firm represents the company, it may be disqualified from individual representation.

Important factors in early designation and identification of who represents whom are the formation of joint defense agreements and the desire to preclude exposing counsel to obstruction of justice claims.

V.

Privileges

These three privileges usually are invoked to limit the scope of subpoenas, or searches.

A. Attorney/Client Privilege

This privilege protects the client from unauthorized disclosure of confidential communications between the lawyer and client, which were made when the entity was a real or potential client, and the lawyer was performing legal services related to the matter discussed.

Waiver of this privilege may occur by even partial disclosure to anyone outside the attorney/client relationship.

B. Work Product Doctrine

The doctrine generally protects from disclosure:

1. documents and things;

2. prepared for client by their lawyer, lawyer's representative or consultant;

3. prepared in anticipation of litigation or for trial.

Waiver may occur if there is a voluntary or accidental disclosure to adversaries or some third parties.

C. Fifth Amendment Privilege

The protection from compelled self-incriminatory statements may only be asserted by an individual and not a company, and waiver must be "knowing and voluntary".

VI.

Immunity

Counsel will certainly explore the availability of immunity, another useful investigative technique available to the government. A grant of immunity shields the client from criminal prosecution in the current proceeding, but counsel must be vigilant in multi-district or multi-state prosecutions to extend the scope and coverage of a grant.

The "letter" immunity offer is usually an agreed procedure in lieu of a court order and is expected to be followed by either a "walk", or a negotiated lesser plea and sentence.

VII.

Conclusion

Sometimes to their detriment, environmental companies seem reluctant to embrace the

notion of preventative legal counseling because of the notion that they don't violate the rules, or perhaps because of some unfortunate hope that they won't get caught. More likely is the constant complaint about fees.

The proposed procedures are no panacea, but they may ease the pain that unhappy time when a calamity has erupted into a high-impact, major take down prosecution.

The Future of Regulatory Reform

"The Turning Point"

Thomas O. McGarity

Thomas O. McGarity

Thomas McGarity holds the W. James Kronzer Chair in Trial and Appellate Advocacy at the University of Texas School of Law, where he is a Professor of Environmental Law, Administrative Law, and Torts. Prof. McGarity graduated from Rice University in 1971. He then attended the University of Texas School of Law, where he served as Articles Editor of the Texas Law Review and was named to the Order of the Coif and the Chancellors. Prof. McGarity served as a law clerk to Judge William E. Doyle of the U.S. Court of Appeals, and has also worked for the United States Environmental Protection Agency and taught at the University of Kansas School of Law. His writings have been featured in numerous publications, most recently the *Duke Law Journal*, *The American Prospect*, and *The New York Times*. His books include *The Law of Environmental Protection* (with John Bonine), *Reinventing Rationality*, and *Workers at Risk* (with Sidney A. Shapiro). Mr. McGarity also has served on the Advisory Panel on Costs of Occupation Safety and Health Regulation for the Office of Technology Assessment, and as a Consultant to the Administrative Conference of the United States in numerous capacities.

The Future of Regulatory Reform[1]

Thomas O. McGarity

Professor of Law
University of Texas School of Law

I. Introduction.

A. The Contract with America -- Promises Made.

During the Fall of 1994, large group of Republican candidates ran for election on a platform, called the "Contract with America," that promised *inter alia* to enact a "Job Creation and Wage Enhancement Act" that would provide for "small business incentives, capital gains cut and indexation, neutral cost recovery, risk assessment/cost-benefit analysis, strengthening the Regulatory Flexibility Act and unfunded mandate reform to create jobs and raise wages."[2] Asserting that "[c]urrent federal policies threaten the competitiveness of American business, stifle entrepreneurial activity, and suppress economic growth and job creation," the signatories promised to enact that legislation within the first one-hundred days of Congress.[3]

The signatories were true to their word. On the very first day of the 104th Congress, the House Republican leadership introduced H.R. 9, a bill with the unassailable title of the "Job Creation and Wage Enhancement Act." This extremely ambitious piece of legislation consisted of twelve separate titles, eight of which addressed government regulation.[4]

Title III established principles for risk assessment and cost-benefit analysis and required peer review for major federal rules to be issued in the future.

Title IV, establishing a federal regulatory budget, attempted to place a cap on the overall costs that federal agencies could impose on the private sector in any given year.

Title V contained amendments to the Paperwork Reduction Act designed to expand its scope and reduce federal paperwork requirements by 5 percent per year.

Title VI contained brief amendments to the Regulatory Flexibility Act, the most important of which would have allowed judicial review of the failure of agencies to prepare "regulatory flexibility analyses" of the impact of federal rules on small businesses.

Title VII contained detailed requirements for the preparation of "regulatory impact analyses" for "major" rules and lowered considerably the threshold criteria for determining whether a rule was major.

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1 Copyright - Thomas O. McGarity

2 Contract with America: The Bold Plan by Rep. Newt Gingrich, Rep. Dick Armey, and the House Republicans to Change the Nation 11 (Ed Gillespie & Bob Schellhas eds. 1995).

3 Contract with America, supra note 2, at 128.

4 H.R. 9 [January 4, 1995 version], 104th Cong. 1st Sess. (1995). Titles I, II XI and XII addressed tax-related issues of capital gains tax reform, neutral cost recovery, taxpayer debt buy-downs and tax incentives for small business.

Title VIII contained two unrelated subtitles, one of which established a "Bill of Rights" for companies subject to federal regulation and the other of which established "whistleblower" provisions designed to protect companies from retaliation by agencies and individual federal employees when the companies legitimately exercised their constitutional or statutory rights.

Title IX gave private property owners the right to compensation when federal regulations diminished the value of their property by more than ten percent.

Title X established an annual "mandate budget" that could not be exceeded by federal agency mandates to state and local governments. This provision was later removed when both houses of Congress elected to pursue unfunded mandates legislation separately.

B. The Contract Meets the Senate -- Promises only Partially Kept.

During the first one-hundred days of the 104th Congress, the House passed the Job Creation and Wage Enhancement Act,[5] a separate Unfunded Mandates Act,[6] and, for good measure, a moratorium on new regulations to last until Congress had a chance to revise or repeal the statutes under which the regulations were promulgated.[7] The House next began serious consideration of comprehensive amendments to many of the statutes that have historically provided the underpinnings for the health, environmental, and consumer fraud protections of the federal government. When the legislative process began to bog down at the end of the summer of 1995, radical deregulatory measures began to appear as riders to House appropriations legislation.[8]

In the Senate, the pace was much slower. The Senate passed and the President signed unfunded mandates legislation[9] and a reauthorization of the Paperwork Reduction Act that extended the authorization of OMB's Office of Information and Regulatory Affairs (OIRA) for an additional five years and provided a goal of a five percent reduction in federally required paperwork per year.[10] Although the unfunded mandates legislation has the potential to bog down the agencies somewhat in analyzing the costs and benefits of regulations, it should be no more burdensome than the existing analytical requirements of the Clinton executive order. Likewise while the Paperwork Reduction Act reauthorization will make it more difficult for federal agencies to gather information, it should have very little impact on the way agencies promulgate protective rules.

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5 H.R. 9, 104th Cong., 1st Sess. (1995).

6 H.R. 5, 104th Cong., 1st Sess. (1995).

7 H.R. 450, 104th Cong., 1st Sess. (1995).

8 See, e.g., House Appropriations Panel Backs EPA Cuts; Efforts Fail To Strike Environmental Riders, 26 BNA Env. Rept. Cur. Dev., July 21, 1995, at 593.

9 Pub. L. No. 104-4, 104th Cong., 1st Sess. (1995).

10 Pub. L. 104-13, 104th Cong., 1st Sess. (1995). The Paperwork Reduction Act reauthorization will have a more serious impact on the Occupational Safety and Health Administration, because it explicitly overrules the Supreme Court holding in Dole v. United Steelworkers of America, 494 U.S. 26 (1990) that OSHA was not required to obtain OMB approval of informational requirements that it placed on regulatees.

Both the House and the Senate passed as part of a general bill to raise the national debt ceiling the "Contract with America Advancement Act,[11] which contained the "Small Business Enforcement Fairness Act" that in turn contained amendments to the Regulatory Flexibility Act and a "report and wait" version of the legislative veto. Although neither of these provisions is substantive in nature, they both have the potential to bog down the administrative rulemaking process considerably through delays caused by judicial review (in the case of the former provision) and congressional review (in the case of the latter provision). Because he had no real alternative to raising the debt ceiling, President Clinton signed the Bill on March 29, 1996.

As of this writing, however, the Senate has not passed omnibus regulatory reform legislation, nor did Senate agree to the moratorium that the House passed in the Spring of 1995. Although several Senate committees are studying comprehensive amendments to the substantive regulatory statutes, only a couple of "targeted fix" amendments to the Resource Conservation and Recovery Act have actually been enacted.

Comprehensive amendments to the Safe Drinking Water Act are still a good bet, and amendments to the Comprehensive Environmental Response Compensation and Liability Act are a possibility.

Like the House, the Senate has passed some "rifle shot" riders to appropriations bills aimed at providing particular instances of regulatory relief, and a few have become law.[12] But most of the riders of relevance to environmental law died during the winter and spring of 1995-96 in the battles between President Clinton and the 104th Congress over the fiscal year 1996 budget. Indeed, 17 environmental riders attached by the House and acceded to by the Senate played a major role in the politics of this confrontation.

In the final analysis the 104th Congress, like the month of April, came in like a lion and went out like a lamb. Very little regulatory reform legislation of relevance to environmental law emerged from the two years of ferocious posturing.

II. Regulatory Moratorium/Legislative Veto.

A. A Failed Moratorium, but a Successful Congressional Review Process.

The newly arrived House Republican leaders were absolutely certain that important regulatory reform legislation would be enacted during the first session of the 104th Congress. Fearing that the Clinton Administration would attempt to promulgate a raft of rules under the existing rulemaking criteria, some of the more radical congresspersons, lead by Congressman Tom DeLay of Houston, proposed a "moratorium" on the promulgation of all federal regulations. The moratorium was to be retroactive, extending from November 9, 1994 until June 30, 1995.[13]

The House Government Reform and Oversight Committee change those dates to extend the moratorium from November 20, 1994 to December 31, 1995 or the date that omnibus regulatory reform legislation was enacted.[14]

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11 Pub. L. 104-121, 104th Cong., 2d Sess. (1996).

12 See, e.g., P.L. 104-59 § 348, 104th Cong., 1st Sess. (November 28, 1995) (placing a moratorium on EPA's centralized inspection and maintenance requirements under the Clean Air Act).

13 H.R. 450, 104th Cong., 1st Sess. (1995).

14 See House Rept. No. 104-39, Part 1, 104th Cong., 1st Sess. (1995).

After a quick set of hearings and much sturm and drang, the measure went to the House floor where numerous amendments were added to protect special interests that might be adversely affected by the moratorium. It also approved an amendment that would have extended to June 30, 1996 the date by which any small business would have to comply with any regulation promulgated after the moratorium ended.[15] The House passed the amended moratorium legislation on February 24, 1995 by a lopsided vote.[16]

The moratorium idea received a much less favorable response in the Senate. Many Senate Republicans were not convinced that a brute force moratorium, despite its symbolic value, was a rational way to go about making public policy. The Senate Governmental Affairs Committee forwarded a moratorium bill to the full Senate on March 9, 1995 by a 6-5 vote,[17] but the bill was limited to major federal rules and it was riddled with exceptions for particular rulemaking initiatives.

It soon became clear that even a truncated moratorium would not produce a successful cloture vote if the Democrats produced a promised filibuster, and it was even more apparent that there were not enough votes to override a promised presidential veto.

Thus stymied, Senator Nickles elected to pursue an alternative plan of substituting a "report and wait" variation of the legislative veto that had been a favorite of his. Under the substitute bill, federal regulations could not go into effect until 45 days after both houses of Congress received a package containing: (i) a copy of the rule; (ii) a concise general statement relating to the rule; (iii) the proposed effective date of the rule; and (iv) a complete copy of the cost-benefit analysis of the rule, if any. [18] Congress would then have an opportunity to pass a joint resolution disapproving the regulation. If the president signed the joint resolution, the rule would not go into effect.[19]

President Clinton promised once again to veto the House version of the moratorium, but expressed support for the Senate report and wait legislative veto.[20]

The full Senate approved the Nickles substitute unanimously on March 29, 1995,[21] but the House returned its moratorium measure, thus necessitating a House-Senate conference committee to resolve the considerable differences between the two bills.[22] The

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15 See House Approves Freeze on New Rules, Extends Moratorium for Small Business, Occupational Safety & Health Reporter, Current Report, March 1, 1995, Vol. 24, No. 39; Pg. 1913.

16 House Approves Freeze on New Rules, Extends Moratorium for Small Business, Occupational Safety & Health Reporter, Current Report, March 1, 1995, Vol. 24, No. 39; Pg. 1913.

17 See S. Rept. No. 104-15, 104th Cong., 1st Sess. (March 16, 1995).

18 S. 219 (Nichols Substitute) § 3(a), 104th Cong., 1st Sess. (1995).

19 S. 219 (Nichols Substitute) § 4(a), 104th Cong., 1st Sess. (1995).

20 See Clinton Issues Veto Threats; Urges GOP To Compromise On Agenda, BNA National Environment Daily, Apr. 11, 1995; House, Senate to Work on Moratorium Differences; Clinton Supports Senate Bill, Daily Labor Report, April 10, 1995.

21 See Senate Passes Alternative To GOP Proposal On Rules Freeze, Occupational Safety & Health Reporter, Current Report, March 29, 1995, Vol. 24, No. 43; Pg. 2135.

22 Senate Democrats Blast House Move To Stick To Moratorium On Agency Rules, Daily Labor Report, MAY 18, 1995.

Senate did not agree to appoint conferees to a House-Senate conference committee until early July, 1995.[23]

The matter languished in conference committee, until March, 1996, when it was combined with a number of unrelated bills, including a bill to raise the federal debt ceiling, called the Contract with America Advancement Act. Under pressure to raise the debt ceiling, both houses passed and the president signed the new law on March 29, 1996.[24]

B. The Report and Wait Review Process.

The new statute amended the Administrative Procedure Act to provide that before a rule subject to its requirements goes into effect, the agency promulgating the rule must submit to each house of Congress and to the Comptroller General a copy of the rule, a concise general statement describing the rule and containing a determination of whether it is a major rule, and the rule's proposed effective date.[25] In addition, the agency must submit to the Comptroller General and make available to both houses a copy of any cost-benefit analysis prepared for the rule, and the agency's actions taken under the Regulatory Flexibility Act, the Unfunded Mandates Act relevant to the rule, and any other relevant analytical requirements required by statute or executive order.[26] Within 15 calendar days of submission of any "major" rule, the Comptroller General must provide a report to the relevant House and Senate committees containing an assessment of the agency's compliance with the Regulatory Flexibility Act, the Unfunded Mandates Act relevant to the rule, and any other relevant analytical requirements of a statute or executive order.[27]

A major rule may not take effect prior to 60 days after the agency submits the rule or it is published in the *Federal Register*.[28] If, however, the rule is submitted within 60 session days (for the Senate) or 60 legislative days (for the House) prior to the end of a session of Congress, the rule cannot go into effect, and the 60 day clock starts all over

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23 See Dole Aims at Senate Passage of Rules Relief Bill By July 4, BNA Washington Insider, June 26, 1995.

24 Pub. L. 104-121, tit. II, subtit. E 104th Cong., 2d Sess. (1996).

25 Pub. L. 104-121, supra, § 251 [adding new 5 U.S.C. § 801(a)(1)(A)]. A "major" rule is defined to be a rule that has resulted in or is likely to result in--

> (A) an annual effect on the economy of $ 100,000,000 or more;
> (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
> (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Pub. L. 104-121, supra, § 251 [adding new 5 U.S.C. § 804(1)]. The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act. Id.

26 Pub. L. 104-121, supra, § 251 [adding new 5 U.S.C. § 801(a)(1)(B)].

27 Pub. L. 104-121, supra, § 251 [adding new 5 U.S.C. § 801(a)(2)(A)].

28 Pub. L. 104-121, supra, § 251 [adding new 5 U.S.C. § 801(a)(3)]. The rule may, however, go into effect immediately after either house votes upon and fails to pass a joint resolution disapproving the rule, Id. Pub. L. 104-121, supra, § 251 [adding new 5 U.S.C. § 801(a)(5)].

again on the 15th day of the next congressional session.[29] The President may by executive order allow the rule to take effect during the review period upon a determination that the rule is necessary because of an imminent threat to health or safety or other emergency, necessary for the enforcement of criminal laws, necessary for national security, or issued pursuant to any statute implementing an international trade agreement.[30]

If Congress takes no action during the review period, the rule will go into effect as written, but the reviewing courts may not infer any congressional intent from its inaction.[31] Congress may pass a joint resolution disapproving the rule during the review period.[32] If the president signs the joint resolution, or if it is passed over the president's veto, the rule shall not take effect,[33] and the agency may not issue a rule in substantially the same form unless Congress enacts legislation authorizing such action.[34] If the president vetos the joint resolution, the rule may not go into effect until Congress votes upon and fails to override the veto or until 30 additional session days have expired without an override vote.[35]

The statute provides general exemptions from the above report and wait requirements for rules related to hunting, fishing and camping, and for any rule that the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. [Giraffe hunters thus have little to fear from this statute.]

C. Brief Evaluation.

The report and wait legislative veto appears unobjectionable on paper. Who can argue against giving Congress an opportunity to prevent a rule from going into effect by enacting legislation specifically repealing the rule? Congress could do so without specific legislation if it could act quickly enough. The legislation merely provides Congress with a systematic vehicle for examining rules and time to act.

The primary problem with the legislation, which will probably be used only rarely, is the time that it gives Congress to act. Although the final legislation gave Congress 60 days to review pending rules, there is surprisingly a good deal of ambiguity in the word "day." Since neither house is in session all of the time, it has been estimated that between the two houses a rule could languish for as long as twelve months before the time period

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29 Pub. L. 104-121, supra, § 251 [adding new 5 U.S.C. § 801(d)].

30 Pub. L. 104-121, supra, § 251 [adding new 5 U.S.C. § 801(c)]. If, however, Congress later enacts a joint resolution of disapproval, the rule must be treated as if it had never gone into effect. Pub. L. 104-121, supra, § 251 [adding new 5 U.S.C. § 801(f)].

31 Pub. L. 104-121, supra, § 251 [adding new 5 U.S.C. § 801(g)].

32 Pub. L. 104-121, supra, § 251 [adding new 5 U.S.C. § 802]. The statute provides expedited procedures for congressional review and votes on rules, including limitations on filibusters. Id.

33 Pub. L. 104-121, supra, § 251 [adding new 5 U.S.C. § 801(b)(1)].

34 Pub. L. 104-121, supra, § 251 [adding new 5 U.S.C. § 801(b)(2)].

35 Pub. L. 104-121, supra, § 251 [adding new 5 U.S.C. § 801(a)(3)(B)].

had expired.[36] In addition, the 60-day clock for any rule that is pending at the end of a legislative session begins anew 15 days in to the next session. Thus, in the end, the House moratorium proponents may have carried the day.

III. Unfunded Mandates.

A. Consideration in the 104th Congress.

State governors and legislators had for years prior to the 104th Congress complained about federal programs that imposed obligations on the states and local governments without providing sufficient funds to implement those obligations.[37] For example, the Clean Water Act requires all publicly owned treatment works to meet technology-based standards promulgated by EPA, but the federal government has only paid for a portion of the costs of building the plants. Similarly, municipal incinerators are subject to federal air pollution and ash disposal standards, but the federal government does not reimburse the compliance costs.[38]

Because President Clinton had indicated when he was Governor of Arkansas and more recently as president that he favored restrictions on unfunded mandates,[39] the leadership in both the House and the Senate made unfunded mandates legislation their highest priority. Indeed, unfunded mandates legislation (S.B. 1) was the very first bill introduced in the Senate during the 104th congress, and the House leadership broke its unfunded mandates bill out of the broader Contract with American legislation so that it could move forward on a faster bipartisan track.

Unfunded mandates legislation had been reported out of committee in both the House and the Senate during the 103rd Congress, but environmental groups had successfully prevented it from coming to the floor in both houses.[40] Since extensive hearings had been held in both houses during the previous Congress,[41] the new

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36 Clinton Administration Concerned About New Congressional Review Mandates, Occupational Safety & Health Reporter, Current Report, April 17, 1996, Vol. 25, No. 45; Pg. 1578.

37 See Margaret Kriz, Cutting the Strings, 27 National J. 167 (January 21, 1995); Unfunded Mandates Top Cities' List of Problems, The Washington Post, January 19, 1995, PAGE A13 (reporting the results of a survey conducted by the National League of Cities indicating that unfunded mandates was the most troubling issue faced by cities).

38 See generally, David A. Dana, The Case for Unfunded Environmental mandates, 69 S. Cal. L. Rev. 1 (1995).

39 GOP Poised for Overhaul in Congress, Dallas Morning News, January 1, 1995, at A1; Katzen Pledges to Work with GOP on Regulatory Bills, Not Freeze, BNA National Environment Daily, Dec. 7, 1994; Jack W. Germond and Jules Witcover; Governors Want Money, Not Strings, 26 National Journal 2799 (November 26, 1994).

40 See Michael Barrier, Unfunded Mandates: Wait Till Next Year! Nation's Business, December, 1994 at 7.

41 See H. Rept. No. 104-1, pt. 2, 104th Cong., 1st Sess. (January 13, 1995) (describing House hearings in the 103rd Congress); S. Rept. No. 104-1, 104th Cong., 1st Sess. (January 11, 1995)(describing unfunded mandates legislation in the Senate during the 103rd Congress).

Republican committee chairpersons felt that it was unnecessary to elicit extensive testimony to prepare an adequate record for the legislation in the 104th Congress.

The legislation sailed through the committees in both Houses with few changes. The most important changes were to delete from the House Bill a section that would have provided private sector businesses relief from federal mandates and an exclusion from both bills of mandates imposed by the civil rights laws.[42]

B. Description of the Act.

The Unfunded Mandates Reform Act of 1995 contains two major elements -- procedures for congressional consideration of future legislation that may impose federal mandates on state, local or tribal governments and analytical requirements for federal rules that impose federal mandates on private sector entities.[43]

1. Definition of Federal Mandates.

Federal mandates can be of two varieties.[44] A "federal intergovernmental mandate" is a provision in a statute or regulation that imposes an enforceable duty on state, local or tribal governments.[45] A "federal private sector mandate" is a provision in a statute or regulation imposes an enforceable duty on the private sector.[46]

2. Congressional Committee Responsibilities.

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42 See Vote to Curb Federal Rules is Near, Boston Globe, January 13, 1995, Pg. 12.

43 Pub. L. 104-4, 104th Cong., 1st Sess. (1995). The Act also requires studies of existing federal mandates and various other reports to be undertaken by the Advisory Commission on Intergovernmental Relations. Id. §§ 301-06.

44 Pub. L. 104-4, § 101 adding to title IV of the Congressional Budget and Impoundment Control Act of 1974 new section 421(6).

45 Pub. L. 104-4, § 101 adding to title IV of the Congressional Budget and Impoundment Control Act of 1974 new section 421(5). The term "intergovernmental mandate" is further defined to include legislation that would reduce existing authorizations or appropriations for federal assistance in controlling international borders and in complying with pre-existing federally imposed duties, unless the duties are reduced by a corresponding amount. Pub. L. 104-4, § 101 adding to title IV of the Congressional Budget and Impoundment Control Act of 1974 new section 421(5)(A)(ii). It also includes legislation or regulations that increases the stringency of conditions to obtaining federal funds under large federal entitlement programs or that caps or decreases such funds in cases where the State, local, or tribal governments that participate in the program lack authority to amend their financial or programmatic responsibilities to continue providing required services that are affected by the legislation or regulations. Pub. L. 104-4, § 101 adding to title IV of the Congressional Budget and Impoundment Control Act of 1974 new section 421(5)(B).

46 Pub. L. 104-4, § 101 adding to title IV of the Congressional Budget and Impoundment Control Act of 1974 new section 421(7). The term "federal private sector mandate" includes legislation or regulations that would reduce or eliminate the amount of authorization of appropriations for Federal financial assistance that will be provided to the private sector for the purposes of ensuring compliance with a federally imposed duty. Pub. L. 104-4, § 101 adding to title IV of the Congressional Budget and Impoundment Control Act of 1974 new section 421(7)(B). It does not include legislation or regulations that condition federal assistance that affect voluntary federal programs. Pub. L. 104-4, § 101 adding to title IV of the Congressional Budget and Impoundment Control Act of 1974 new section 421(7)(A)(i), (ii).

The Act imposes upon every authorizing committee of Congress the responsibility to identify any federal mandates in legislation that the committee reports out favorably.[47] Each committee report must describe the federal mandates, provide a qualitative, or, if practicable, quantitative cost-benefit analysis of the mandate, an assessment of how federal payment of public sector costs would affect the competitive balance between the public and private sectors, and description of the actions taken by the committee to avoid any adverse impact on the private sector or the competitive balance between the public sector and the private sector.[48] For intergovernmental mandates, the committee report must provide a statement (with reasons) of whether the committee intends that the mandates be partly or entirely unfunded, an identification of any federal moneys available to pay for the mandate under existing programs or programs that will be created for that purpose, a statement of whether and how the committee has created a mechanism to allocate the funding to pay for the mandate.[49]

3. Congressional Procedures.

For each bill of a public character reported out by a congressional committee, the Congressional Budget Office (CBO) must prepare an estimate of whether the bill will impose an intergovernmental mandate the direct costs of which will exceed $50 million per year or a private sector mandate the direct costs of which will exceed $100 million per year, or explain why such an estimate is not feasible.[50] The statute provides that it shall not be in order for either house to consider a bill for which the CBO has not prepared a required estimate.[51] It is likewise out of order for either house to consider a bill that contains an intergovernmental mandate that imposes direct costs greater than the $50 million threshold unless it provides assurance that federal moneys will be available to pay for the mandate.[52]

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47 Pub. L. 104-4, § 101 adding to title IV of the Congressional Budget and Impoundment Control Act of 1974 new section 423(a). There are exceptions to these requirements for, *inter alia*, bills that enforce constitutional rights, civil rights bills, and emergencies. Pub. L. 104-4, § 101 adding to title IV of the Congressional Budget and Impoundment Control Act of 1974 new section 422.

48 Pub. L. 104-4, § 101 adding to title IV of the Congressional Budget and Impoundment Control Act of 1974 new section 423(c).

49 Pub. L. 104-4, § 101 adding to title IV of the Congressional Budget and Impoundment Control Act of 1974 new section 423(d). The report must contain an explicit statement of any intent by the committee to preempt state or local law. Pub. L. 104-4, § 101 adding to title IV of the Congressional Budget and Impoundment Control Act of 1974 new section 423(e).

50 Pub. L. 104-4, § 101 adding to title IV of the Congressional Budget and Impoundment Control Act of 1974 new section 424(a), (b). Problems can obviously arise if a bill that did not impose a federal mandate (or imposed only a modest mandate) is amended on the floor of either house to include a major mandate. In that event, the conference committee is required to ensure to the greatest extent practicable that the Congressional Budget Office prepares an estimate. Pub. L. 104-4, § 101 adding to title IV of the Congressional Budget and Impoundment Control Act of 1974 new section 423(d).

51 Pub. L. 104-4, § 101 adding to title IV of the Congressional Budget and Impoundment Control Act of 1974 new section 425(a).

52 Pub. L. 104-4, § 101 adding to title IV of the Congressional Budget and Impoundment Control Act of 1974 new section 425(a)(2). The assurance that moneys will be available can come in many forms. Pub. L. 104-4, § 101 adding to title IV of the Congressional Budget and Impoundment Control Act of 1974

4. Federal Agency Requirements.

Federal agencies must develop procedures to facilitate the participation of state and local officials in the process of promulgating rules that contain significant federal intergovernmental mandates.[53] Before promulgating any regulatory requirements that might significantly or uniquely affect small governments, the agency must develop a plan under which the agency will provide notice of the requirements to potentially affected small governments, enable local officials to provide input, and inform, educate, and advise small governments on compliance with the requirements.[54]

The Act also imposes various analytical requirements directly upon federal agencies. Unless otherwise prohibited by law, agencies must prepare a mandates impact statement prior to publishing a proposed or final rule that contains a federal mandate that may result in an annual expenditure of $100 million by the public sector or the private sector.[55] The impact statement must include:

- an identification of the provision of Federal law under which the rule is being promulgated;
- a qualitative and quantitative assessment of the anticipated costs and benefits of the federal mandate to the public and private sectors, including an analysis of the extent to which federal resources are available to pay costs to public entities;
- estimates, to the extent reasonably feasible, of future compliance costs and any disproportionate effects upon any particular regions or communities, or particular segments of the private sector;
- estimates of the effect on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness, if accurate estimates are reasonably feasible and relevant and material; and
- a description of the agency's prior consultation with elected representatives of the affected public entities, together with a summary the agency's evaluation of their comments and concerns.[56]

The agency must select from among the available regulatory options, "the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule,"

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new section 425(a)(2)(A), (B). The statute contains many hedges against false or overly optimistic assurances that the federal moneys will be forthcoming. Id.

53 Pub. L. 104-4, § 204(a). The requirements of the Federal Advisory Committee Act, 5 U.S.C. App. are not applicable to meetings between federal officials and state or local officials that are solely for the purpose of exchanging views or advise. Pub. L. 104-4, § 204(b).

54 Pub. L. 104-4, § 203(a). The term "small government" is given the same meaning as in the Regulatory Flexibility Act, 5 U.S.C. § 601, et seq. That law defines "small government" to include "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." 5 U.S.C. § 601(5).

55 Pub. L. 104-4, § 202(a).

56 Pub. L. 104-4, § 202(a)(1)-(5).

unless that option is prohibited by law or the agency head otherwise explains why that option was not selected.[57]

The primary enforcer of the analytical requirements is the Office of Management and Budget, which must make annual reports to Congress on agency compliance.[58] However, a court may compel an agency to prepare a mandates impact statement if the agency is arbitrary and capricious in failing to prepare the statement.[59] The inadequacy of a mandates impact statement or the failure to prepare the statement may not be used as the basis for "staying, enjoining, invalidating or otherwise affecting such agency rule."[60] Apparently, would-be challengers to an agency's failure to prepare a statement must act rapidly to secure a court order requiring the agency to prepare the statement before the rule goes into effect.

C. Brief evaluation.

The primary problem with unfunded mandates legislation will be coming up with federal dollars to pay for state mandates in an age of shrinking federal budgets. Since the law applies only to future legislation, it is difficult to predict how seriously it will be taken when Congress decides to impose obligations on states but cannot find the funds to pay for it. The law certainly contains sufficient loopholes to allow Congress to impose additional unfunded mandates on the states, but it will unquestionably make that process more difficult, and the decision will definitely be more visible.

A second objection to unfunded mandates legislation, raised primarily by environmental groups evokes the "level playing field" metaphor frequently invoked in the context of international trade. If cities and states decide to go into businesses that are typically engaged in primarily by entities in the private sector, is it fair to allow the public entities to escape federal environmental mandates if the federal government declines to pay. For example, the City of Austin owns a power plant that produces electricity that the city sells to individual customers. If Congress enacts amendments to the Clean Air Act calling for new air pollution control standards for such power plants, it is unclear why private utility companies (and their consumers) should have to pay for installing the necessary technologies while the city may ignore the standard if the federal government is unwilling to pay the compliance costs.

Finally, the analytical provisions contained in the act, which are entirely unrelated to the congressional limitations (and only marginally related to the subject of unfunded mandates, for that matter) will no doubt prove burdensome to the affected agencies. The judicial review provisions will provide regulatees with an opportunity to challenge the agency's "threshold" determination that a rule will not have an impact of $100 million on the public or private sector. The agencies will no doubt go to considerable effort to support threshold findings with an administrative record upon which courts may conduct arbitrary and capricious review.

IV. Paperwork Reduction Act.

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57 Pub. L. 104-4, § 205(a), (b).

58 Pub. L. 104-4, § 208.

59 Pub. L. 104-4, § 401(a)(2).

60 Pub. L. 104-4, § 401(a)(3).

A. The Paperwork Reduction Act of 1980.

Nobody likes paperwork, and the federal government is the cause of a huge amount of paperwork. In 1980, Congress enacted the Paperwork Reduction Act (PRA), which attempted to control federal paperwork requirements by subjecting most recordkeeping requirements and information collection activities associated with regulations to review by OIRA in OMB, requiring agencies to eliminate duplication, minimize burdens, and develop plans for using the information before requesting OMB approval, and creating a "public protection provision" stating that no penalty may be imposed on a person who fails to respond to an unapproved paperwork requirement.[61] The goal of the original statute was to reduce the then existing burden of federal collections of information by 15 percent by October 1, 1982 to reduce the paperwork burden by an additional 10 percent during the next year.[62]

Although the Paperwork Reduction Act was enacted during the Carter Administration and had generally received bipartisan support, it became controversial during the latter part of the Reagan Administration. At the outset of the Reagan Administration, the Office of Information and Regulatory Affairs (OIRA), the Office within OMB that administered the Act, expanded its role to that of reviewing all agency rules for compliance with the executive order requiring agencies to prepare regulatory impact analyses for all major rules.[63] OIRA spent a good deal more of its time and effort in this regulatory review role than in its paperwork review role, and it soon became a "black hole" into which many controversial rules disappeared forever.[64] This led to a good deal of friction between OIRA and Democrat-controlled congressional committees during the latter half of the 1980s.[65]

OIRA attempted to expand its paperwork review role during the latter part of the Reagan Administration to include review of substantive rules that imposed obligations on regulated companies to share information with third party beneficiaries of regulatory statutes. When OIRA insisted upon reviewing OSHA requirements that companies communicate information about hazardous workplaces to their employees, the Supreme Court, in *Dole v. United Steelworkers of America*, agreed with the unions that the Paperwork Reduction Act applied only to direct agency demands for information to be

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61 P.L. 96-511, adding new 44 U.S.C. § 3512. See Prepared Statement of Sally Katzen, Before the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs of the House Committee on Government Reform and Oversight, 104th Cong., 1st Sess. (February 7, 1995).

62 P.L. 96-511, adding new 44 U.S.C. § 3505(a)(1)(A), (B). OMB reported that it had achieved a 32 percent reduction in paperwork requirements by January, 1984. H. Rept. No. 104-37, 104th Cong., 1st Sess. (February 15, 1995).

63 See Executive Order 12291 (1981). The executive order remained in force during the Bush Administration, but President Clinton replaced it with an order that assigned a similar role to OIRA. See Executive Order 12866 (1993).

64 Susan J. Tolchin and Martin Tolchin, Dismantling American, The Rush to Deregulate 73 (1983). See generally McGarity Reinventing Rationality, supra, at ch. 18.

65 See Harold H. Bruff, Separation of Powers and the Executive Branch: The Reagan Era in Retrospect, 57 Geo. Wash. L. Rev. 533 (1989).

presented to the agency.[66] This holding precipitated demands by regulated companies to amend the PRA to allow OIRA to review third party information requirements. During the 103rd Congress, the Senate unanimously passed bipartisan Paperwork Reduction Act reforms,[67] but the House did not take action on the bill, primarily because of union and public interest group opposition to expanding OMB's review role to third party information requirements.[68]

B. The 1995 Amendments to the Paperwork Reduction Act.

One of the promises of the Contract with America was to reduce government-required paperwork. Thus, one of the titles of the Job Creation and Wage Enhancement Act, introduced at the outset of the 104th Congress, would have revamped the paperwork review process and made that process applicable to third-party information requirements.[69] At about the same time, Senator Nunn introduced a bipartisan Senate bill, introduced by Senator Nunn, that was almost identical to the bill that passed the Senate during the 103rd Congress.[70] That bill proposed, *inter alia*, to give the PRA more ambitious paperwork reduction goals, to clarify and strengthen federal agency responsibilities in the area of information resources management, to require agencies to solicit and review public comment on proposed information collections before submitting them to OIRA, and to expand OIRA's powers to include review of third party information requirements.[71] The Clinton Administration quickly endorsed the Senate Bill.[72]

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66 494 U.S. 26 (1990).

67 See S. Rept. No. 104-8, 104th Cong., 1st Sess. (February 14, 1995) ("S. 560, as reported by the Committee on August 2, 1994, was the product of a year-long, bipartisan effort within the Committee, assisted by frequent consultation with staff of the General Accounting Office (GAO) and the Office of Management and Budget (OMB), and the solicitation of public comment").

68 White House Backs Senate Paperwork Bill; Urges House to Include Portions Of S 244, BNA National Environment Daily, Jan. 31, 1995; Sen. Nunn to Introduce Bipartisan Paperwork Reduction Act Reauthorization, BNA's Banking Report, January 23, 1995. See also Prepared Statement of Sally Katzen, Before the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs of the House Committee on Government Reform and Oversight, 104th Cong., 1st Sess. (February 7, 1995).

69 See H.R. 9, tit. V, [original version], 104th Cong., 1st Sess. (1995).

70 S. 244 [original version], 104th Cong., 1st Sess. (1995); S. Rept. No. 104-8, 104th Cong., 1st Sess. (February 14, 1995) ("[t]he "Paperwork Reduction Act of 1995" is substantially identical to S. 560, the "Paperwork Reduction Act of 1994", in the 103rd Congress"). Senator Nunn introduced the bill on January 19, 1995. See Sen. Nunn to Introduce Bipartisan Paperwork Reduction Act Reauthorization, BNA's Banking Report, January 23, 1995.

71 See S. 244 [original version], 104th Cong., 1st Sess. (1995); S. Rept. No. 104-8, 104th Cong., 1st Sess. (February 14, 1995) [section of report entitled "Purpose].

72 See Prepared Statement of Sally Katzen, Before the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs of the House Committee on Government Reform and Oversight, 104th Cong., 1st Sess. (February 7, 1995).

After the Administration made it clear that it opposed the PRA reforms contained in the Job Creation and Wage Enhancement Act,[73] Representative William Clinger, the chairman of the House committee with jurisdiction over paperwork reduction legislation introduced a substitute bill that closely resembled the Senate bill.[74] After very brief hearings in which the Administration expressed support for the revised House bill,[75] the House Government Reform and Oversight Committee substituted Clinger's bill for the Contract with America version.

The Committee did make one important change to the Clinger bill. Within hours after the Committee received the bill, the Taxpayer Assets Project (a group affiliated with Ralph Nader) had alerted the public via the internet to one obscure provision that would have allowed any company to use government information for private profit and would have prevented the government from acquiring, disseminating or making use of any government data to which a private company had added "value" to the information except on terms acceptable to the private company.[76] This provision was apparently inserted at the behest of lobbyists for West Publishing Company, which routinely adds value to government information (e.g., court decisions and legislation) by providing headnotes and annotations.[77] The internet alert resulted in one of the first internet "flames" aimed at Congress as committee members received hundreds of e-mail messages expressing opposition to this obscure provision.[78] Vigorous objections by Democratic members of the committee to the provision generated coverage in the mainstream media. Once the press reported on this quiet attempt by a special interest to limit governmental use of government information, the House Committee quickly jettisoned it.[79] This brief experience gave

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73 See Clinton Supports House Paperwork Bill; White House Critiques GOP Contract Bill. The Bureau Of National Affairs, Inc. Daily Labor Report, February 8, 1995.

74 H.R. 833, 104th Cong., 1st Sess. (1995). See Prepared Statement of David M. MacIntosh, Before the Subcommittee on National Economic Growth, Natural Resource, and Regulatory Affairs of the House Committee on Government Reform and Oversight, 104th Cong., 1st Sess. (February 7, 1995).

75 The House Small Business Committee devoted a one-day hearing to the Paperwork Reduction Act on January 27, 1995. See H. Rept. No. 104-37, 104th Cong., 1st Sess. (February 15, 1995) (summarizing testimony presented at the January 27 hearing). The House Government Reform and Oversight Committee held a one-day hearing on February 8, 1995 before beginning to mark up the bill on February 9, 1995. See id. For the Administration's position on the Clinger bill, see Prepared Statement of Sally Katzen, Before the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs of the House Committee on Government Reform and Oversight, 104th Cong., 1st Sess. (February 7, 1995).

76 H.R. 833, 104th Cong., 1st Sess. (1995), adding 44 U.S.C. § 3518(f).

77 See West Publishing, Competitors Spar over Bill Provision over Information, Star Tribune, February 10, 1995, at D1; Agreement Reached In House Panel On Regulatory Moratorium, National Journal's CongressDaily, February 10, 1995; Republican Moratorium Bill Barring New Regulations Passes House Panel, Wall St. J. February 9, 1995, at A16.

78 see Read All About It!...on the Net? 27 National Journal 577 (March 4, 1995).

79 See Paperwork Reduction Bill Goes to House Minus Beneficial Provision for Publisher, BNA's Banking Report, February 20, 1995; Paperwork Targeted, Washington Post, February 11, 1995, at A8. The committee also increased the paperwork reduction goal from 5 percent per year to 10 percent per year. Paperwork Reduction Bill Goes to House Minus Beneficial Provision for Publisher, BNA's Banking Report, February 20, 1995.

credence to Speaker Gingrich's claim that "[i]f every citizen has access (through computer networks) to the information that Washington lobbyists have, we will have changed the balance of power in America toward the citizens and out of the Beltway,"[80] but it still required the efforts of a vigilant public interest group.

After this concession to the Democrats, the bipartisan bills sailed rapidly through both houses of Congress. After defeating a Democrat-sponsored amendment that would have deleted OIRA review of third party information requirements, the House unanimously passed its version of the Paperwork Reduction Act amendments, which were part of the Job Creation and Wage Enhancement Act, on February 22, 1995.[81] The Senate passed its version of the bill on March 7, 1995 by a 99-0 vote, but the Senate version differed from the House version in several minor regards.[82] For example, the House bill set a goal of 10 percent reduction in paperwork per year, whereas the Senate bill settled for a 5 percent per year reduction.[83] It took a conference committee until April 6 to come up with a compromise bill, and it took another six weeks for both houses to pass and the president to sign the conference committee version. President Clinton signed the bill on May 22, 1995.[84]

The Paperwork Reduction Act of 1995 reversed the *Steelworkers* case by defining the term "collection of information" to mean "the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency" and by subjecting such collections of information to review by OIRA.[85] It also provided a procedure for petitioning OIRA to reevaluate existing informational requirements in light of the criteria specified in the amendments.[86] In addition to overruling the *Steelworkers* case, the bill extended the authorization for the Office of Information and Regulatory Affairs in OMB for an additional five years and provided a goal of a ten percent reduction in federally required paperwork per year for 1996 and 1997 and a five percent annual reduction thereafter.[87]

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80 Quoted in Read All About It!...on the Net? 27 National Journal 577 (March 4, 1995).

81 See House Approves Paperwork Reduction Bill After Defeating Amendment on OMB Reviews, 24 Occupational Safety & Health Reporter, Current Report 1917 (March 1, 1995).

82 Senate Votes To Reauthorize Paperwork Reduction Act Of 1980, 24 Occupational Safety & Health Reporter, Current Report 1996 (March 15, 1995).

83 Compare H.R.. 9, [final version], Div. A § 102, 104th Cong., 1st Sess. (1995), amending 44 U.S.C. § 3505(a)(1) with S 244 [final version], 104th Cong., 1st Sess., amending 44 U.S.C. § 3505(a)(1).

84 Pub. L. 104-13, 104th Cong., 1st Sess. (1995).

85 Pub. L. 104-13, 104th Cong., 1st Sess. (1995), adding 44 U.S.C. §§ 3502(3), 3504(c).

86 Pub. L. 104-13, 104th Cong., 1st Sess. (1995), adding 44 U.S.C. §§ 3517(b).

87 Pub. L. 104-13, 104th Cong., 1st Sess. (1995), adding 44 U.S.C. §§ 3505(a)(1). The House unanimously passed a separate bill, called the "Paperwork Elimination Act" on April 24, 1996. The purpose of this bill was to allow small businesses to file paperwork with agencies via electronic mail. See House Unanimously Passes Paperwork Elimination Act, Occupational Safety & Health Reporter, Current Report, May 1, 1996, Vol. 25, No. 47; Pg. 1642.

C. Brief Evaluation.

The bipartisan effort to enact amendments to the Paperwork Reduction Act was the second important regulatory reform legislation of the 104th Congress. It owed its easy passage to the fact that bipartisan legislation had been crafted and very nearly enacted in the 103rd Congress and to the willingness of the House leadership to abandon the language of the Job Creation and Wage Enhancement Act to which many Democrats and the Clinton Administration were opposed. The House Republicans were therefore stretching matters when they took credit for enacting this aspect of the Contract with America. The language of the Contract was left on the cutting-room floor. On the other hand, absent the Republican takeover of the House, the prospects for enacting significant amendments were slim (as evidenced by the failure of the House to enact the Senate's bill during the 103rd Congress) and the prospects for including within such amendments a provision overturning the *Steelworkers* case would have been virtually nil, given the strong opposition of the unions.

The PRA was not badly broken, and it needed only modest fixing, mostly in the area of internal agency information resource management. Most of the calls for reform had more to do with implementation problems than with the statute itself.[88] The primary reasons for addressing it at all were the need to reauthorize OIRA's existing authority, articulate specific paperwork reduction goals, and expand it to include third party information requirements. Even this last need was highly debatable. Although the rhetoric of "paperwork reduction" is politically popular, the third-party information disclosure amendments had very little to do with government paperwork. The House Committee Report referred to third-party disclosure requirements as a "government information activity," not a government-imposed paperwork requirement.[89]

Proponents of expanding OIRA's authority argued that agencies could otherwise avoid OIRA review of government-imposed information gathering requirements on the private sector by simply requiring companies to gather information and provide it directly to beneficiaries of regulation.[90] But this raises the question whether OIRA has the expertise or the concern for the beneficiaries of regulation required to make a wise decision about whether a disclosure requirement should be imposed on the private sector. In the past, OIRA has betrayed a good deal more concern for corporate targets of government disclosure requirements than for the beneficiaries of the statutes under which the agencies promulgate those requirements.[91] Yet the statute as amended provides no vehicle for

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88 See, e.g., H. Rept. No. 104-37, 104th Cong., 1st Sess. (February 15, 1995) ("too little progress has been made in implementing key provisions of the Act").

89 H. Rept. No. 104-37, 104th Cong., 1st Sess. (February 15, 1995) [section entitled "Overturning Dole v. Steelworkers"].

90 See H. Rept. No. 104-37, 104th Cong., 1st Sess. (February 15, 1995) ("Third party disclosure is increasing partly because agencies, with their own limited resources to collect and analyze information, have discovered that their program objectives may be met by requiring private parties to provide information directly to the intended beneficiary (e.g., an employee of the employer) or enforcer (e.g., the State or local government charged with regulatory enforcement), eliminating the Federal middle-man.").

91 See McGarity, Reinventing Rationality, supra, ch. 18. [Citations to Houck and Olsen.] Another rational underlying the expansion of OIRA review to third-party information disclosure requirements is the attempt by some agencies to avoid OMB review by requiring private companies to make submit information to state and local agencies. See H. Rept. No. 104-37, 104th Cong., 1st Sess. (February 15, 1995) ("the Federal Government has increased the use of third party disclosure by having private institutions and individuals report to State or local governments"). This activity is much closer to the traditional

beneficiaries of a third-party information requirement to challenge an arbitrary decision by OIRA to refuse to allow the agency to promulgate it.

With the enactment of the 1995 amendments, agencies like EPA, OSHA and FDA will have to clear still another hurdle before they may require companies to inform persons that they put at risk of the nature and magnitude of those risks. The *Steelworkers* case that the statute overturned involved OIRA's assertion of jurisdiction to approve certain requirements in OSHA's hazard communication standard that employers inform employees of the risks posed by toxic chemicals in the workplace.[92] As the public applauded the rhetoric of paperwork reduction, they were probably unaware of the fact that they were limiting FDA's power to require warnings on food and drugs, EPA's power to require companies to share information on toxic releases with local communities, the Department of Treasury's power to require warnings on alcoholic beverages, and OSHA's power to require employers to acquaint employees with workplace risks.[93] In addition, the statute's requirement that existing third-party information disclosure requirements be reevaluated has the potential to tie up scarce agency resources and to reduce existing risk communication requirements.

V. Small Business-Oriented Reforms.

Congress has historically paid close attention to the complaints from small businesses and their trade associations about the burdens that federal regulation impose on small economic entities. Near the top of the list of small business complaints was the intrusiveness of federal regulation.[94] According to one study, small business bears a disproportionate share of the costs imposed by federal regulations, because a large component of regulatory compliance costs tends to be fixed costs that large firms can spread across more units of output.[95] Thus, the Small Business Administration calculated that small businesses employ 53 percent of the work force, but bear 63 percent of the total business regulatory costs.[96]

A. The White House Conference on Small Business.

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government information-gathering function that is the proper subject matter of the Paperwork Reduction Act.

92 Dole v. United Steelworkers of America, 49 U.S. 26 (1990).

93 See Prepared Statement of John J. Sheehan, United Steelworkers of America, Before the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs of the House Committee on Government Reform and Oversight, 104th Cong., 1st Sess. (February 7, 1995).

94 See, e.g., Testimony of Karen Kerrigan, President, Small Business Survival Committee, Before the House Committee on Small Business, 104th Cong., 1st Sess. (January 18, 1995) ("Government has become the main obstacle to small business prosperity).

95 Office of the Chief Counsel for Advocacy, Small Business Administration, The Changing Burden of Regulation, Paperwork, and Tax Compliance on Small Business (October 1995).

96 Office of the Chief Counsel for Advocacy, Small Business Administration, The Changing Burden of Regulation, Paperwork, and Tax Compliance on Small Business (October 1995).

Prior to the 1994 elections, President Clinton attempted to demonstrate his concern for small business by convening a White House Conference on Small Business to hear complaints and suggestions from a broad range of small business interests. The process began with conventions of more than 20,000 elected small business representatives in all 50 states during 1994 and early 1995. Each state made recommendations and appointed delegates to the national convention, which gathered in Washington, D.C. in June, 1995.[97] The assembled delegates were delighted to hear President Clinton tell them of the 16,000 pages of regulations he had just consigned to the trash heap, including the regulations (from which he quoted in detail, to the immense delight of the audience) for determining whether grits were truly grits. But the audience was also happy to find Congress in friendly hands.[98]

The conference produced a list of 60 recommendations, many of which were directed to federal regulation. Near the top of the list (right after demanding a 100 percent deduction for business meal and entertainment expenses) was a recommendation that the Regulatory Flexibility Act be broadened to apply to all federal agencies and strengthened to require better regulatory flexibility analyses and judicial review of agency failures to prepare such analyses.[99] Also high on the list were compensation for federal regulatory interference with property rights, reform of the Superfund statute, cost-benefit analysis for technology-based standards, a five-year sunset provision for all regulations, and greater enforcement flexibility for small businesses.[100]

B. The Regulatory Flexibility Act.

The Regulatory Flexibility Act of 1980[101] was the first law enacted by Congress that required all agencies to engage in systematic regulatory analysis of regulations. That statute, which was enacted during the Carter Administration, is limited to rules that affect small businesses, small organizations and small governmental jurisdictions, collectively referred to as "small entities."[102] Roughly, this category includes businesses with fewer than 500 employees or less than $5 million in sales.[103] Its enactment represented "a

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97 Office of the Chief Counsel for Advocacy, Small Business Administration, The Changing Burden of Regulation, Paperwork, and Tax Compliance on Small Business (October 1995).

98 The White House, Office of the Press Secretary, Remarks by the President to the White House Conference on Small Business, June 12, 1995. See also Rules 16,000 Pages Shorter, Rocky Mountain News, June 13, 1995, at A40.

99 See 141 Cong Rec S 8958 (June 22, 1995) (remarks of Congressman Kyl) (listing the top five recommendations of the White House Conference on Small Business). Three of the top five recommendations dealt with taxes. The other two addressed federal regulation. Tax Relief Dominates Agenda Of Small Business Conference, BNA Pension & Benefits Reporter, Vol. 22, No. 25; Pg. 1418, June 19, 1995.

100 See The 60 Recommendations of the 1995 White House Conference on Small Business, Prepared by the Office of Advocacy of the U.S. Small Business Administration.

101 5 U.S.C. § 601 et seq. (1982).

102 5 U.S.C. § 601(6).

103 Regulatory Flexibility Act: Joint Hearings Before the Subcommittee on Regulatory Reform of the Senate Judiciary Committee and the Subcommittee on Government Regulation and Paperwork of the

stunning achievement for the small business community and its representatives because it requires virtually all government policymaking to be sensitive to small business concerns."[104]

The goal of the Act is to insure that agencies "fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation."[105] The Act attempts to achieve these goals primarily through several procedural and analytical requirements. First, each agency must publish, at least semi-annually, a "regulatory flexibility agenda" of all proposed or pending rules that are "likely to have a significant economic impact on a substantial number of small entities."[106] The agency must give notice of the agenda to the Small Business Administration (SBA) and to affected "small entities" to "assure that small entities have been given an opportunity to participate in the rulemaking. . . ."[107] The agency must publish an "Initial Regulatory Flexibility Analysis" (IRFA) and a final analysis (FRFA) to accompany proposed and final rules.[108] Finally, each agency must develop a ten-year plan to examine existing and proposed rules which might have a "significant economic impact" on "a substantial number of small entities."[109]

The purpose of the IRFA is to "describe the impact of the proposed rule on small entities."[110] The analysis must contain:

(1) a description of the reasons why action by the agency is being considered;
(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;
(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
(4) a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.[111]

Senate Committee on Small Business, 97th Cong., 2d Sess. 25 (1982) (testimony of the Chief Counsel for Advocacy, Small Business Administration).

104 Paul Verkuil, A Critical Guide to the Regulatory Flexibility Act, 1982 Duke L. J. 213 (1982).

105 5 U.S.C. § 601.

106 5 U.S.C. § 602(a)(1). The terms "significant economic impact" and "substantial number" are not defined by the Act.

107 5 U.S.C. §§ 602(b) & (c), & 609.

108 5 U.S.C. § 603, 604.

109 5 U.S.C. § 610.

110 5 U.S.C. § 603(a).

111 5 U.S.C. § 603(b).

In addition, the IRFA must analyze "significant" alternatives to the agency's proposed action such as:

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
(3) the use of performance rather than design standards; and
(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

The analysis of alternatives, however, need only be undertaken to the extent that it is "[c]onsistent with the stated objective of applicable statutes."[112]

When the agency promulgates its final rule, it must prepare a FRFA containing:

(1) a succinct statement of the need for, and the objectives of, the rule;
(2) a summary of the issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; and
(3) a description of each of the significant alternatives to the rule consistent with the stated objectives of applicable statutes and designed to minimize any significant economic impact of the rule on small entities which was considered by the agency, and a statement of the reasons why each one of such alternatives was rejected.[113]

The agency is free to adopt either a quantitative or numerical description of the rule's effects or "more general descriptive statements" if quantification is not "practicable or reliable."[114]

Liberal reference throughout the Act to the Chief Counsel for Advocacy of the Small Business Administration indicates that Congress expected that official to provide an oversight function. The FRFA is part of the record on judicial review and may be considered by the reviewing court in deciding whether a rulemaking effort is "arbitrary and capricious," and the D.C. Circuit has held that "in an appropriate case" an inadequate RFA could constitute grounds for remanding a rule to an agency if the defect was critical to the reviewing court's analysis of the reasonableness of the underlying rule.[115] The agency's failure to prepare an RFA, however, was not subject to judicial review under the original Act.[116]

C. Amendments to the Regulatory Flexibility Act.

Dissatisfaction with the Act in the small business community stemmed primarily from the limitation on judicial review.[117] With some justification, small business

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112 5 U.S.C. § 603(b).

113 5 U.S.C. § 604(a).

114 5 U.S.C. § 607.

115 Small Refiners Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 538-39 (D.C. Cir. 1983). See also, Thompson v. Clark, 741 F.2d 401, 405 (D.C. Cir. 1984).

116 5 U.S.C. § 611(a).

117 See, e.g., Testimony of James P. Carty, Vice President, National Association Of Manufacturers, Before The House Committee On Small Business, 104th Cong., 1st Sess. (January 23, 1995); Statement

organizations believed that agencies were paying lip service to the statute by publishing most rules a boiler plate finding that the rule would not have a significant impact on a substantial number of small entities and therefore a regulatory flexibility analysis was not required. When the agencies did prepare such analyses, small businesses complained that they were often entirely inadequate.

Under the original statute, the only institution charged with enforcing the regulatory flexibility analysis requirements was the Office of the Chief Counsel for Advocacy of the Small Business Administration. That office, however, had traditionally been a weak stepchild in the executive branch. For example, from November 1989 until May 5, 1994, there was only one confirmed Chief Counsel, and he served only seven months.[118]

Since the failure to prepare a analysis and the adequacy of the analysis were not subject to judicial review, the agencies could essentially ignore the analytical requirements. The 103rd Congress very nearly passed a brief amendment to the Regulatory Flexibility Act that would have simply deleted the prohibition on judicial review, thereby allowing small entities to challenge the failure to prepare an FRFA.[119]

In the newly elected 104th Congress, small business was clearly in the driver's seat. Titles IV and VI of the Job Creation and Wage Enhancement Act, one of the original Contract with America bills, was devoted to changes in the Regulatory Flexibility Act.[120] Title IV added to the elements of a regulatory flexibility analysis a "numerical" description of the "monetary costs incurred by small entities, other businesses, and individuals in complying with the proposed rule,"[121] Title VI added a general requirement that agencies consider both direct and indirect effects of regulations in deciding the threshold question whether they have a significant impact on a substantial number of small entities.[122] It also gave the Chief Counsel for Advocacy of the Small Business Administration an opportunity to lodge with the agency a "statement of opposition" to proposed and final rules prior to publication and required the agency to respond to that statement in the *Federal Register*.[123] Finally, title VI repealed the limitation on judicial review contained in the original Regulatory Flexibility Act.[124]

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of Jack Faris, National Federation of Independent Business, Before The House Committee On Small Business, 104th Cong., 1st Sess. (January 23, 1995); Testimony of Robert Pool, National Association for the Self-Employed, Before the House Committee on Small Business, 104th Cong., 1st Sess. (January 23, 1995).

118 See Testimony of Jere W. Glover, Chief Counsel For Advocacy, United States Small Business Administration, Before the House Small Business Committee, 104th Cong. 1st Sess. (April 4, 1995).

119 See H.R. 830, 103d Cong., 2d Sess. (1993). This bill became part of S 4, the National Competitiveness Act, which passed both houses, but died in conference committee. See Statement of Michael O. Roush, National Federation of Independent Business, Before the Senate Committee on Governmental Affairs, 104th Cong., 1st Sess. (February 8, 1995); Small Business Calls for Judicial Review to Strengthen Regulatory Flexibility Act, BNA Occupational Safety & Health Daily, Jan. 26, 1995.

120 H.R. 9 [original version] tit. IV, VI, 104th Cong., 1st Sess. (1995).

121 H.R. 9 [original version] § 4003, 104th Cong., 1st Sess. (1995).

122 H.R. 9 [original version] § 6002, 104th Cong., 1st Sess. (1995).

123 H.R. 9 [original version] § 6003, 104th Cong., 1st Sess. (1995).

124 H.R. 9 [original version] § 6001, 104th Cong., 1st Sess. (1995).

The Clinton Administration's much heralded National Performance Review, published in 1993, recommended that the Regulatory Flexibility Act be amended to allow judicial review of agency failures to prepare regulatory flexibility analyses, and the Administration had supported legislation to that effect during the 103rd Congress.[125] It continued to support similar amendments in the 104th Congress.[126] According to the Chief Counsel for advocacy of the Small Business Administration, "[a] more substantial and ongoing threat, potential judicial review of agency compliance with the RFA, would certainly lead to scrupulous compliance with the RFA."[127]

The Administration did, however, urge Congress to specify the scope of review and to limit the timing of petitions for review.[128] The Administration also joined Democratic congresspersons in objecting to language in Title IV that would have required agencies to analyze the impacts of regulations on big businesses as well as small businesses. Finally, the Administration argued against requiring agencies to consider "indirect" effects in determining whether a rule would have a significant impact on a substantial number of small entities.[129]

At the end of brief hearings, the chairpersons of the House Judiciary and House Small Business Committees introduced new bills to serve as markup vehicles.[130] After the chairpersons met to coordinate their efforts, the two committees, largely by voice vote, approved almost identical bills, both of which moved in the direction of the Administration position.[131] The two markup vehicles deleted both the extension of regulatory analysis

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125 From Red Tape to Results: Creating a Government that Works Better & Costs Less: Improving Regulatory Systems (Accompanying Report of the National Performance Review, September 1993). See also Jeffrey S. Lubbers, Better Regulations: The National Performance Review's Regulatory Reform Recommendations, 43 Duke L J 1165, 1172 (1994)

126 See Testimony of John T. Spotila, General Counsel, United States Small Business Administration, Before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary, 104th Cong. 1st Sess. (February 3, 1995).

127 Testimony of Jere W. Glover, Chief Counsel for Advocacy, United States Small Business Administration, Before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary, 104th Cong., 1st Sess. (February 3, 1995)

128 See Testimony of John T. Spotila, General Counsel, United States Small Business Administration, Before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary, 104th Cong. 1st Sess. (February 3, 1995).

129 Statement Of Gary D. Bass, Executive Director, OMB Watch, Before The Subcommittee On Commercial And Administrative Law Of The House Judiciary Committee, 104th Cong., 1st Sess. February 16, 1995; Testimony of John T. Spotila, General Counsel, United States Small Business Administration, Before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary, 104th Cong. 1st Sess. (February 3, 1995); Statement Of David C. Vladeck, Public Citizen Litigation Group, Before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary, 104th Cong. 1st Sess. (February 3, 1995) (requiring agencies to consider indirect effects would place enormous and unwarranted burdens on agencies").

130 H.R. 926, 104th Cong., 1st Sess. (1995); H.R. 937, 104th Cong., 1st Sess. (1995). See House Rept. No. 104-48, 104th Cong., 1st Sess. (February 23, 1995).

131 See Reg Flexibility Bills Moving Quickly; Provisions Said to Enjoy Wide Support, Daily Report For Executives, February 23, 1995.

requirements to big business and the requirement that agencies consider "indirect" effects in deciding whether to prepare regulatory flexibility analyses.[132] The committees also added changes during markup to limit the scope and timing of judicial review in accordance with the Administration's wishes and to exempt monetary policy and certain banking agency regulations from the requirement that proposed regulations be submitted to SBA for comment in advance.[133]

The full House passed the revised bill on March 1, 1995, well within the 100 days promised by the Contract with America.[134] The bill that emerged, however, was different in many regards from the hard-line bill contained in the Job Creation and Wage Enhancement Act. The House retained the limitations imposed by the Judiciary and Small Business Committees, except for greatly lengthening (from 180 days to one year) the time that small businesses would have to file suit after publication of a rule.[135] The House then folded the Regulatory Flexibility Act amendments back into H.R. 9, the Job Creation and Wage Enhancement Act, so that the Republicans could claim credit for fulfilling their promise to enact that statue within 100 days.

On February 2, 1995, Senator Christopher S. Bond introduced a bill (S. 350) that would have amended the Act to allow affected parties to petition for judicial review of agency failures to prepare regulatory flexibility analyses and of the adequacy of such analyses. Senator Dole incorporated Senator Bond's Regulatory Flexibility Act changed into Dole's omnibus regulatory reform legislation (S. 343).[136] Despite the absence of serious opposition to the regulatory flexibility aspects of the Dole bill, opposition from Senate Democrats and the Administration to other aspects of the omnibus legislation ultimately killed the bill after three dramatic cloture votes in July, 1995. The regulatory flexibility reforms suffered the fate of the Dole bill for the remainder of the first session of the 104th Congress.

D. The Small Business Regulatory Fairness Act

1. Evolution in Congress.

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132 See House Judiciary Committee Approves Bill to Require Analysis of Impact of New Rules, BNA National Environment Daily, Feb. 17, 1995; House Small Business Approves Reg Flex Provisions in Markup, BNA National Environment Daily, Feb. 16, 1995; Reference to Large Firms Deleted in 'Reg Flex' Act, Wall St. J., February 17, 1995, at B2.

133 See House Rept. No. 104-48, 104th Cong., 1st Sess. (February 23, 1995); Reg Flexibility Bills Moving Quickly; Provisions Said to Enjoy Wide Support, Daily Report For Executives, February 23, 1995; House Small Business Approves Reg Flex Provisions in Markup, BNA National Environment Daily, Feb. 16, 1995.

134 See House Passes Regulatory Relief Bill Modifying Regulatory Flexibility Act, Daily Report For Executives, March 2, 1995.

135 Regulatory Flexibility Bills Moving Quickly, 24 Occupational Safety & Health Reporter, Current Report 1932 (March 1, 1995). The longer statute of limitations had been urged by the National Federation of Independent Business. See Statement of Michael O. Roush, National Federation of Independent Business, Before the Senate Committee on Governmental Affairs, 104th Cong., 1st Sess. (February 8, 1995).

136 S. 343 subdiv. IV(b), 104th Cong., 1st Sess. (1995). See Statement by Senator Bob Dole, before the Senate Committee on Government Affairs, 104th Cong., 1st Sess. (February 7, 1994).

On the last day of the White House Conference on Small Business, Senator Kit Bond introduced the Small Business Regulatory Fairness Act (S 942), a bill that went far beyond the modest changes to the Regulatory Flexibility Act that were included in HR 9 and S 343. Drawing on the Conference recommendations, S 942 would have amended the Regulatory Flexibility Act to: (1) require agencies to publish a plain English "compliance guide" for any rule requiring a regulatory flexibility analysis explaining clearly what does and does not constitute a violation,[137] require agencies to issue "no action letters" protecting small entities from prosecution for matters covered by those letters;[138] render voluntary self-audits inadmissible in civil actions against small entities;[139] provide a defense to small entities in enforcement actions if they reasonably interpreted vague or ambiguous rules;[140] create small business ombudsmen and regulatory fairness boards at SBA regional offices;[141] and amend the Equal Access to Justice Act to allow small businesses to obtain their legal expenses from the government when the court determined that the agency had taken an "unreasonable" position in litigation.[142]

After Senator Dole withdrew his bill in late July, Senator Bond's bill became the obvious vehicle in the Senate for advancing the small business regulatory reform agenda. Nevertheless, the bill got put aside in the press of other matters, and the Senate Small Business committee did not get around to holding hearings on the bill for the remainder of session.

At the beginning of the second session of the 104th Congress, Senator Bond scheduled hearings on S. 942 for February 28, 1996.[143] Two weeks prior to the hearings, Sen. Bond circulated a re-draft of S. 942 that combined the provisions of the old version with the Regulatory Flexibility Act amendments from the now-defunct Dole Bill, and a bill introduced by Sen. Domenici to set up small business advocacy review panels to facilitate small business participation in agency rulemaking prior to publication of proposed rules in the *Federal Register*.[144] At the hearings, Sen. Bond declared; "I want a bill that can pass the Senate and become law this year."[145]

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137 S. 942, § 102 104th Cong., 1st Sess. (1995).

138 S. 942, § 103 104th Cong., 1st Sess. (1995).

139 S. 942, § 104 104th Cong., 1st Sess. (1995).

140 S. 942, § 105 104th Cong., 1st Sess. (1995).

141 S. 942, § 201, 202 104th Cong., 1st Sess. (1995).

142 S. 942, §§ 301, 302 104th Cong., 1st Sess. (1995).

143 Hearings on Implementing The White House Conference On Small Business Recommendations On Regulations And Paperwork, Before the Senate Committee on Small Business, 104th Cong., 2d Sess. (February 28, 1996).

144 See Statement of Sen. Christopher S. Bond, Before the Senate Small Business Committee, 104th Cong., 2d Sess. (February 28, 1996).

145 Statement of Sen. Christopher S. Bond, Before the Senate Small Business Committee, 104th Cong., 2d Sess. (February 28, 1996).

After the hearings Senator Bond introduced an amended S. 942 as the committee markup vehicle.[146] After a brief markup session, the Senate Small Business Committee reported out the bill on March 6, 1996.[147] It appeared for a time that the bill might become sidetracked by a controversial proposal by Senator Spencer Abraham to add to it a "regulatory sunset" requirement that agencies periodically revisit existing rules,[148] Senator Abraham backed off after Democrats expressed opposition.[149] The full Senate did, however, adopt an uncontroversial favorite of Senator Nickles that was not among the recommendations of the White House Conference -- the "report-and-wait" legislative veto that the full Senate had passed the previous session.[150] After President Clinton issued a statement voicing general approval for the bill,[151] the Senate approved the bill by a vote of 100-0 on March 19, 1996.[152]

For the House, which had already passed amendments to the Regulatory Flexibility Act, the Republicans adopted a strategy of attaching regulatory reform bills almost identical to S. 942 to the bill raising the debt ceiling and some other unrelated bills, like the Line Item Veto Act and the Senior Citizens' Right to Work Act. They called this potpourri the Contract With America Advancement Act (HR 3136).[153] Since it was imperative that the debt ceiling be raised by the end of March in order to avert a crisis in the financial markets, there was little that opponents of the bill could do in the House to stop it. The bill was

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146 See Summary and Section-By-Section Analysis of S 942, the Small Business Regulatory Enforcement Fairness Act Of 1996, reprinted in BNA, Daily Report for Executives, March 7, 1996.

147 Senate Committee Reports Out Bill; Review Provisions May Be Added on Floor, BNA Daily Report For Executives, March 7, 1996.

148 See Sen. Bond's Reform Bill May Go To Floor; Republicans Strive For Unanimous Consent, BNA Daily Report For Executives, March 14, 1996; Sens. Abraham, Reid Reach Accord on Administrative Review of Rules, BNA Pensions & Benefits Daily, Mar. 11, 1996.

149 Passage Expected on Bill Addressing Regulatory Concerns of Small Businesses, BNA Daily Report For Executives, March 18, 1996.

150 See Statement By Sen. Don Nickles (R-Okla) Concerning H.R. 3136, The Small Business Regulatory Enforcement Fairness Act of 1996, reprinted in ___ Cong. Rec. S ___ (April 18, 1006). The language of the amendment to S. 942 was similar to that of S. 219, which had passed the Senate during the first session of the 104th Congress.

151 Passage Expected on Bill Addressing Regulatory Concerns of Small Businesses, BNA Daily Report For Executives, March 18, 1996. The Administration did express concerns about the amendments to the Equal Access to Justice Act and the review panels. The Administration urged that attorneys fees only be allowed if the governments original penalty demand was "unreasonable," not "disproportionate." With respect to the review panels, the Administration worried about the delays that the process could cause. Id.

152 142 Cong Rec S 2321 (1996). See Senate Passes Reg Reform For Small Businesses, Environment Reporter Current Developments, Vol. 26, No. 45; Pg. 2204, March 22, 1996.

153 The house bill also contained a the presidential line-item veto, but the Senate removed that provision and subjected it to a separate vote when Senator Byrd threatened a filibuster. Senate Plans To Bring Up Line-Item Veto As Separate Bill To Prevent Amendments, BNA Daily Report For Executives, March 26, 1996.

introduced on March 21, 1996, referred to and adopted by five committees without hearings, and passed by the House one week after introduction on March 28, 1996.[154] T

Although President Clinton was not happy with all aspects of the regulatory reform measures, he too had few alternatives. President Clinton signed the "Small Business Regulatory Fairness Act on March 29, 1996. In a public statement issued upon signing the bill, the President focused primarily upon the benefits of raising the debt ceiling and on the need to balance the budget.

2. New Protections for Small Businesses.

The enforcement provisions of the Act require agencies to write "small entity compliance guides" explaining "the actions a small entity is required to take to comply" with rules (or groups of related rules) that have a significant impact on substantial number of small entities.[155] In addition, agencies are to make it a practice to answer informal inquiries from small entities concerning compliance. In subsequent enforcement litigation, any such guidance "may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties or damages."[156]

The Act further requires the Small Business Administration to appoint an ombudsman to work with agencies and small businesspersons on compliance issues and Regional Small Business Regulatory Fairness Boards (each composed of five small businesspersons) to address and report to the ombudsman "substantiated instances of excessive enforcement actions of agencies against small business concerns."[157]

Each agency must establish a policy within one year to provide for the "reduction, and under appropriate circumstances for the waiver, of civil penalties" for violations of regulatory requirements by small entities.[158] The agency may also consider a small entity's ability to pay in determining penalty assessments.[159] The agency may condition such leniency upon compliance within a reasonable period of time or may limit the penalty reduction policy to violations disclosed during voluntary compliance audits.[160] In addition, the agency may exclude from the policy willful or criminal conduct, violations that pose serious health or environmental threats, and entities that are guilty of multiple violations.[161]

The statute also amends the Equal Access to Justice Act to allow small entities to recoup litigation expenses in administrative and civil judicial actions when the fine

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154 142 Cong Rec S 3153 (1996).

155 Pub. L. 104-121 § 212, 104th Cong., 2d Sess. (1996). The compliance guides are not subject to judicial review. Id. § 212(c).

156 Pub. L. 104-121 § 213, 104th Cong., 2d Sess. (1996). Federal agencies must make efforts to incorporate guidance from states on compliance with related state regulations. Id. § 215.

157 Pub. L. 104-121 § 222(b), (c), 104th Cong., 2d Sess. (1996).

158 Pub. L. 104-121 § 223(a), 104th Cong., 2d Sess. (1996).

159 Pub. L. 104-121 § 223(a), 104th Cong., 2d Sess. (1996).

160 Pub. L. 104-121 § 223(b)(1), (2), 104th Cong., 2d Sess. (1996).

161 Pub. L. 104-121 § 223(b)(3) - (5), 104th Cong., 2d Sess. (1996).

demanded by the agency is "substantially in excess" of the amount actually received and is "unreasonable when compared with such decision."[162]

Prior to the publication of an initial regulatory flexibility analysis, the agency must provide the chief counsel for advocacy with information on the impact of the regulation on small entities. The Chief Counsel must within 15 days identify individuals representative of the affected industries for the purpose of eliciting their advice about the rule. The agency must then convene a "review panel," composed of agency employees and representatives from OMB and the Chief Counsel, to consider the regulatory flexibility analysis and the advice of the industry representatives. The review panel must within 60 days report its findings to the agency, which may then revise the rule and the regulatory flexibility analysis accordingly prior to publishing it in the *Federal Register*.[163]

Finally, the Act amends the Regulatory Flexibility Act to clarify that the regulatory flexibility analysis requirements applied to IRS interpretative rulings,[164] add somewhat to the required contents of the final regulatory flexibility analysis, and to allow judicial review of an agency's failure to prepare a regulatory flexibility analysis and of the adequacy of final analyses.[165] The act gives affected small entities one year to challenge the failure to prepare an analysis, except where the agency's statute specifies a different period for challenging the rule.[166] The courts are empowered to order appropriate relief, including remanding the rule to the agency and "deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest."[167]

E. Brief Evaluation.

The regulatory compliance requirements are not especially troublesome from the perspective of the beneficiaries of regulation. They provide agencies with sufficient discretion to send strong messages to "bad actors" while at the same time providing some flexibility to address good faith violations in a sensible way. There is some danger that allowing agencies to waive penalties resulting from voluntary compliance audits will encourage companies to conduct frequent audits in order to shield themselves from enforcement. But the statute leaves agencies with discretion to avoid this abusive use of voluntary audits. If the ultimate goal is compliance, not maximizing citations, allowing companies to detect and cure problems under the supervision of the agency may prove very effective. The real issue is the extent to which such audits are available to beneficiaries

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162 Pub. L. 104-121 § 231, 104th Cong., 2d Sess. (1996). EPA has issued "Interim Guidance" to it regional enforcement officials to "reduce the Agency's risk of creating a cause of action in an administrative or judicial penalty action." EPA Interim Guidance on Administrative and Civil Judicial Enforcement to Accommodate Changes in the Equal Access to Justice Act, Signed May 28, reprinted in BNA Daily Report For Executives, May 30, 1996.

163 Pub. L. 104-121 § 244, 104th Cong., 2d Sess. (1996).

164 Pub. L. 104-121 § 241(a), 104th Cong., 2d Sess. (1996).

165 Pub. L. 104-121 § 242, 104th Cong., 2d Sess. (1996).

166 Pub. L. 104-121 § 242, 104th Cong., 2d Sess. (1996).

167 Pub. L. 104-121 § 242, 104th Cong., 2d Sess. (1996).

who might not trust the agencies and the regulatees to achieve compliance through voluntary means. The statute is silent on this critical issue.

The amendments to the Equal Access to Justice Act will no doubt reduce the number of occasions when agencies request that administrative tribunals and courts award the maximum civil penalties available under the law. The prospect of having to award attorneys' fees when the amount demanded is "substantially in excess" of the amount actually awarded means that agency enforcement officials will have to make an educated guess as to how lenient the judge is likely to be. The addition (at the Clinton Administration's insistence) of an additional "unreasonableness" test, however, should protect the treasury from paying litigation expenses when the agency makes a good faith prediction that turns out to be wrong. Since it is a hindsight test, the courts should also interpret the "unreasonableness" test to shield the agency when the small entity introduces evidence in the enforcement proceeding (e.g., by way of mitigation) that was not reasonably available to the agency.

The review panel procedure is very troublesome from the perspective of procedural fairness. In essence, the new statute gives selected representatives of the affected industries a unique opportunity to affect the outcome of a rulemaking initiative before the effort even sees the light of day. Representatives of beneficiary groups and large corporations, which may have a huge stake in the outcome, must wait until after the small entity representatives have had their bite of the apple in private. As a practical matter, few agencies are likely to stick up for regulatory beneficiaries in the review panel sessions. All of the pressures in this pre-publication procedure are working against protecting the people for whose benefit the statute was enacted.

Also troublesome is the role that the procedure assigns to representatives from OMB and the Chief Counsel. Although the agency theoretically remains the decisionmaker, anyone familiar with the dynamics of the "team" model of regulatory decisionmaking knows that the members of the panel will seek accommodation and compromise, if only because they must deal with each other in the future.[168] Since only one side of the regulatory debate will be represented by the outsiders at panel meetings, compromise will move only in one direction -- toward reduced stringency.

The additional pre-publication procedures will also lengthen the already lengthy process of promulgating rules. The required 60 days for the panel to deliberate is the least important aspect of the potential for delay. Since the agencies will know in advance that the regulatory flexibility analyses will be fly-specked by representatives from OMB, the Chief Counsel's office and small entities, they will feel pressure to prepare "cadillac" analyses that will take much time and money. Years of staff effort and hundreds of thousands of dollars will be spent on preparing analyses that can withstand the certain attacks.

Empowering the courts to review agency failures to prepare adequate RFAs will burden the courts with issues that are tangential to the substantive questions of statutory interpretation and record support that should be the subject of judicial challenges to agency rulemaking. It is not necessary to vest this additional power in the courts if Congress intends only to ensure that agencies carefully consider the impact of their rules on small business. Agencies have an obligation to consider the impact of their rules on affected persons, including small businesses, quite apart from the Regulatory Flexibility Act. Judicial review is available to ensure that agency rules are not "arbitrary and capricious."[169]

The Regulatory Flexibility Analysis performs two primary purposes -- (1) it should aid upper level agency decisionmakers in making difficult decisions; and (2) it should

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168 See Thomas O. McGarity, Reinventing Rationality ch. 14 (1991).

169 5 U.S.C. § 706(2)(a).

inform Congress and the public of the goals that the agency is seeking to advance, the prominent alternatives for achieving those goals, the assumptions and inferences underlying the agency's reasoning process, and the data and information available on the relevant issues. Candor is absolutely critical to these functions. Yet fear of reversal in reviewing courts would induce agencies to gloss over uncertainties and to paint a prettier picture of the selected alternative than the facts may warrant. Agencies know that intelligent lawyers can seize upon any absence of critical data and any apparent gap in the agency's reasoning process to "trash" RFAs during judicial review. Agency analysts would therefore feel pressure to state conclusions with more confidence than was warranted, to base predictions on single models that lead to predetermined results, and to stress agency "expertise" at all critical junctures. In short, Regulatory Flexibility Analyses would become advocacy documents.

This would be an unfortunate development for several reasons. First, it would cause agency staffers to depart from their traditional roles as professional assessors and analyzers of information. Second, less information about the true basis for agency decisions would reach the public. Third, the quality of judicial review would suffer, because the reviewing judges could not possibly ferret out all attempts by agency experts to "fudge" analyses of technical issues of enormous complexity.

Small business proponents should be aware of the fact that judicial review is a two-edged sword. It can be used by a small business advocate to ensure that an agency thoroughly considers the impact of the proposed rule on small companies. But it can also be used by large companies or advocates of more stringent regulation to slow down or derail agency attempts to provide the very regulatory flexibility that the statute is intended to provide.

The rulemaking process has in recent years become so ossified with procedural, analytical and substantive review requirements that it is in danger of becoming extinct.[170] Agencies are increasingly seeking alternative vehicles for imposing legal requirements on regulatees, and these efforts have sometimes reduced the visibility of the bureaucratic process of creating legally binding norms. Small business will not benefit from agency attempts to write rules in individual adjudications or in guidance documents and technical manuals.

VI. Omnibus Regulatory Reform Legislation.

The omnibus regulatory reforms promised by the Contract with America were originally introduced in the House of Representatives as H.R. 9, titles III, IV, V, VII, VIII and X of which dealt with regulatory reform. To facilitate separate committee consideration, it was broken into several different bills: H.R. 830 (paperwork reduction); H.R. 925 (property rights); H.R. 926 (OMB review, regulatory flexibility, regulatory analysis, regulatee rights); H.R. 1022 (risk assessment and cost/benefit analysis). After voting favorably on each of the separate bills, the House then voted to re-combine them into H.R. 9, which was to be called the Job Creation and Wage Enhancement Act.

Although its supporters claimed that the House had passed the Job Creation and Wage Enhancement Act in its entirety within the first 100 days of the 104th Congress, some important provisions were, in fact, abandoned and never became part of the final version of H.R. 9. For example, the ambitious proposals for a regulatory budget and a mandates budget in Titles IV and X of the original H.R. 9 did not survive. Other provisions were deprived of all substantive content in committee. For example, an

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170 See McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L. J. 1385 (1992).

exceedingly foolish title of the original bill would have entitled every target of a federal investigation to prior notice of the investigation and to have an attorney or accountant present at any interrogation. Original H.R. 9 § 8101. As the Deputy Attorney General testified to the House Judiciary Committee, this provision would have "vastly expand[ed] the rights of criminal defendants" and hamstrung the Federal Bureau of Investigation and the Drug Enforcement Administration in their investigation of criminal conduct.[171]

Another terribly unwise provision would have prohibited any agency employee from taking any action against any regulatee in retaliation for criticizing the agency. It would have allowed alleged retaliation to be a complete defense to any enforcement action and would have made federal employees personally liable for any damages caused by such retaliation.[172] According to the Deputy Attorney General, the bill would "create a flood tide of civil litigation; it will greatly expand federal judges' authority over both federal agencies and the states; and it may penalize career civil servants personally for actions they take in a good faith belief that they are required by law."[173] The House Judiciary Committee reduced this to a requirement that the President promulgate regulations to ensure that anyone connected with a federal enforcement action be "protected from abuse, reprisal, or retaliation" and be "treated fairly, equitably, and with due regard for such person's rights under the Constitution."[174]

In the Senate, the vehicle for omnibus regulatory reform legislation was S. 343, the Dole Bill. That bill grew as it evolved through the committees and through various compromises between Senate Republicans and conservative Democrats during the summer of 1995. Like H.R. 9, the Dole bill would have specified principles for agencies to use in risk assessment and in characterizing risks. Also like H.R. 9, the bill would have required agencies to engage in cost-benefit analysis in promulgating major rules.

In addition, the bill as passed by the Judiciary Committee would have subjected CERCLA cleanups to the risk assessment requirements and a cost-benefit test. Under a later version of the bill, EPA would have been obliged to re-examine its toxics release inventory and delete any toxics that did not pose a "significant risk."

The Dole bill also added a "look back" requirement that would have subjected all existing rules to re-examination under the new statutory criteria for risk assessment and cost-benefit analysis. This look back petition process was later added to H.R. 9.

Also originating in the Dole bill was a controversial "supermandate" provision under which the bill's cost benefit decision criterion expressly superseded any other statutory provision to the contrary. This provision would have repealed section 109 of the Clean Air Act, which prevents EPA from considering costs in promulgating national primary ambient air quality standards. This would also have effectively repealed most environmental statutory provisions requiring agencies to adopt a technology-based approach to standard-setting. Although the supermandate was later softened during the summer compromises in the Senate, it remained in H.R. 9 as passed by the House.

The hopes for enacting omnibus regulatory reform legislation dimmed perceptibly at the end of July, 1995. After more than three weeks of intense debate in the Senate, a vote to cut off debate failed on three separate occasions by two votes. Although the Democrats

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171 Prepared Statement of Ms. Jamie Gorelick, Deputy Attorney General, Before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary, 104th Cong., 1st Sess. (February 3, 1995).

172 Original H.R. 9 §§ 8204-05.

173 Gorelick Statement, supra.

174 H.R. 9, § 301, tit. III, § 331.

denied having filibustered the bill to death and expressed a willingness to continue to negotiate about the controversial look back and supermandate provisions, Senator Dole pulled the bill from the calendar. Numerous attempts since then by conservative Democrats to come up with a compromise bill that would be acceptable to the Republican leadership and secure the required 60 votes to invoke cloture have failed.

VII. Conclusion.

Although the 104th Congress produced little legislation of lasting significance relevant to environmental law, it will no doubt have some impact in the future. The Unfunded Mandates statute will make it much more difficult to write legislation that places affirmative obligations on states, as much existing legislation does. The report-and-wait legislative veto and the Paperwork Reduction Act and Regulatory Flexibility Act amendments have the potential to tie EPA up in even more reviews and litigation than it currently faces. But the primary impact may be the indirect message that the process of enacting the legislation sent to EPA. Hoping to head off radical reforms in the Congress, the Clinton Administration backed off of many regulatory initiatives and greatly softened others. Thus, the major legacy of the 104th Congress on environmental law may be a more conciliatory and less protective Environmental Protection Agency.

TNRCC Policies

"The Ten Commandments"

Barry McBee

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

FOR YOUR INFORMATION

CHAIRMAN BARRY R. McBEE

Barry McBee has served as chairman of the Texas Natural Resource Conservation Commission (TNRCC) since August 16, 1995.

Prior to his appointment to this post by Governor George W. Bush, Chairman McBee had served as Deputy Commissioner of the Texas Department of Agriculture under Rick Perry since January 1991.

Chairman McBee returned to Texas from Washington, D.C., where he served as Associate Director of Cabinet Affairs at the White House following his selection as a 1989-1990 White House Fellow by President George Bush.

He also served the State of Texas under the administration of Governor William P. Clements, Jr. from 1987 to 1989 as Deputy General Counsel and Chief Deputy Director of Governmental Appointments.

Chairman McBee joined Governor Clements' staff from the Dallas law firm of Thompson & Knight, where he was elected as a partner in 1986.

Chairman McBee is a 1978 graduate of the University of Oklahoma (B.A. with distinction), where he was elected as a member of Phi Beta Kappa, and a 1981 graduate of the Southern Methodist University School of Law (J.D. cum laude).

He is married and is the proud father of two sons.

AGENCY MISSION



"The Texas Natural Resource Conservation Commission strives to protect our state's precious human and natural resources consistent with sustainable economic development. Our goal is clean air, clean water and safe management of waste with an emphasis on pollution prevention. We are committed to providing efficient, prompt and courteous service to the people of Texas, ever mindful that our decision are based on common sense, good science and fiscal responsibility."

AGENCY PHILOSOPHY

To accomplish our mission, our basic guiding principles will be:

- To promote and foster voluntary compliance with environmental law
- To ensure that regulations promote flexibility in achieving environmental goals
- To ensure that regulations and decisions are rational and based on common sense, good science, and current risk factors
- To ensure that regulations are applied clearly and consistently
- To ensure meaningful public participation in the decision-making process
- To ensure that commission decisions follow the law
- To ensure strict, sure, and just enforcement when environmental laws are violated
- To ensure that unnecessary, ineffective, or redundant regulations and processes are eliminated whenever possible
- To ensure that this agency is dedicated to serving the people of Texas and to hire, develop and retain a high quality, diverse workforce

NOTES

Assessing Risk Assessment

"Weird Science"

Your Risk Assessment is a Loaded Weapon

Jim Embree, PhD, DABT

Dr. James W. Embree, DABT
Vice President
Geomatrix Consultants, Inc.

Dr. James W. Embree is the Principal Toxicologist and Discipline Leader for the Environmental Toxicology Group at Geomatrix Consultants, an environmental engineering consulting firm that employs over 200 professionals. He earned a Ph.D. in Comparative Pharmacology and Toxicology from the School of Medicine, University of California, San Francisco and an MS in water pollution ecology from the University of Washington. His undergraduate degree is in physiology and fisheries from the University of Washington. He has been a Diplomate of the American Board of Toxicology since the initial establishment of the certification process in 1980.

Dr. Embree has 26 years of experience in evaluating the potential for adverse health effects associated with chemicals in the environment. After conducting basic research and teaching toxicology as a faculty member at the University of California, San Francisco, he joined the toxicology staff of a large petroleum company, providing toxicology support to product stewardship programs and new product research and development programs. For the past 10 years he has worked as a consultant in the field of environmental and product toxicology providing technical support for regulatory compliance, environmental evaluation and toxic tort activities. He serves government, industry and the legal community. His expertise includes the general toxicology of industrial chemicals, health and ecological risk assessment of chemicals in soil, water and air from both past industrial practices (e.g., soil and water contamination) and current or proposed activities (e.g., new source permitting) and risk communication programs.

Dr. Embree is currently providing toxicology and health risk assessment support to ongoing projects in Taiwan, Mexico and Costa Rica as well as supporting the health risk assessment projects of the Geomatrix offices in Austin, Minneapolis, San Francisco and Los Angeles. Assisting industry on a national and international level to comply with the State of California Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) is an area of special expertise.

Your Risk Assessment is a Loaded Weapon

Jim Embree, Ph.D., DABT
Principal Toxicologist

GEOMATRIX

Sources of Health Risk Assessments

- Environmental Remediation
  - Remedial investigation assessments
  - Feasibility study assessments
  - Preliminary Remediation Goals
  - Preliminary Environmental Assessments
- Environmental Permitting
  - New Source Review (BAAQMD Regulation 2, Rule 5)
- Warning Compliance
  - AB 2588 - Air Toxics "Hot Spots"
  - Proposition 65

GEOMATRIX

Health Risk Assessments do not define the existence of actual health effects

GEOMATRIX

Toxicity Endpoints

- Estimates of cancer risk
- Estimates of the likelihood of non-cancer health risks

GEOMATRIX

Cancer Risk

Lifetime Cancer Probability

- Cancer potency slope defined as risk per unit dose
  - Extrapolation from high dose animal or human exposures
  - No threshold for effect
- Dose averaged over a lifetime
  - Cancer Risk = 3×10^{-5} (30 in 1 million)

Cancer Burden

- Risk times number of population exposed
  - Cancer Burden = 0.02 (less than 1 additional case)
  - Less than zero not very useful

GEOMATRIX

Cancer Data Extrapolation

Cancer Bioassays

- Tumor data from lifetime experiments

Human Epidemiology

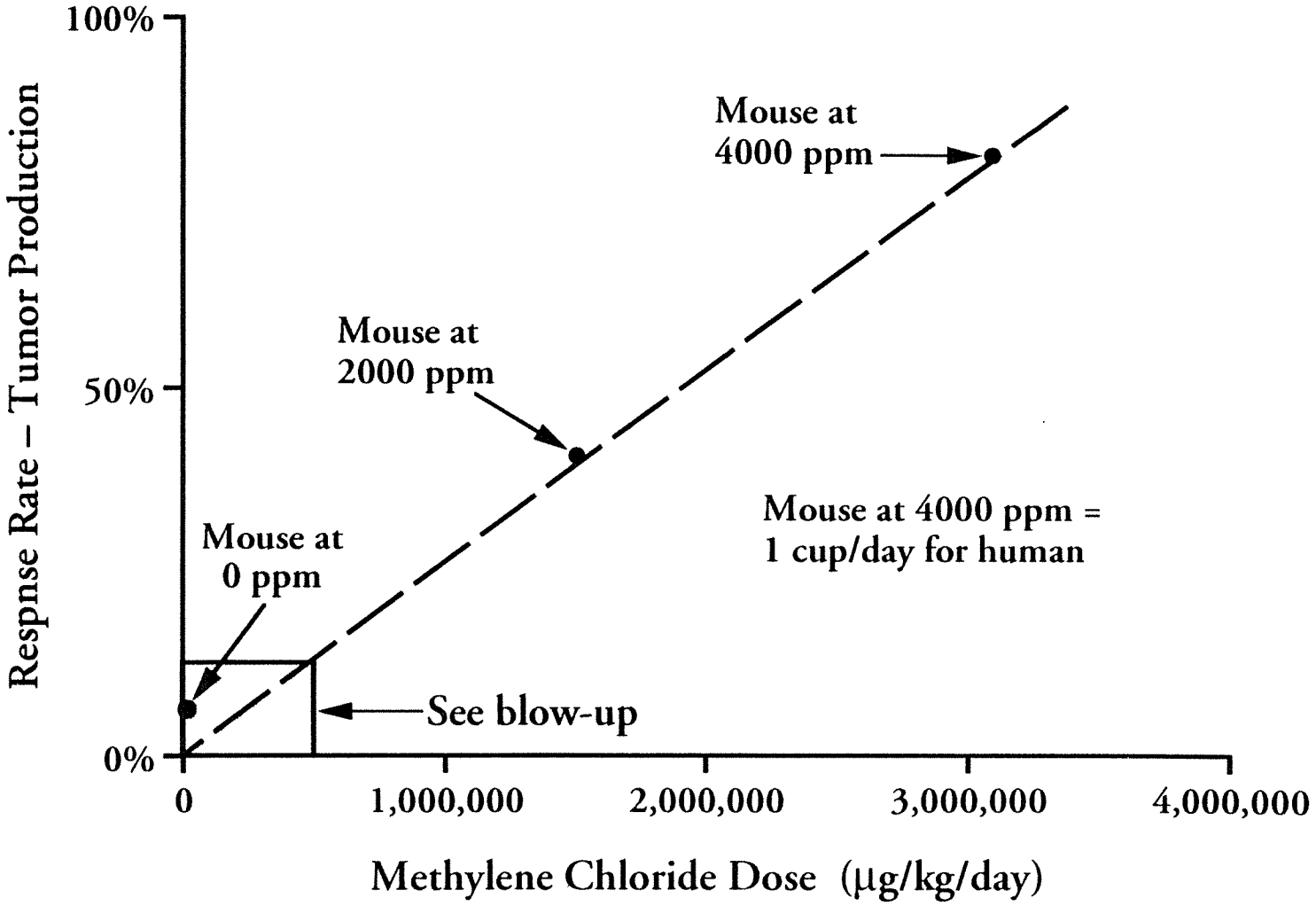
- Cancer mortality data from occupational cohort studies
- Cancer mortality data from residential populations
  - Arsenic in drinking water in Taiwan

Linear Extrapolation of Effect Assuming No Threshold

- Statistical upper-bound estimate of slope (95th percent)

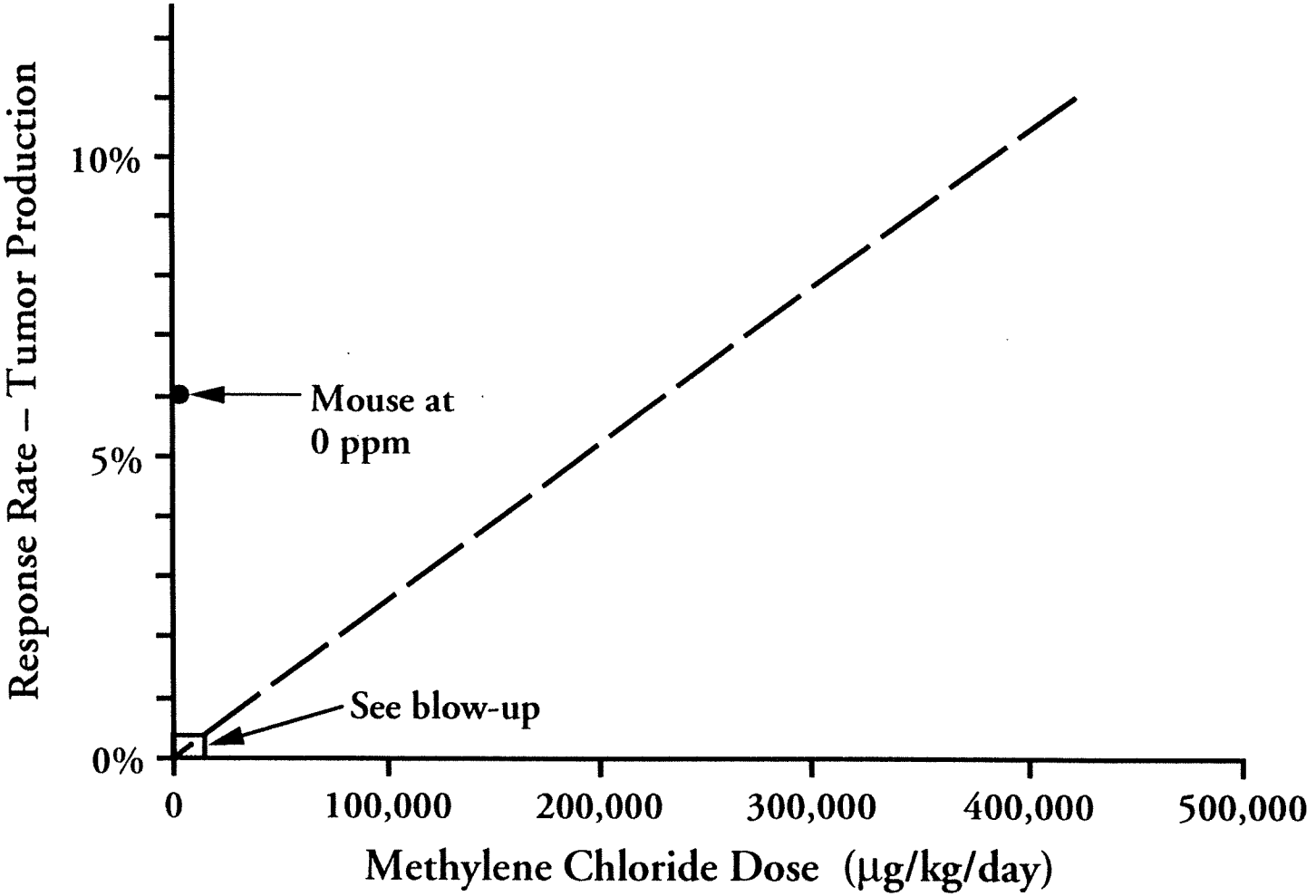
GEOMATRIX

Dose Response Extrapolation
Mouse Tumors



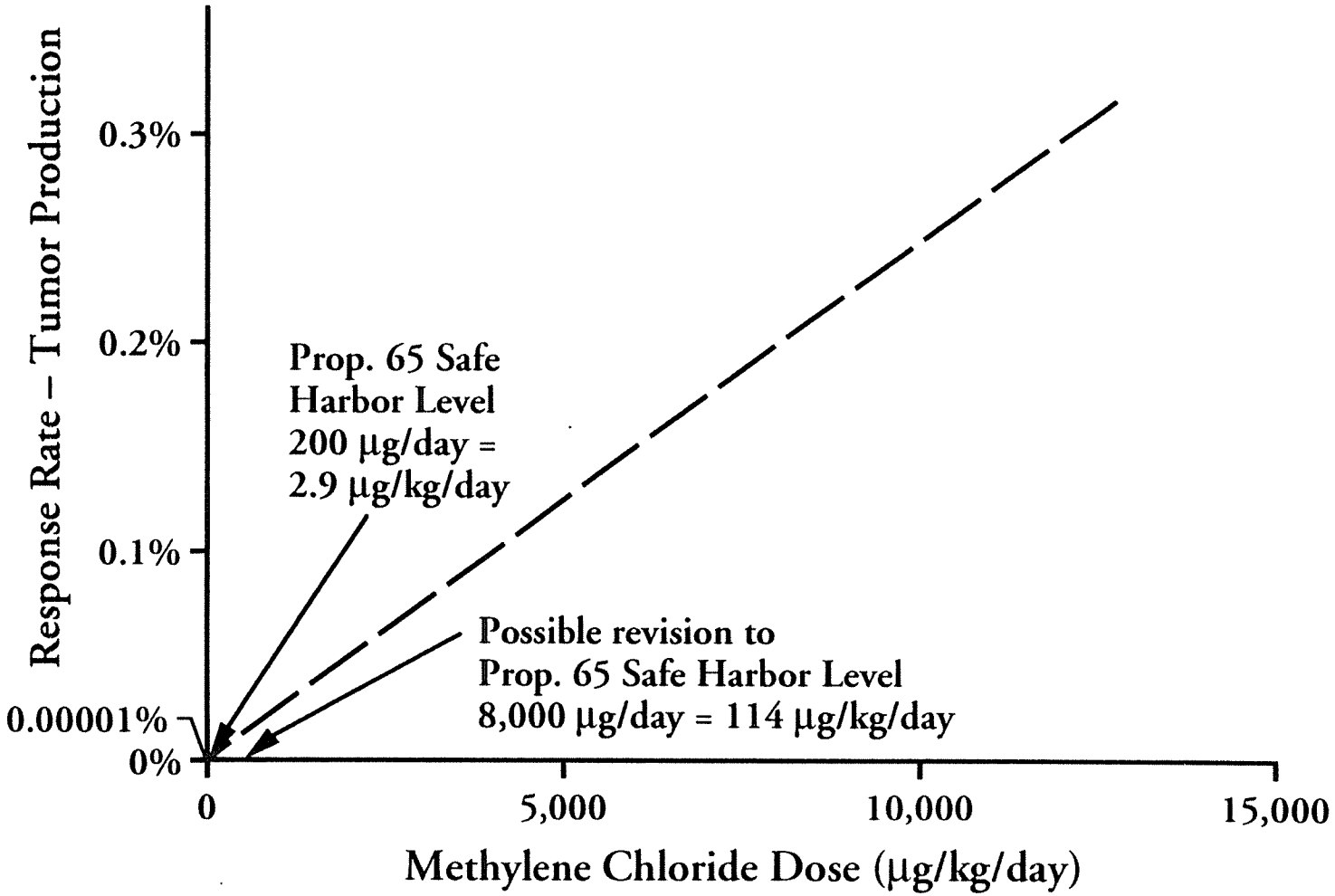
GEOMATRIX

Dose Response Extrapolation
Mouse Tumors



GEOMATRIX

Dose Response Extrapolation
Mouse Tumors



GEOMATRIX

Cancer Classification

- Current
  - Category A — Known human carcinogen
  - Category B1 — Probable human carcinogen based on human data
  - Category B2 — Probable human carcinogen based on animal data
  - Category C — Possible human carcinogen based on animal data
  - Category D — Insufficient data to classify
  - Category E — Not a human carcinogen

- Perchloroethylene (PCE) and trichloroethylene (TCE) not currently listed

GEOMATRIX

Cancer Classification

- Proposed Descriptions of Weight of Evidence
  - Known human carcinogen - High confidence
  - Likely human carcinogen - Reasonable assurance
  - Not likely - Satisfactory evidence for no concern
  - Cannot be determined

Reference: Draft Revisions to the Guidelines for Carcinogen Risk Assessment, 1994

GEOMATRIX

Cancer Classification

- Future Trends
  - Category I — Might pose a carcinogenic hazard to humans under any conditions of exposure
  - Category II — Might pose a carcinogenic hazard to humans, but only under limited conditions
  - Category III — Not likely to pose a carcinogenic hazard under any conditions
  - Category IV — No evidence of carcinogenicity

Reference: National Research Council Committee on Risk Assessment of Hazardous Pollutants, 1994

GEOMATRIX

Hazard Index

- Toxic effects other than cancer
  - Assumes a threshold exists
  - $$\text{Hazard Index} = \frac{\text{Exposure (mg/kg-day)}}{\text{Reference Dose [RfD] (mg/kg-day)}}$$
  - Hazard Index = 0.2 (no effects anticipated)

GEOMATRIX

Derivation of RfD

- Identify No Observable Effect Level (NOEL)
- Apply 10x uncertainty factors
  - Animal to human
  - Normal human to sensitive human
  - Short-term to long-term (if appropriate)
  - LOAEL to NOEL
- Divide NOEL by aggregate of uncertainty factors
- Divide NOEL by Quality of Data factor

GEOMATRIX

Prediction of Effects on Humans

Environmental Epidemiology

- Study of the effect on human health of physical, biologic, and chemical factors in the external environment
  - Knowledge of potential exposures
  - Animal data that show toxicity or carcinogenicity from such exposures
  - Estimated health risks from similar exposures
  - Studies that reveal symptomatology or disease in those exposed to similar levels
  - Leads to causal inference

GEOMATRIX

Criteria for Causal Relationships

- Strength and significance of association
- Consistency of association
- Specificity
- Temporality
- Dose-response
- Biological plausibility

GEOMATRIX

Harmonized Risk Based Cleanup

"Risky Business"

John Conner

BIOGRAPHICAL INFORMATION

Mr. John A. Connor, P.E.

Mr. Connor is President of Groundwater Services, Inc. (GSI). He received an M.S. in Civil Engineering from Stanford University and has over 16 years of professional experience in environmental engineering, with specialization in environmental site investigations, risk assessments, and corrective action design.

Mr. Connor is the principal author of the "Tier 2 Guidance Manual to Risk-Based Corrective Action" and the "RBCA State Risk Policy Issues Workbook". He also authored the "GSI User's Guide to the Texas Risk Reduction Rules." He is a contributing author for the "Groundwater Contamination: Transport and Remediation" textbook recently published by Prentice-Hall. Mr. Connor is a Certified Trainer for the ASTM RBCA Task Group, and is presently involved in the development of risk-based regulatory programs in the states of Texas, Oklahoma, Louisiana, Florida, Utah, Iowa, Michigan, Illinois, and Wisconsin.

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Overview of Revised Texas Risk Reduction Rules

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Eighth Annual Texas Environmental Superconference

August 1-2, 1996
Austin, Texas

Overview of Revised Texas Risk Reduction Rules

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1.0 INTRODUCTION

The Texas Natural Resource Conservation Commission (TNRCC) is presently undertaking an initiative to "harmonize" the separate risk-based standards of the Industrial and Hazardous Waste (IHW) and Petroleum Storage Tank (PST) Divisions. The revised Risk Reduction Rules, scheduled for proposal in January 1997, will incorporate key elements of the American Society of Testing and Materials (ASTM) "Standard for Risk-Based Corrective Action (RBCA) at Petroleum Release Sites" issued in final form in December 1995.

The revised Risk Reduction Rules will establish uniform risk management policies applicable to all sites under TNRCC jurisdiction. The new rules are intended to streamline the site assessment process and expedite site remediation/closure in a manner protective of both public health and the environment. A draft conceptual guide to the Revised Risk Reduction Rules was published by the TNRCC in May 1996. This paper reviews the current TNRCC risk management program and highlights key revisions proposed in the recent conceptual guide.

2.0 CURRENT TNRCC RISK MANAGEMENT PROGRAMS

In June 1993, the TNRCC IHW Division issued the Risk Reduction Rules (30 TAC 335 Subchapter S) in an effort to incorporate risk management principles in the assessment and remediation of environmental impacts associated with releases of solid wastes or hazardous substances. In January 1994, the TNRCC PST Division issued separate risk management guidelines for leaking petroleum storage tank (LPST) sites, closely paralleling the ASTM RBCA process.

Both programs establish risk-based cleanup standards for remediation of affected soil and groundwater. However, as indicated on Table 1, they differ significantly in terms of the requisite administrative procedures, as well as the specific concentration limits to be applied. The TNRCC Risk Reduction Rules establish three optional concentration limits for a given site, corresponding to *alternate degrees of site decontamination* (i.e., Standard 1: Cleanup to background; Standard 2: Cleanup to generic risk-based concentration limits; and Standard 3: Cleanup to site-specific limits in conjunction with long-term controls). In an effort to reduce the time and expense of LPST site closure, the PST Division RBCA guidelines are directed toward streamlining the corrective action process itself. Accordingly, the PST guidelines establish two optional procedures for development of risk-based cleanup levels at LPST sites, representing *alternate degrees of site evaluation and risk characterization* (i.e., Plan A: Generic Cleanup Levels, involving use of Look-Up Tables; or Plan B: Site-Specific Cleanup Levels, involving site-specific fate and transport modeling, etc.).

The two risk management programs have met with varying degrees of success in terms of expediting the site remediation/closure process. Under both programs, the application of site-specific, risk-based cleanup standards and flexible risk management options is viewed as the key to achieving site closure in an environmentally sound and economical manner. Although many sites have been addressed under these risk-based programs in the past few years, site-specific remediation standards (i.e., Standard 3 or Plan B) have been applied at a relatively small percentage of sites. Limited use of these potential cost-saving options can be traced to the following factors:

- *Undefined Risk Assessment Protocols*: Key parameters involved in calculation of site-specific, risk-based cleanup standards (e.g., target risk limits, applicable points of exposure, etc.) are not clearly defined under the current rules, greatly complicating the application and review process.

- *Deed Recordation Concerns*: Due to concern regarding potential impacts on site marketability, many commercial property owners have avoided those standards involving deed recordation requirements (e.g., Risk Reduction Standards 2 and 3).

- *Limited Agency Staff and Contractor Expertise*: Many environmental contractors lack experience in the more complex data analyses and modeling tasks involved in development of site-specific risk evaluations. In the absence of TNRCC pre-approved modeling and calculation protocols, this condition has contributed to costly and often poor quality applications, with uncertain outcomes following agency review.

TABLE 1. COMPARISON OF CURRENT TNRCC IHW AND PST DIVISION RISK MANAGEMENT PROGRAMS

Category	IHW Risk Reduction Rules	PST RBCA Guidelines
1) Applicability	Remedial actions for spills or releases of solid waste, hazardous substances, or other contaminants regulated under 30 TAC 335.	Remedial actions for releases from petroleum storage tanks regulated under 30 TAC 334.
2) Key Revisions to Prior Standards	Supplement prior background cleanup standards with risk-based criteria. Allow for site remedies involving long-term engineering or institutional controls.	Replace prior soil and groundwater cleanup standards with risk-based criteria. Match level of effort to relative site complexity.
3) Site Prioritization System	Not addressed.	Site classification system designed to prioritize response actions per relative magnitude and immediacy of risk.
4) Risk-Based Cleanup Goals	Three optional standards corresponding to alternate levels of site remediation: • Standard 1 - Background Levels. • Standard 2 - Generic, Risk-Based Levels (vary based on land use). • Standard 3 - Site-specific, Risk-Based Levels combined with long-term controls.	Two optional procedures for definition of cleanup goals, corresponding to alternate degrees of risk calculation effort: • Plan A: Generic, Risk-Based Levels (vary based on land use and local groundwater quality). • Plan B: Site-Specific, Risk-Based Levels.
5) Risk Management Options	Standards 1 and 2 require source removal/treatment. Use of long-term engineering and/or institutional controls allowed under Standard 3.	Use of source removal/treatment, engineering controls, and/or institutional controls allowed under Plans A or B.
6) Deed Recordation	Required for Standards 2 and 3.	Not addressed.

NOTE: TNRCC Risk Reduction Rules are codified in 30 TAC 335 Subchapter S, issued June 1993. TNRCC PST Division RBCA guidelines are outlined in the "Risk-Based Corrective Action for Leaking Storage Tank Sites", issued in January 1994, and the "Limited Site Assessment Guidance Document", issued in April 1995.

The current rule modification is intended to address these issues and establish uniform risk management policies for all divisions of the TNRCC Office of Waste Management. Toward this end, agency representatives have participated in the ASTM RBCA Training Initiative, under U.S. EPA sponsorship, to address policy issues critical to development of a cost-effective and workable risk management program. Key elements of the ASTM RBCA process and upcoming modifications to the existing TNRCC risk management programs are addressed below.

3.0 ASTM RBCA PLANNING PROCESS

Overview of RBCA

In December 1995, the American Society for Testing and Materials (ASTM) issued E-1739 "Standard Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites". The ASTM RBCA Standard is the product of a two-year effort by a task group composed of representatives from state and federal regulatory agencies, environmental consulting firms, and the banking, insurance, and oil marketing industries. The RBCA process outlines streamlined procedures for assessment and response to soil and groundwater contamination problems. As embodied in ASTM E-1739 and the accompanying guidance manual (see References 1-3), the ASTM RBCA process seeks to integrate risk assessment practices with traditional site investigation and remedy selection activities. The ultimate goal of the RBCA planning process is the closure of sites in a protective and cost-effective manner.

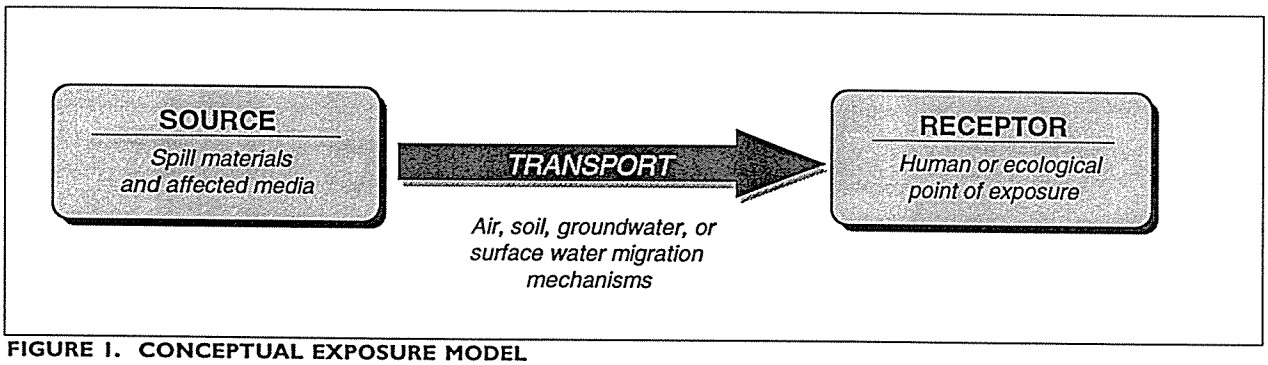

FIGURE 1. CONCEPTUAL EXPOSURE MODEL

Under this integrated approach, release sites are characterized in terms of sources, transport mechanisms, and receptors (see Figure 1). Remedial measures are then applied as needed to prevent human or environmental exposure to harmful levels of site constituents. Such risk-based corrective action can be achieved by addressing any step in the exposure process: i) removing or treating the source, ii) interrupting contaminant transport mechanisms, or iii) controlling activities at the point of exposure. Key elements of the ASTM RBCA planning process are as follows:

Site Prioritization and Immediate Response:
Under the ASTM program, sites are first classified with regard to the magnitude and immediacy of potential human health and environmental risks, and appropriate emergency response actions are implemented as needed. The goal of this preliminary classification/response step is to target available remediation resources toward those sites posing the greatest risk in the immediate future. Table 1 outlines the basic structure of the ASTM site classification system and the associated response actions.

Tiered Evaluation of Cleanup Objectives:
For the ASTM process, soil and groundwater cleanup standards are calculated as site-specific limits based upon the estimated degree of risk posed to human health or the environment. For purpose of efficiency, calculation of risk-based cleanup standards proceeds in a tiered manner designed to match the level of effort to the relative complexity of each site (see Figure 2). The tiered process begins with a direct comparison of site constituent concentrations to generic screening levels (Tier 1) and, if desired by the responsible party, proceeds to more involved, site-specific calculations under Tier 2 (simple fate-and-transport analysis). The sequential tiers serve to refine the cleanup standard evaluation, based on increasingly sophisticated levels of data collection and analysis. Upon completion of each tier, the user reviews the results and decides if further analysis is required to establish appropriate and cost-effective remediation goals.

Risk-Based Remedy Selection:
Under RBCA, remedial actions are required for all areas of affected soil and groundwater containing site constituents in excess of applicable risk-based limits. The goal of the remedial action program is to reduce the potential for human or ecological exposure to these constituents at levels causing harmful effects. This can be achieved by either removing or treating the source materials; controlling contaminant migration pathways; interrupting possible exposure routes; or some combination thereof. Flexibility in the development of risk-based remedial action strategies is considered central to the overall efficiency and economy of the risk management program.

Detailed information on the ASTM RBCA process can be found in the publications listed at the end of this paper (ASTM, 1995; Connor et al, 1995; DeVaull et al, 1996).

TABLE 2. ASTM RBCA SITE CLASSIFICATIONS AND RESPONSE ACTIONS

CURRENT HAZARD	SITE CLASSIFICATION		INITIAL RESPONSE ACTION
ACUTE	• Class 1: Immediate Threat	⇨	Abate Release
CHRONIC	• Class 2: Near-Term Threat (0-2 years)	⇨	Monitor/Remediate
	• Class 3: Future Threat (>2 years)	⇨	Monitor/Investigate
AESTHETIC	• Class 4: No Current Demonstrable Risk	⇨	Monitor Only

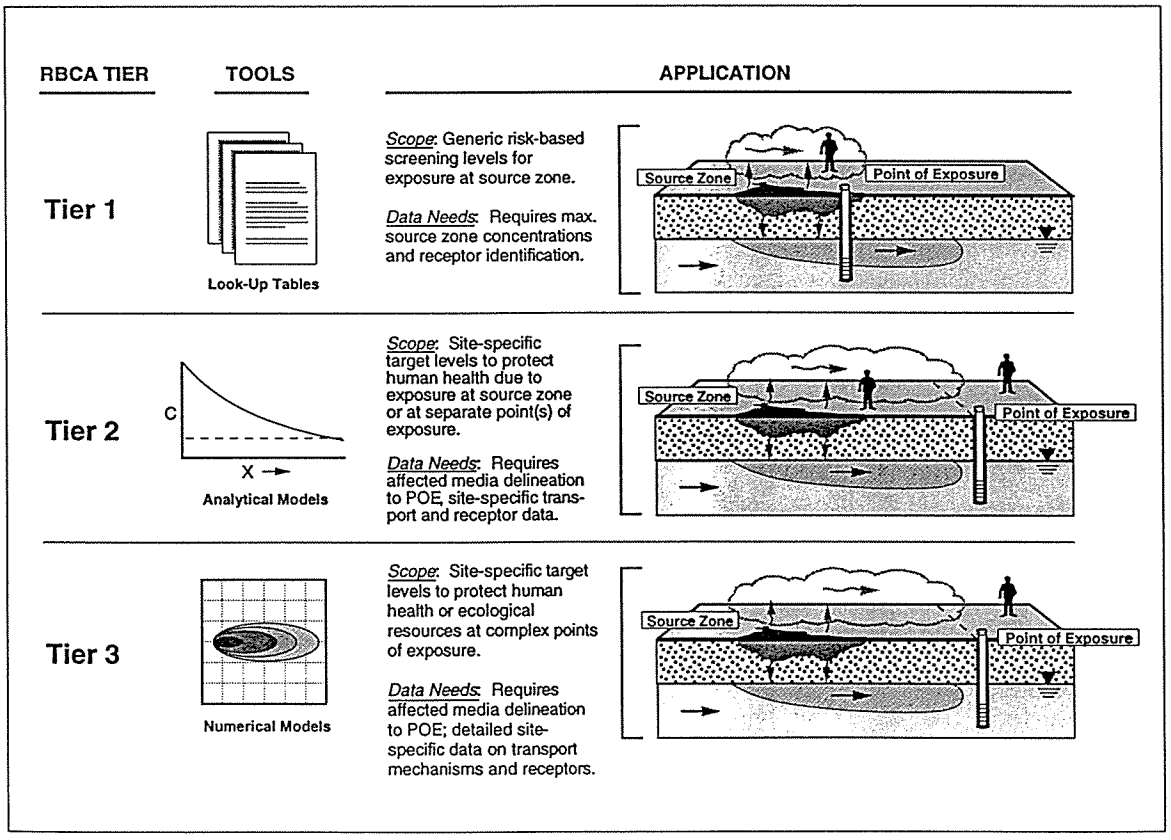

FIGURE 2. OVERVIEW OF ASTM TIERED PROCESS FOR CLEANUP GOAL CALCULATION

ASTM RBCA Training Initiative

Under U.S. EPA sponsorship, over 40 state environmental agencies are presently participating in the ASTM RBCA Training Initiative, designed to facilitate the development of state-specific RBCA programs. Following staff training in risk assessment fundamentals, each agency must customize the RBCA process as needed to address local environmental concerns and legal /regulatory constraints. Key policy issues that must be addressed in the RBCA program development effort are identified in the "RBCA State Risk Policy Issues Workbook" (Connor et al, 1995a). To assist in program implementation, the ASTM RBCA Task Group has also sponsored development of Tier 1 and Tier 2 RBCA guidance documents and software systems designed to streamline the site evaluation process (DeVaull et al, 1995; Connor et al, 1995b).

As of February 1996, sixteen states were in the implementation phase of the RBCA program development process, with an additional twenty-four states undergoing preliminary staff training. Contractor training programs are also underway for those states presently implementing RBCA regulations.

4.0 PROPOSED MODIFICATIONS TO TNRCC RISK MANAGEMENT PROGRAMS

As part of the on-going TNRCC "harmonization" effort, specific elements of the ASTM RBCA planning process will be incorporated into the revised Risk Reduction Rules. To develop this revised rules package, the agency has to initiated an extensive outreach effort, soliciting public comment and input. The draft guidance document issued in May 1996 will be reissued in September incorporating the agency's response to public comments. Draft rules should be issued by January 1997.

Based on the author's current understanding, key modifications to the existing risk management policies of the IHW and PST Divisions are itemized on Table 3 and discussed briefly below. Please note that this information is preliminary in nature and is subject to change as the rule-making and public comment period proceeds. Nevertheless, this discussion should provide a sense of the general direction of the upcoming rule revisions.

Key Revisions to Existing Risk Reduction Rules

In an effort to clarify and streamline the site evaluation and remediation process, the following modifications to the current TNRCC Risk Reduction Rules are presently under consideration:

1) ***Risk Management Options***: Under the revised rules, corrective actions will be required only for those affected media found to contain site constituents at concentrations exceeding applicable risk-based limits (i.e., Tier 1 Protective Concentration Levels). For sites requiring remedial action, the responsible person may choose to implement either a "pollution cleanup" or "exposure control" remedy, as needed to protect public health and the environment. Accordingly, the responsible person, in cooperation with the land owner, may choose among removal/treatment, containment, and institutional control measures in developing a risk management plan for the affected site. Under the revised rules, these optional site cleanup or control strategies are characterized as "remedy standards", which prescribe the relative degree of land use restriction and post-closure care efforts to be applied.

2) ***Site Classification Scheme***: To better allocate staff resources toward those sites posing the greatest risks in the near future, the basic framework of the ASTM RBCA site classification system (see Table 2) may be adopted as an "immediacy rating" for response actions. The separate divisions of the TNRCC Office of Waste Management will issue division-specific guidelines regarding site classification procedures and associated response requirements.

3) ***Remedy Standards***: Applicable cleanup standards and associated remedial action plans will depend on the type of land use to be restored for the impacted area. Under the revised rules, three optional remedy standards (see Figure 3) involving varying degrees of on-site land use restrictions, may be considered:

   - **Type A**: Unrestricted Land Use / Permanent Remedies
   - **Type B**: Restricted Land Use / Remedy with Controls

- **Type C**: No Active Land Use / Remedy with Controls

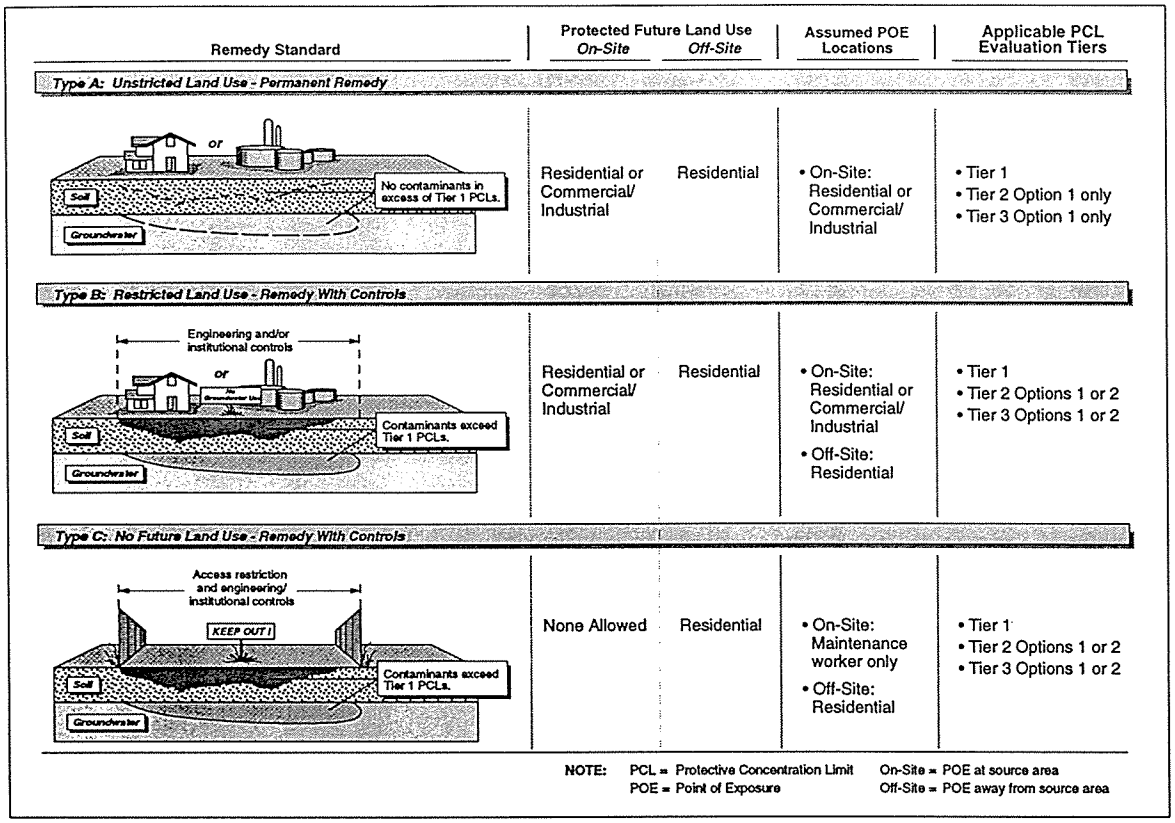

FIGURE 3. COMPARISON OF REMEDY STANDARDS AND ASSOCIATED PCL CALCULATION CRITERIA

Each of these remedy standards is protective of unrestricted land use on surrounding *off-site* properties. However, the degree of land use flexibility to be restored *on-site* will dictate the degree of land use flexibility and/or post-closure care requirements that will apply. For example, to restore conditions suitable for unrestricted on-site land use (either residential or commercial), a Type A remedy standard, involving use of a permanent remedy, will be required to reduce constituent concentrations to applicable risk-based limits in *all* affected media. If moderate land use restrictions are acceptable (e.g., on-site groundwater use prohibition), a Type B remedy may be selected, allowing on-site constituent concentrations to exceed relevant risk-based limits subject to long-term control measures. Under a Type C remedy, no active on-site land use is restored; rather, the remedial action plan is directed toward protection of off-site land use only.

The selected remedy standard serves as a template for the evaluation of necessary remedial measures. Each standard dictates: i) the applicable exposure assumptions used in development of risk-based concentration limits, ii) the response objectives to be achieved by the remedial action program, and iii) the post-closure care measures to be maintained at the site.

4) ***Risk-Based Cleanup Standards***: The current cleanup standard options (e.g., Standards 1-3; Plans A & B) will be replaced with a three-tiered system comparable to the ASTM RBCA process (see Figure 2). The Tier 1 Look-Up Table (i.e., Standard 2 MSC values, Plan A Limits) will be expanded to incorporate roughly 200 chemicals. Procedures for Tier 1 and Tier 2 site evaluations (i.e., pre-approved calculation procedures, report forms, etc.) will be prescribed by the TNRCC in order to streamline the application and review effort. Remediation to background (per former standard 1) will no longer be required in any case.

5) ***Target Risk Limits***: The target risk range allowed under the current rules (i.e., cumulative carcinogenic risk of 1.0E-6 to 1.0E-4) will be replaced with individual constituent values consistent with median regulatory limits (i.e., carcinogen risk limit: 1.0E-5, hazard quotient: 0.2). Drinking water Maximum Contaminant Levels (MCLs) will apply to those waters meeting the definition of Class 1 or Class 2 groundwater.

6) ***Response Objectives***: The adequacy of proposed remedial measures will be evaluated on the basis of performance standards known as *response objectives*. The responsible person will no longer be required to submit a corrective measure study showing the selected remedy to be the most cost-effective option. Rather, the proposed remedial action plan must be shown to achieve the response objectives of the selected remedy standard, such as i) for Type A remedies, permanent removal/treatment of site constituents exceeding relevant risk-based limits, ii) for Type B and C remedies, removal/treatment or long-term control of site constituents so as to prevent unsafe exposure, and iii) adequate restoration of water quality for Class 1 or Class 2 groundwater resources.

7) ***Groundwater Classification***: The proposed rules refine the definition of usable groundwater based upon the following classification system for water-bearing units:

Groundwater Class	TDS (mg/L)		Well Yield
Class 1: Primary Resource	< 3000	and	≥ 100 gpm
Class 2: Potential Resource	≥ 3000	and	≥ 150 gpd
Class 3: Non-Potential Resource	≥ 10,000	or	< 150 gpd

Response objectives differ significantly for the three groundwater classes. In a Class 1 water-bearing unit, constituent concentrations must be reduced to applicable Tier 1 limits throughout the full plume area. For a Class 2 unit, a groundwater use restriction may be applied on-site and remedial measures directed toward protection of potential off-site groundwater users. Class 3 groundwater is considered unsuitable for human consumption, and, therefore, drinking water standards do not apply.

8) ***Notification Requirements***: The responsible person may be required to provide notice to affected landowners under three circumstances: i) exceedance of Tier 1 concentration limits in off-site soil or groundwater, ii) exceedance of Tier 1 concentration limits on on-site leased property, or iii) proposal of a remedial action plan that may reduce the land use flexibility of the impacted property (e.g., impose industrial use restriction on current residential property or impose Type C (no use) restriction on currently active property). Notification of a Tier 1 exceedance on land not owned by the responsible person is to be completed within 30 days of confirmation of such impacts.

Anticipated Impacts of Revised Rules

The goal of the upcoming revision to the Risk Reduction Rules is to establish cleanup standards that are protective of public health and the environment, while streamlining the site evaluation process and ultimately reducing the cost of site remediation and closure. The final form of this revised risk management system will reflect the input of key stakeholders, including the agency, the general public, and affected industries.

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BIOGRAPHICAL INFORMATION

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Mr. Connor is President of Groundwater Services, Inc. (GSI). He received an M.S. in Civil Engineering from Stanford University and has over 16 years of professional experience in environmental engineering, with specialization in environmental site investigations, risk assessments, and corrective action design.

Mr. Connor is the principal author of the "Tier 2 Guidance Manual to Risk-Based Corrective Action" and the "RBCA State Risk Policy Issues Workbook". He also authored the "GSI User's Guide to the Texas Risk Reduction Rules." He is a contributing author for the "Groundwater Contamination: Transport and Remediation" textbook recently published by Prentice-Hall. Mr. Connor is a Certified Trainer for the ASTM RBCA Task Group, and is presently involved in the development of risk-based regulatory programs in the states of Texas, Oklahoma, Louisiana, Florida, Utah, Iowa, Michigan, Illinois, and Wisconsin.

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CHARLES EPPERSON

Charles Epperson is the manager of the Voluntary Cleanup Section in the Pollution Cleanup Division of the Texas Natural Resource Conservation Commission. He manages voluntary cleanup project managers and administrative staff who oversee the cleanup of more than 210 sites in Texas. Prior to his current duties, Charles has worked for the Texas Natural Resource Conservation Commission and its predecessor agencies for ten years, as a field investigator in the Tyler and San Antonio regional offices, as a remedial project manager and unit manager in the Superfund program, and as a unit manager in the Superfund Investigation Section .

Charles participated in the writing of the Texas Voluntary Cleanup Program law (HB 2296), the Texas Voluntary Cleanup Program rules (30 Texas Administrative Code Chapter 333), and the technical "Guidance for Initiating and Reporting Response Actions Conducted Under the TNRCC VCP". He has lectured extensively on administrative and technical issues regarding the Texas Risk Reduction rules and the Texas Voluntary Cleanup Program.

He is a member of the Association of State and Territorial Solid Waste Management Officials Voluntary Cleanup Task Force.

He earned his B.S.and M.S. in Biology from Southwest Texas State University.

The Texas Voluntary Cleanup Program

1. Purpose

The primary purpose of the Voluntary Cleanup Program (VCP) is to provide incentives to encourage the cleanup of contaminated sites in Texas by removing liability of future land owners and lenders and to provide a process by which voluntary response actions can be completed in a timely manner. The statutory basis for the program is found in House Bill (HB) 2296, 74th Legislature, which establishes the existence of the VCP in Subchapter S of the Solid Waste Disposal Act (SWDA), Chapter 361, Health and Safety Code. The statute allows the VCP to recover all reasonable costs expended in the review and oversight of projects within the program. The voluntary cleanup rules are located in 30 Texas Administrative Code (TAC) Chapter 333 which expands on many sections of the law by providing definitions and clarifying certain statutory provisions.

A site is eligible for the VCP if the cleanup is not subject to a commission permit or order and is not under the jurisdiction of the Texas Railroad Commission. Subject to a permit includes any facility operating under interim status. All other facilities are eligible to enter the VCP.

2. A Solution for "Brownfields"

Prior to the effective date of the VCP, September 1, 1995, no mechanism at the TNRCC existed to fund and ensure timely review of the growing number of site remediations in Texas driven by real estate transactions. Most cleanup programs have been tasked with reviewing and approving site remediations on a worst case first priority. At the same time, the number of unremediated contaminated properties in Texas and in the United States were growing at an alarming rate due to the prospective purchasers concerns for future liability. This fear of liability has left thousands of sites in Texas contaminated resulting in reduced property values, an inability to sell the property, and often abandonment. Many communities and industrial areas in Texas have suffered from an out-migration of companies and residents to undeveloped, suburban properties ("greenfields"). Developers have determined that it is more cost-effective to build business or housing infrastructures at pristine "greenfields" rather than clean up available industrial, commercial, or residential contaminated properties. These properties are commonly referred to nationally as "brownfields". The lack of interest in clean up and redevelopment of "brownfields" results in erosion of the local tax base, leaving local governments with scarce economic resources to cope with the rising costs of education, crime prevention, and reinvestment in the affected communities to attract new jobs and businesses. The liability release provided through the Texas VCP allows owners of "brownfields" sites to attract prospective purchasers who may consider viable redevelopment potential for these sites.

3. VCP Cleanup Incentives

With the establishment of the Texas VCP, once a site response action is completed, any person who is not a responsible party is released from all liability to the state for cleanup of areas of the site covered by the certificate of completion. Also, the TNRCC will not initiate an enforcement action against persons complying with their agreement to perform response actions under the VCP. These distinctive attributes, along with providing an administrative and technical process which allows the completion of voluntary response actions in a timely manner; businesses, lending institutions, and developers are given significant incentives to voluntarily cleanup properties which would otherwise remain contaminated.

4. VCP/Environmental Protection Agency (EPA) Memorandum of Agreement

Some businesses, lenders, and developers may feel reluctant to cleanup and redevelop sites because of federal liability concerns about a site under CERCLA (Comprehensive Environmental Response and Compensation Liability Act) or fear of federal enforcement actions under RCRA (Resource Conservation Recovery Act). To address these concerns, EPA Region 6 and the TNRCC negotiated a Memorandum of Agreement (MOA) for the purposes of endorsing the VCP and defining the roles and responsibilities of Region 6 and TNRCC with respect to activities conducted under the authority of the VCP. The MOA was signed by TNRCC Chairman Barry McBee and EPA Region 6 Administrator Jane Saginaw on May 1, 1996 at the former Roach Paint voluntary cleanup site in Dallas.

For sites with ongoing investigation or remediation, or have been completed through the VCP, EPA will not plan or anticipate any federal action under CERCLA or RCRA for that part of the site. EPA will also suspend further action or take no action at sites being investigated or remediated under the VCP. However, EPA reserves the right to initiate actions at VCP sites if an applicant fails to complete necessary cleanup, the TNRCC is unable to ensure completion of response actions, or an emergency situation arises that would require federal intervention.

Other strategic goals of the MOA are to promote appropriate investigations and cleanups by groups/individuals participating in the VCP; develop partnerships between Region 6, the TNRCC, other State and local governmental agencies, and external stakeholders in Texas; provide necessary information to property owners, prospective purchasers, lenders, public and private developers, citizens, municipalities, counties, and elected officials to allow for informed decision-making; provide public involvement activities to ensure the affected public is informed of response actions related to the VCP; promote mitigation of exposure to contaminated media cost-effectively, consistent with projected future uses at the sites and applicable federal and state law; and to promote response action objectives when approving mitigation measures for these sites. To accomplish these goals, Region 6 will help and support the TNRCC in further developing and expanding the use of the VCP. In turn, the TNRCC will assist and support efforts to promote and implement the Region 6 Brownfields Initiative. Also, the VCP has received funding from EPA to develop a Brownfields site assessment program and determine the effect of the VCP on Brownfields issues across Texas.

5. VCP Administrative Process

The VCP has a formal administrative process that all applicants must complete in order to participate and receive the full benefits of the program. The administrative process requires the submittal of an **Application,** the signing of a **VCP Agreement**, and the issuance by the TNRCC of a **Certificate of Completion (COC)**. An understanding of the administrative process and familiarity with these documents is essential in order to ensure that response actions are completed in a timely and efficient manner.

5.1 The Application

Information provided in the application is necessary to determine the applicant's VCP eligibility and to provide information on current site conditions. The application consists of an application package consisting of an **application form**, an **environmental site assessment**, and an **application fee** of $1,000. The application package should be submitted to the TNRCC Cashier, at the address indicated on the application form. The TNRCC will process the application package within 45 days of application receipt. The TNRCC will not initiate an enforcement action at the site during the application package review period.

If a person who is not a responsible party plans to purchase the property before the COC is issued, then the person must be either the sole applicant or a co-applicant to receive the liability release. A person who is not a responsible party under §361.271 or §361.275(g), SWDA at the time of application, is qualified to obtain the protection from liability provided by §361.610, Subchapter S, SWDA, upon issuance of a COC (see Health and Safety Code, Chapter 361, Section 361.610).

An important portion of the application form is the description of previous contacts with any state or federal regulatory program concerning the site. Examples of information needed to determine site eligibility include any order, notice of violations or permits related to the site, or any other past activity which could jeopardize participation in the VCP. Additionally, it is important to provide any Solid Waste Registration, U.S. Environmental Protection Agency ID, Leaking Petroleum Storage Tank (PST), and CERCLIS numbers associated with the site.

The Environmental Site Assessment:

A copy of all environmental site assessment(s) (Phase I, Phase II, etc.) conducted up to the application date should be submitted with the completed application. The assessment(s) should be of sufficient detail to fulfill the statutory requirements of Chapter 361.604 (c)(1)-(5). At a minimum, the document(s) should identify all areas of known or suspected contamination that will be addressed by the voluntary cleanup application and agreement. Specifically, the environmental site assessment(s) should include but is not limited to the following items:

1. a legal description of the site;
2. a description of the physical characteristics of the site;
3. a discussion of the operational history of the site to the extent the history

is known by the applicant;

4. information of which the applicant is aware concerning the nature and extent of any relevant contamination or release at the site and immediately contiguous to the site, or wherever the contamination came to be located; and
5. relevant information of which the applicant is aware concerning the potential for human exposure to contamination at the site.

The Application Fee:

Since the intent of the voluntary cleanup statute was to form a self-supporting program, all costs associated with review and oversight of voluntary cleanup projects must be recovered by the VCP. The application fee is $1,000. The fee should be paid by check and submitted directly to the TNRCC Cashier's Office with the entire application package. The application fee will be drawn upon to cover the initial TNRCC oversight costs. If the oversight costs extend over $1,000 the applicant will be billed by the TNRCC on a quarterly basis. For FY96 the hourly rate is $60.80/hour. The VCP is required by statute to update this rate on an annual basis. The FY97 rate will be published by early September, 1996.

Rejection of an Application:

If the application is rejected because of incomplete or inaccurate information, the TNRCC will provide the applicant with a list of information necessary to make it complete or accurate. An applicant may then resubmit an application without submitting an additional application fee. An application may also be rejected for the following reasons: enforcement concerning site remediation is pending; a federal grant requires an enforcement action; response actions were initiated prior to signing of a VCP agreement; all costs recoverable by the state have not been paid in full for a state superfund site; or the site is deemed ineligible as it is subject to a permit or order. The TNRCC will refund half the application fee if the application is rejected.

5.2 The VCP Agreement

The VCP Agreement is a non-binding agreement that sets forth the terms and conditions of the evaluation of the work plans and reports. After acceptance into the VCP, the applicant is contacted and agreement negotiations begin. Once all terms of the agreement are agreed upon by both the applicant and the TNRCC, the applicant complete and signs the form, and submits the agreement for signature by the TNRCC. In order to expedite the review of work plans and reports, the agreement may be submitted with the application. The applicant should fill out the agreement to the best of their ability, sign the agreement, and allow the TNRCC to insert certain information and make revisions as needed to the agreement (with the applicants concurrence). However, if numerous or significant revisions are required, the applicant may be requested to

replace it with a new agreement. Once the agreement is signed by both parties, the assigned project manager may begin reviewing and commenting on any work plan and report submittals. The applicant or the TNRCC may withdraw from the agreement at any time, as long as at least 15 days advance written notice is provided.

The VCP Agreement is a form agreement that is used for every site entering into the VCP. The VCP will not negotiate a site specific agreement which modifies the main body of the document. However, the TNRCC may consider any comments and recommendations on the main body of the agreement that will make it an improved document for all sites. The parts of the agreement which are primarily negotiable are the "blanks" of the document. For the first two pages of the document the appropriate information concerning the site must be inserted. This information consists of the applicant's name, the site name, the VCP number, the TNRCC project manager's name, and the contact name and address of the person(s) to receive all future correspondence. The appropriate information can be obtained from the TNRCC project manager assigned to the site. The third page consists of the portions of the agreement which are negotiable and involve the following sections:

1. The applicable statutes and rules;
2. The work plans and reports which are to be submitted for review;
3. A schedule for submitting the work plans and reports; and
4. The technical standards to be applied while reviewing the work plans and reports (residential or non-residential).

The two major items which are agreed to in the body of the agreement are:

1. The applicant agrees to pay all TNRCC oversight costs; and
2. The TNRCC agrees to not initiate any enforcement action regarding the contamination being addressed under the agreement.

It is important that the applicant and the TNRCC project manager communicate and have a clear understanding of the cleanup goals to be achieved at the site and what actions are required for those cleanup goals to be achieved while negotiating the agreement. This communication and understanding will enable the cleanup of the site and the issuance of the COC to be attained in a timely and efficient manner.

A copy of the signed VCP agreement will be issued to the applicant once signed by the TNRCC. If the applicant would like to have an original copy of the agreement, then two originals should be submitted to the TNRCC for signature. A signed original agreement will then be mailed back to the applicant.

5.3 The Certificate of Completion (COC):

The COC is issued by the TNRCC once all terms of the agreement have been fulfilled and the contaminated media meets the applicable remediation requirements. The COC states that all plans and reports have been submitted and approved per the signed agreement, indicates the appropriate future land use of the site (residential or non-residential), and acknowledges the liability protection to all future owners and lenders who were not responsible parties previous to the date of the COC. A legal survey description is attached to the COC and the COC is placed on the deed record of the property.

Two types of certificates may be issued for a site, a Final or a Conditional COC. A Final COC is issued when all cleanup goals are achieved at the site and no further action is required. For example, a Final COC would be issued once a Risk Reduction Standard No. 1, a Risk Reduction Standard 2, or a PST Plan A remediation is completed. A Conditional COC will be issued once a Risk Reduction Standard No. 3, or a PST Plan B response action which uses engineering controls, remediation systems, or post-closure care, and/or non-permanent institutional controls is proven to be satisfactorily maintained. A Conditional COC would require that operation and maintenance of the engineering controls be maintained and be protective of the appropriate future land use, per an approved plan. If the control measures or remediation systems are discontinued without TNRCC permission, the land use of the site will be considered as having been changed to one resulting in increased risk to human health or the environment. Should this situation occur, the liability release to the state will no longer apply to the person causing the land use change. The responsible person may then be subject to possible future enforcement action. It is important to note that in this situation, the release of liability would remain in effect for those previous owners who were not otherwise responsible parties.

A COC must be filed into the site deed record prior to a sale or transfer of the property, but not later than 60 days from the date of issuance of the COC. The applicant has the choice of having the TNRCC place the COC into the deed record or placing the COC into the deed record themselves. In most cases the applicant has chosen to place the COC into the deed record themselves in order to minimize time delays in completing a property transaction. Proof that the COC has been filed into the appropriate county records must be submitted to the TNRCC. This is usually demonstrated by providing a copy of the COC which has been stamped by the county clerk.

Persons released from liability include all future owners and lenders who are not responsible parties prior to the issuance of the COC and applicants who are not responsible parties on the date of application. The liability release is voided in cases where the COC was acquired by fraud, misrepresentation, or knowing failure to disclose material information. Additionally, a liability release does not apply if a person changes land use from the use specified in the COC to a use which may result in increased risks to human health or the environment. For example, if the COC states the future land use is non-residential and a new owner changes to a residential land use, future owners will not be released from liability and also may be subject to future enforcement

action.

6. Deed Certification

In the VCP, the filing of the COC into the deed record satisfies the deed recordation requirements of 30TAC Chapter 334 (PST Rules) and 30TAC Chapter 335 (Industrial and Hazardous Waste Rules). For off-site areas which are addressed under the VCP, the applicant may obtain a COC for those areas, as long as all media within the area meet the response action objectives. If the certificate is not desired for the off-site areas, the appropriate deed certification requirements must be met. Deed certification on off-site property is not required when the response action obtains residential health-based levels and does not rely upon any type of legal or institutional control.

7. Technical Issues

7.1 Important Definitions

Response action - Means the cleanup or removal of a hazardous substance or contaminant from the environment, excluding a waste, pollutant, or substance regulated by or that results from an activity under the jurisdiction of the Railroad Commission of Texas under Chapter 91 or 141, Natural Resources Code, or Chapter 27, Water Code.

Partial response action - A response action which is limited to an areal portion of the site and off-site areas, if any, contaminated due to releases which have migrated from the partial response action area onto property owned or controlled by others, inclusive of all media.

Partial response action area - The area of the site and off-site within which the partial response action will be conducted in accordance with a plan approved by the Executive Director.

Response action objectives - The goals of the response actions, which may include both qualitative and quantitative goals.

7.2 Investigation Requirements

STATUTE

After signing a voluntary cleanup agreement, the person shall prepare and submit the appropriate work plans and reports to the Executive Director. The Executive Director shall review and evaluate the work plans and reports for accuracy, quality, and completeness. The Executive Director may approve a voluntary cleanup work plan or report or, if a work plan or report is not approved, notify the person concerning additional information or commitments needed to obtain approval. At any time during the evaluation of a work plan or report, the Executive Director may request the person to submit

additional or corrected information.

RULE

Voluntary cleanup work plans and reports shall include an investigation of the full nature and extent of contamination in all media unless the person demonstrates to the satisfaction of the Executive Director that site conditions warrant a focused investigation. This may be demonstrated with an exposure assessment model. The exposure assessment model shall examine all currently discovered and reasonably anticipated future exposure pathways for all contaminants and media of concern. The aforementioned requirements apply to a partial response action when a contaminant release originating from a partial response action area has migrated onto property owned or controlled by others.

7.3 Remediation Requirements

The Voluntary Cleanup Program (VCP) does not have its own technical standards for remediation but instead relies upon existing technical standards such as the Risk Reduction Rules or Petroleum Storage Tank Rules. As discussed earlier, the agreement lists the appropriate technical standards based upon site history and contaminants. The rules which are applicable based upon this information will be used to set forth the remediation requirements and to assess the adequacy of any response actions.

STATUTE

After considering future land use, the Executive Director may approve work plans and reports submitted under this section that do not require removal or remedy of all discharges, releases, and threatened releases at a site if the partial response actions for the property:

a. will be completed in a manner that protects human health and the environment;
b. will not cause, contribute, or exacerbate discharges, releases, or threatened releases that are not required to be removed or remedied under the work plan; and
c. will not interfere with or substantially increase the cost of response actions to address the remaining discharges, releases, or threatened releases.

RULE

Excepting areal limitations with partial response actions, all media which exceed the health-based and environmental cleanup levels shall be addressed through the appropriate response action and in accordance with the appropriate technical standards based upon the site characteristics and site contaminants. These requirements apply to all voluntary cleanup response actions with the following exceptions:

a. when a person demonstrates to the satisfaction of the Executive Director that the source of contamination is from off-site and the person did not cause the release, the person may address only contamination on the site or the partial response action

area within the site according to the appropriate established technical standards, and

b. when a contaminant release is present outside the site or partial response action area, but on property owned or otherwise controlled by the applicant, addressing the areal extent of contamination outside the site or partial response action area is not required under the VCP; however, the contaminant release within the partial response action area shall be addressed according to the appropriate established technical standards.

For those areas which are not addressed as part of a partial response action, the TNRCC reserves the right to pursue enforcement, if necessary.

The applicant shall select a response action for the response action area which will achieve the response action objectives. This allows applicants to forgo the submission of a formal Corrective Measure Study (Risk Reduction Rules) or Corrective Action Plan (Petroleum Storage Tank Rules) which usually requires the comparison of numerous response action alternatives and, instead submit a report (Response Action Work Plan) which describes one chosen response action and its ability to achieve the response action objectives. The Texas Natural Resource Conservation Commission (TNRCC) shall only evaluate the chosen response action for its ability to achieve the response action objectives.

State or local permits are not required for removal or remedial action under the VCP; however, the person conducting the voluntary cleanup shall comply with any federal or state standard, requirement, criterion, or limitation to which the response action would otherwise be subject if a permit were required unless such TNRCC rule requirements are inconsistent with a specific provision of this subchapter.

7.4 Post-Closure Requirements

Once again, the VCP does not have any program specific regulations concerning this issue, but relies upon existing rule requirements. Post-closure care is of particular importance in the VCP, however, due to the possible loss of liability release if post-closure care is not maintained as required in the approved work plans.

Post-closure care is generally required when contaminants remain on-site above the health-based cleanup levels. The most common examples being the use for a "cap" for soil contamination or groundwater monitoring in the case of groundwater contamination.

8. Notification

RULE

When contamination is located on property owned by another person or on property where an interest such as a fee ownership, leasehold, easement, or right-of-way is held by another person, the applicant must provide notification to all such property owners. Applicants shall use the notification form as provided by the Executive Director at a minimum, but may include additional language as desired.

Notice to property owners affected by concentrations of contaminants equal to or below the residential health-based levels for any media shall occur within two weeks after TNRCC approval of a report confirming the nature and extent of contamination at the site, and prior to initiation of response actions. However, notification will not be required when concentrations are below background. The notice will indicate that the contaminants are at concentrations protective of any future land use and that the TNRCC will not require further investigation or remediation off-site. The notice shall also state the availability for inspection and copying of reports in the TNRCC files, concerning the site. Under these circumstances, the applicant may provide notice in local newspapers, block advertisements, letters to individual households and businesses, or other personal contacts. The executive director shall require verification that such activity has been completed.

Direct notice is required, in the form of letters to affected individual households, businesses, and other interest holders, when concentrations of contaminants exceed the residential health-based levels on the off-site property. The notice shall state that concentrations of contaminants exceed the residential health-based levels on the off-site property. The notice shall also state the availability for inspection and copying of reports in the TNRCC files concerning the site. The applicant shall submit copies of the notice letter delivered with the recipient's signature and date of delivery to the TNRCC within two weeks after initial discovery of the off-site contamination or two weeks after the effective date of the VCP agreement. If initial notification attempts are unsuccessful, the applicant shall repeat the process monthly until all affected parties are noticed or at least four failed attempts are documented to the satisfaction of the Executive Director. Notice to governmental entities shall be delivered to the chief clerk or city secretary.

9. Guidance for Initiating and Reporting Response Actions Conducted Under TNRCC'S Voluntary Cleanup Program, TNRCC Document: RG-215

In April 1996, the Voluntary Cleanup Program (VCP) published this guidance for the purpose of acquainting the voluntary cleanup applicant with the framework for initiating response actions in the VCP and to provide report formats and checklists outlining minimum technical and informational requirements necessary to expedite approval of documents submitted to the VCP.

The document includes an introduction plus four main topic/submittal sections:

Section 1	**Introduction**
Section 2	**Guidance for Preparation of a Site Investigation Report**
Section 3	**Guidance for Preparation of a Conceptual Exposure Assessment Model (CEAM)**
Section 4	**Guidance for Preparation of a Response Action Work Plan**
Section 5	**Guidance for Preparation of a Response Action Completion Report**

The order of the sections in this document appear in the relative order of any environmental investigation and cleanup process (of course allowing for phased and iterative approaches). Section 1 of the guidance provides an introduction to the VCP process, expands on the use of applicable technical standards in the VCP, and discusses VCP-specific standards. Sections 2 through Sections 5 provide report formats and checklists outlining minimum technical and

information requirements necessary to expedite approval of documents submitted to the VCP.

10. VCP On-Line Information:

VCP Internet Homepage:

The VCP law, rules, guidance, and forms (application, agreement, certificates of completion) can all be found at:

http://www.tnrcc.state.tx.us/waste/pcd/vcp/index.html

TNRCC Bulletin Board:

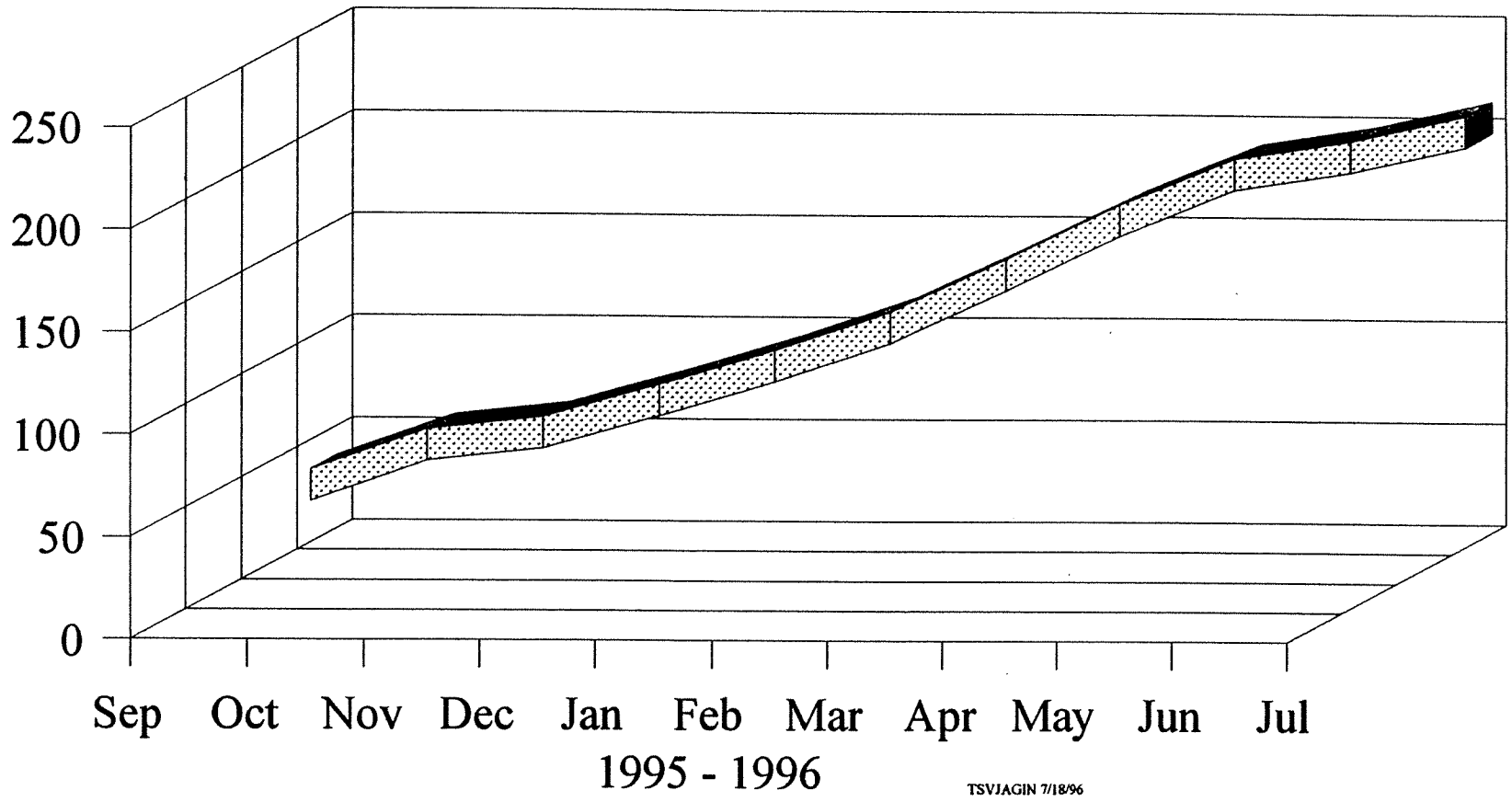
In addition to the above information, the database of VCP sites (updated weekly) can be found at:

512/239-0700

Help Desk: 512/239-0911

Voluntary Cleanup Program

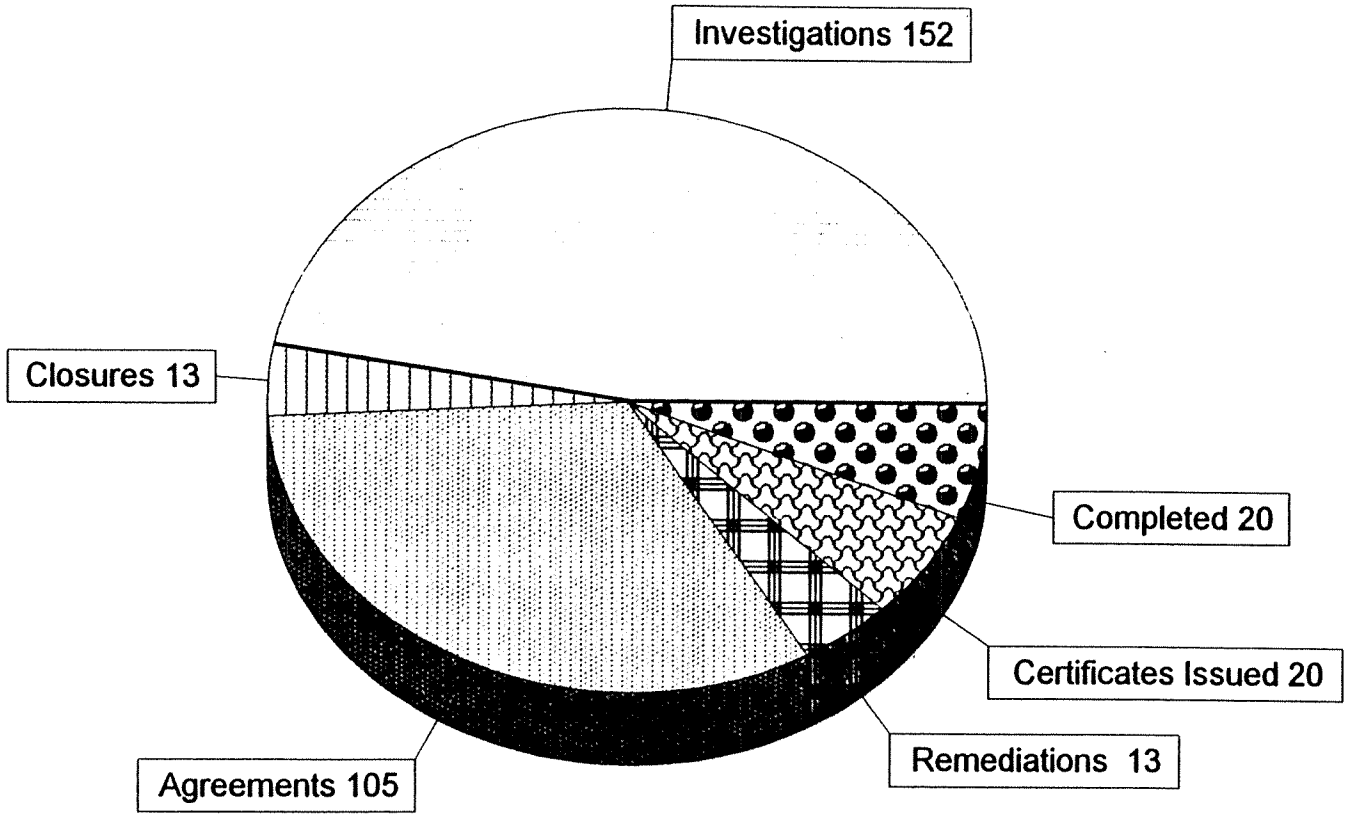
Total Applications to Date



TSVJAGIN 7/18/96

Voluntary Cleanup Program - 7/96

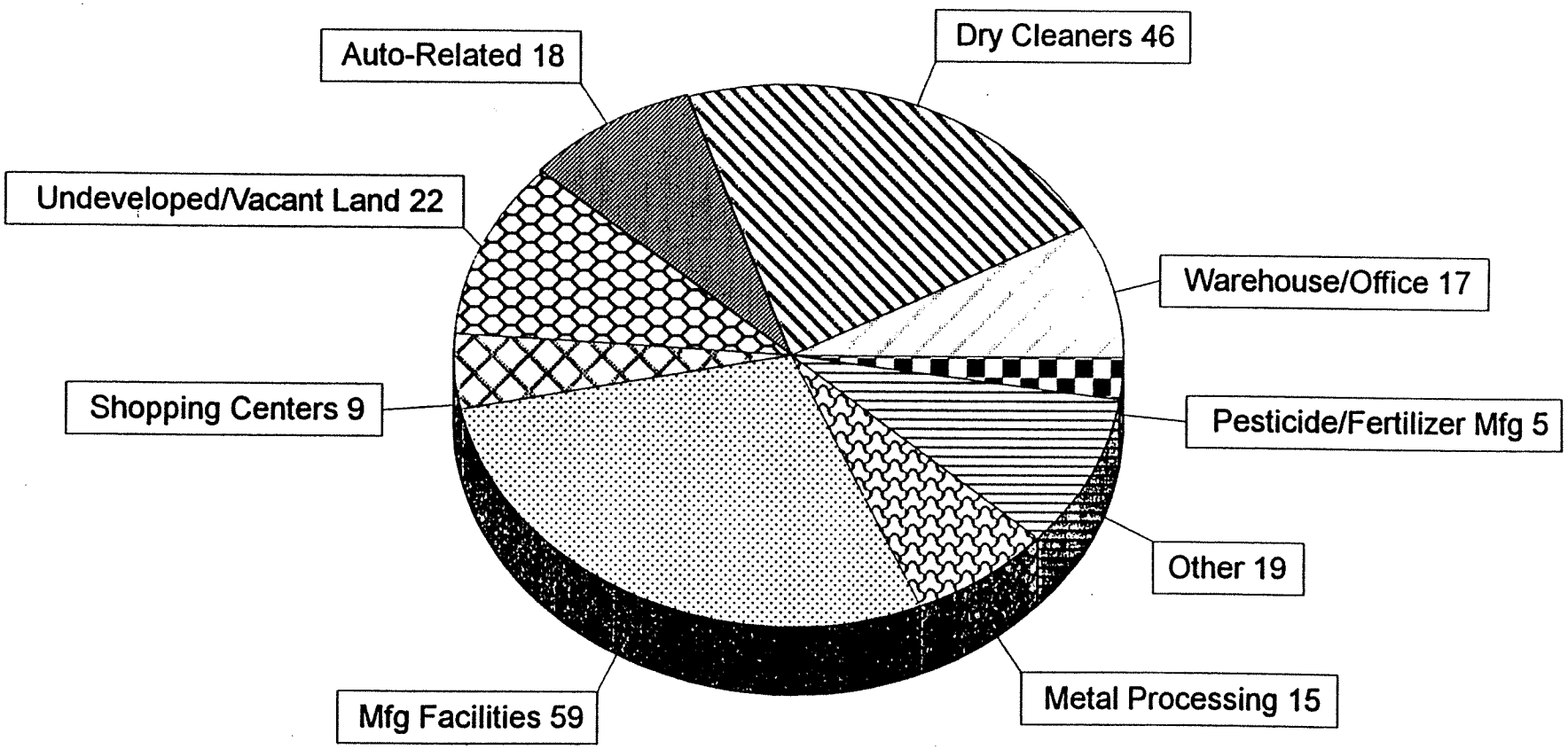
Phases of Projects (206 Sites)



TSVJAGIN 7/18/96

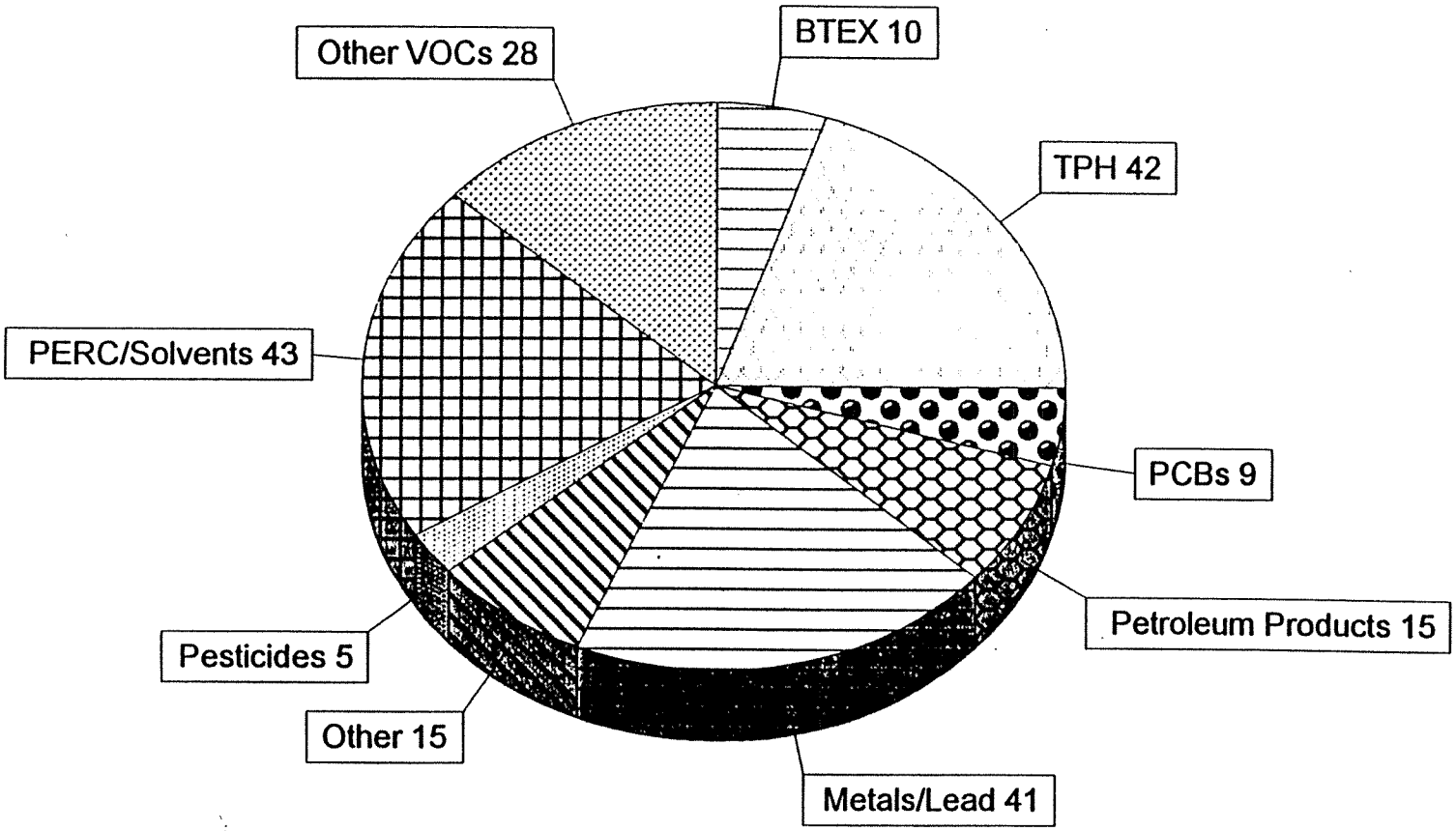
Voluntary Cleanup Program - 7/96

Types of Facilities (206 Sites)



Voluntary Cleanup Program - 7/96

Contaminant Categories (206 Sites)

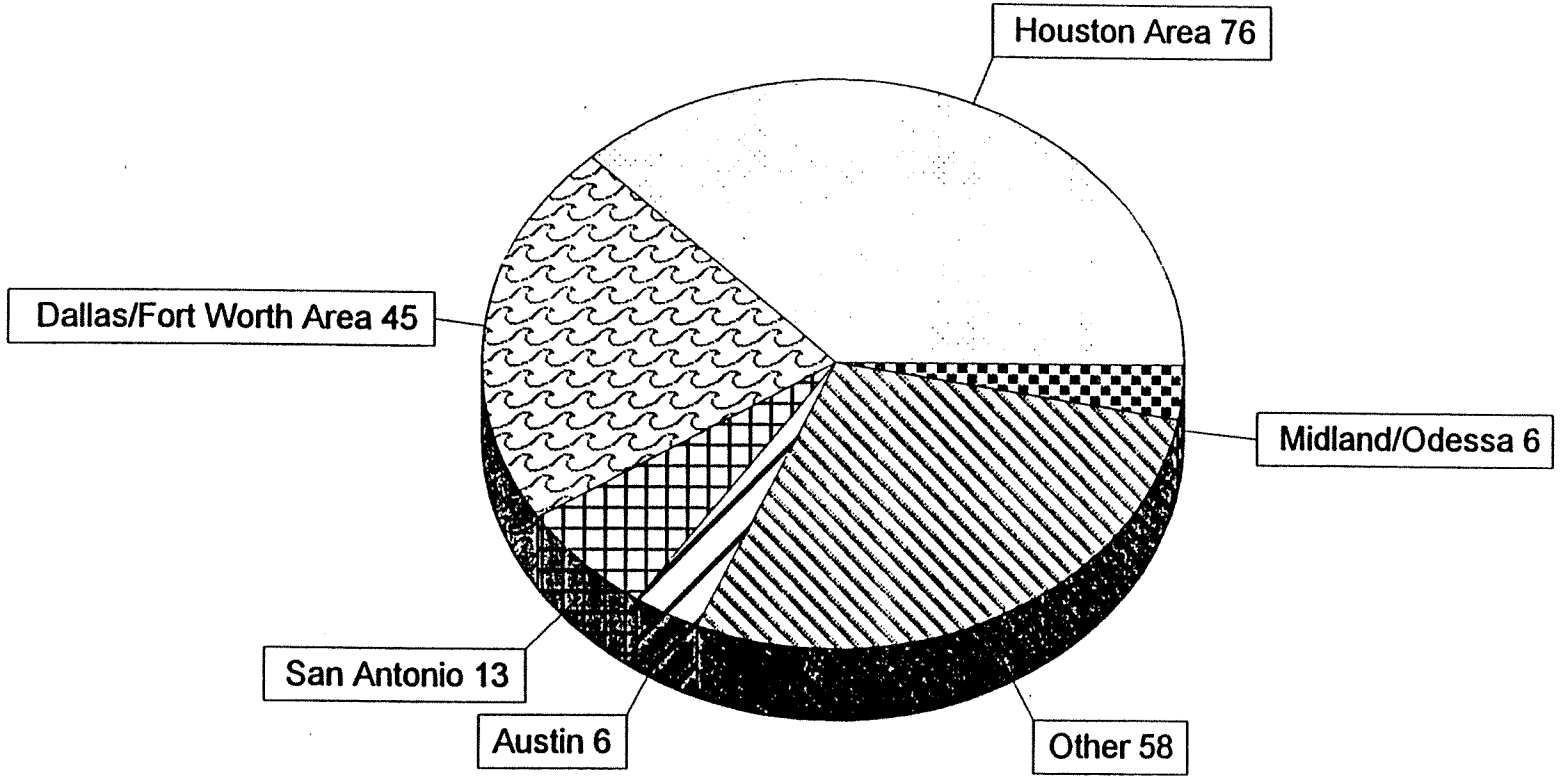


TSVJAGIN 7/18/96

TSVJAGIN 7/18/96

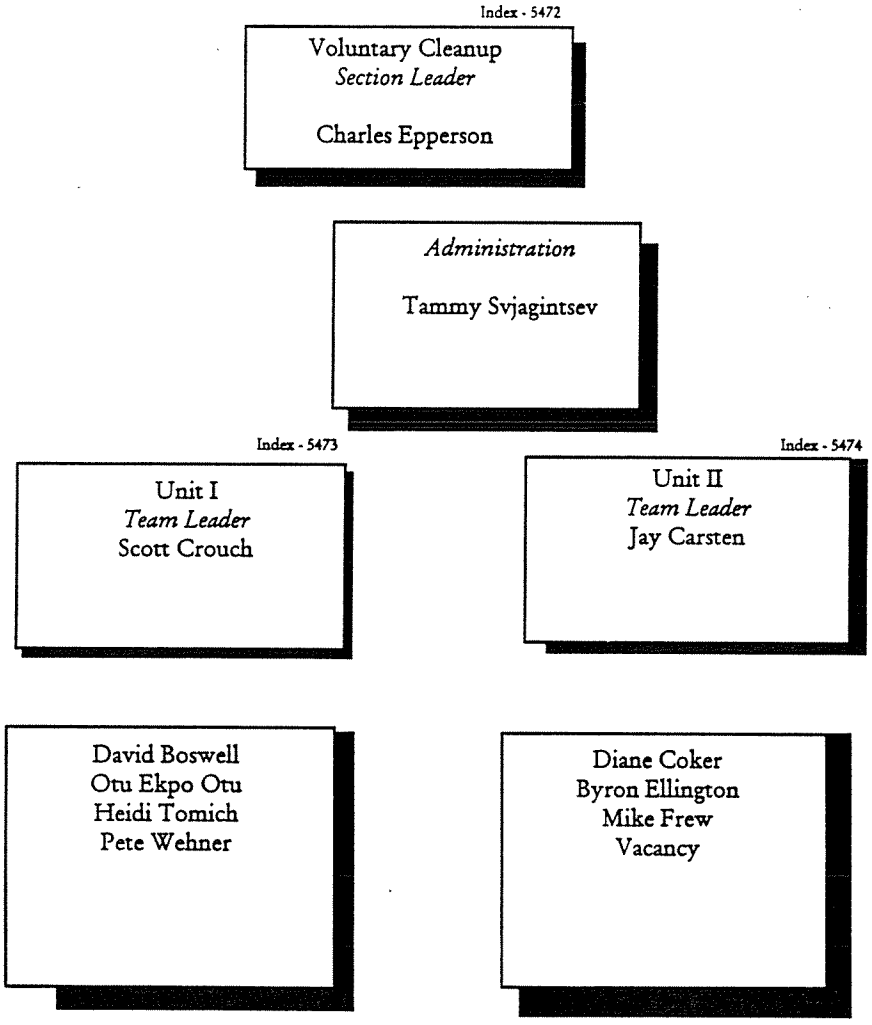
Voluntary Cleanup Program - 7/96

Applications by City (206 Sites)



Voluntary Cleanup

Organization Chart



Section FTEs = 12
MC 221

Barry R. McBee, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
John M. Baker, *Commissioner*
Dan Pearson, *Executive Director*

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Protecting Texas by Reducing and Preventing Pollution

June, 1996

Re: Voluntary Cleanup Program (VCP)

Dear Voluntary Cleanup Applicant:

Thank you for your interest in the Texas VCP. Through this program, we believe that we are offering to the public a dynamic, incentive-based approach for cleanups to be completed in Texas. As you may know, the Texas Voluntary Cleanup Law (Texas Health and Safety Code, Chapter 361 - Subchapter S), which became effective on September 1, 1995, set forth the prescriptive framework of requirements for this new program. As per the Voluntary Cleanup Law, it will be necessary for voluntary parties to submit an application and an application fee of $1,000. The Law also specifies that voluntary parties must enter into a Voluntary Cleanup Agreement before any plans or reports can be evaluated. Following the statutory requirements, no site related information will be reviewed until the agreement has been completed. I have enclosed copies of the application, agreement, draft certificate of completion, the U.S. Environmental Protection Agency/VCP Memorandum of Agreement, draft public notification letter and adopted rules on the VCP. The VCP Guidance Document will be mailed to you separately by the Texas Natural Resource Conservation Commission (TNRCC) Publications Division. If you would also like to obtain a copy of the Guidance Document in person, you may visit the TNRCC Publications Division located in Building A, Room 102A, 12100 Park 35 Circle in Austin.

If you would like to obtain any VCP documents electronically, including the VCP Guidance Document, you may download the VCP documents via the Internet at the VCP's URL: **http://www.tnrcc.state.tx.us/waste/pcd/vcp/index.html** to get access to the VCP's homepage. You may also obtain access to the documents via the TNRCC OnLine Bulletin Board (BBS), Office of Waste by dialing 512-239-0700. If you have any trouble with the BBS, please contact the Technical Help Desk at 512-239-0911.

Upon receipt of applications, they will be reviewed for acceptance as quickly as possible. If the application is accepted, you will be contacted to complete the agreement. If you have any questions, please contact me at 239-2498.

Sincerely,

Charles R. Epperson
Section Manager
Voluntary Cleanup Section
Pollution Cleanup Division

Enclosures

SC/CE/ts

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION
VOLUNTARY CLEANUP PROGRAM APPLICATION INSTRUCTIONS

The information provided on the Voluntary Cleanup Program (VCP) application will be used to determine an applicant's eligibility for participation in the VCP. It is imperative that the application be fully complete and accurate, otherwise the application will be rejected. The application also provides information as to site conditions. The application assumes that a Phase I Environmental Site Assessment or similar investigation has already been performed at the site.

General Information

This provides site specific information and should be completed in the greatest detail possible.

Applicant(s)

Applicant A is generally considered the person requesting the Certificate of Completion and agreeing to pay agency oversight costs. If billing should be directed to another person or address, be sure to provide this information along with written proof of their consent.

If a person who is not a responsible party intends to purchase the property before the Certificate of Completion is issued, then the person should be either the sole applicant or an additional applicant (see §361.610(a), Solid Waste Disposal Act [SWDA]). There may be others who also wish to be applicants, such as lenders. All future owners and future lenders on the date of issuance of a Certificate of Completion who were not responsible parties under §361.271 or §361.275(g), are qualified to obtain the protection from liability provided by §361.610, Subchapter S, SWDA (see Health and Safety Code, Section 1, Chapter 361).

Along with the applicants name and address, also describe their interest in the property (e.g., owner, tenant, potential purchaser, lender, etc).

Current Property Owner

If the current owner is not included as an applicant, then provide the requested information for the current property owner.

Other Contacts

If others are involved in the voluntary cleanup, such as an environmental consultant or legal representative, provide the requested information for this person. This should be (in the applicant's determination) the person with the greatest capability to provide site specific information or make decisions related to the voluntary cleanup.

Billing Information

If the billing is to be directed to someone other than Applicant A, provide the requested information and have the person sign, indicating their consent to payment of the Texas Natural Resource Conservation Commission (TNRCC) oversight costs.

Current Property Use

Check the correct category or provide a more appropriate description under "other". If the property is divided into more than one use category, indicate this by providing the percent of the land area used for each land use category.

Involvement with Other Regulatory Programs

Describe in detail any contact with any state or federal regulatory program. Please provide names and dates, contacts, and any actions taken as a result of these contacts. It is especially important to describe any order, notice of violations, permits, or inspections related to the site, as this may directly impact the eligibility of the site for participation in the VCP. No site which is under a TNRCC permit or order is eligible to participate in the VCP. If there has been no prior contact with any state or federal environmental regulatory agency indicate this clearly. This section must not be left blank.

Applicant's Intended Response Action Objectives

This section is requesting information about the applicant's intentions related to the site cleanup. The applicant is not required to make this decision this early in the process; however, if the applicant has made this determination it will make completion of the VCP agreement easier. Please check the appropriate selection.

Environmental Assessment

A copy of the Phase I Environmental Site Assessment or similar investigation should be submitted with the completed application. The assessment should be of sufficient detail to fulfill the requirements of House Bill 2296 that was codified in the SWDA, Sec. 361.604 (c)(1)-(5). At a minimum, the document should identify all areas of known or suspected contamination that will be addressed by the voluntary cleanup application and agreement. Specifically, the Phase I Environmental Site Assessment should include but is not limited to the following items:

1. A legal description of the site, including a site map;

2. A description of the physical characteristics of the site;

3. A discussion of the operational history of the site to the extent the history is known by the applicant;

4. Information of which the applicant is aware concerning the nature and extent of any relevant contamination or release at the site and immediately contiguous to the site, or wherever the contamination came to be located; and

5. Relevant information of which the applicant is aware concerning the potential for human exposure to contamination at the site.

A detailed explanation of the these items is presented below.

Legal Description of the Site

A legal description of the property or partial response area should be prepared for the site. Although the legal description does not have to include a survey performed by a licensed surveyor at the time of application, the description should provide adequate detail such that the areal extent and location of the site is obvious. Include a site map which clearly indicates property boundaries and is of such a scale to include surrounding properties. It may be necessary to include two maps of different scale, but a map should indicate the site location relative to the intersection of two major roads.

Prior to issuance of the Certificate of Completion a legal description and a map of the property prepared and sealed by a Registered Public Land Surveyor in the State of Texas will be necessary to describe the specific area to which the Certificate of Completion and corresponding environmental liability release will apply. A separate survey and map should be performed for off-site properties which wish to receive the Certificate of Completion.

Physical Characteristics of the Site

The physical characteristics of the site should be described using a map illustrating site features. The site map should depict the following: property lines, building and road outlines, potential source areas (i.e., chemical storage areas, above and below ground tanks, process equipment, loading/unloading areas, waste treatment, storage or disposal areas), surface water bodies, water supply wells, and utility right-of-way. In addition, a map should be prepared that illustrates the adjacent properties and identifies the land use (i.e., commercial or residential).

Summary of Operational History

A summary of the historical and current business operations should be prepared for the response action area with an emphasis upon identifying possible contaminant source areas. The summary should include a list of the potential source areas and a discussion of the types of contaminants for each of the potential source areas if known. A map should be included that clearly identifies known or suspected primary source areas (process area, product storage, etc.) and secondary source areas (contaminated soils).

Nature and Extent of Contamination

To the degree the nature and extent of contamination is known at the time of application to the VCP, this information should be made available to the TNRCC. At a minimum, a site map should be prepared illustrating known or suspected areas of contamination. Please consult the TNRCC voluntary cleanup guidance for preparation of a site investigation report if the Phase I Environmental Site Assessment has been followed up by Phase II Sampling Activities.

Potential for Human and Environmental Exposure

Discuss potential exposure and risk to human health and the environment presented by known or suspected contamination in the response action area. Highlight any areas that may require immediate action.

How Long Does it Take to Process Applications?

Applications will be processed in less than 45 days. If an application is rejected because it is not complete or accurate, the TNRCC will provide the applicant with a list of information needed to make the application complete or accurate. An applicant may resubmit an application without submitting an additional application fee. As per §361.605© SWDA, the TNRCC will refund half of the application fee if the application is rejected unless the applicant indicates a desire to resubmit a corrected application.

OFFICE USE ONLY
Site name:_____
PCA number: _____
Agency Object Code:_____
VCP Project number:_____

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION VOLUNTARY CLEANUP PROGRAM

Program Application

Complete this form to request assistance and review from the Texas Natural Resource Conservation Commission (TNRCC) staff in the Voluntary Cleanup Program (VCP) pursuant to §361.604 of the Texas Solid Waste Disposal Act.

Complete all applicable sections. Incomplete or inaccurate applications may be rejected as per §361.605 of the VCP statute. Please refer to the application instruction sheet or call (512) 239-5891 with any questions concerning the completion of this form.

General Information

Property/Site name _____
Address _____
City _____ State _____ Zip Code _____
Latitude _____ Longitude_____
Property size (acres) _____

Applicant(s)

Applicant A (The person seeking review and approval of a plan or report, and/or issuance of a Certificate of Completion by the TNRCC. Applicant A is responsible for payment of TNRCC costs of review and oversight unless indicated otherwise on page 2 of this form.)
Applicant_____
Contact Person_____ Title _____
Organization _____ Phone ( ) Fax ( )
Address _____
City _____ State _____ Zip Code _____
Interest in Property _____

Applicant B
Applicant_____
Contact Person_____ Title _____
Organization _____ Phone ( ) Fax ( )
Address _____
City _____ State _____ Zip Code _____
Interest in Property _____

Applicant C
Applicant _____
Contact Person _____ Title _____
Organization _____ Phone ( ) Fax ( )
Address _____
City _____ State _____ Zip Code _____
Interest in Property _____

Applicant D
Applicant _____
Contact Person _____ Title _____
Organization _____ Phone ( ) Fax ( )
Address _____
City _____ State _____ Zip Code _____
Interest in Property _____

Current Property Owner (if different from applicant)

Owner(s) _____
Contact Person _____ Title _____
Organization _____ Phone ( ) Fax ( )
Address _____
City _____ State _____ Zip Code _____

Other Contacts (Consultant/Attorney)

Name(s) _____ Title _____
Organization _____ Phone ( ) Fax ( )
Address _____
City _____ State _____ Zip Code _____

Name(s) _____ Title _____
Organization _____ Phone ( ) Fax ( )
Address _____
City _____ State _____ Zip Code _____

Billing Information

If billing should be directed to a person other than Applicant A, please enter the required information below and include their signature consenting to payment of TNRCC oversight costs.

Name(s)_____ Title _____
Organization _____ Phone ( ) _____ Fax ( ) _____
Address _____
City _____ State _____ Zip Code _____

Signature of Consent: _____

Current Property Use (Use percentage if property is divided into different use categories.)

Residential _____ Agricultural _____ Other _____
Commercial/Industrial _____ Recreational _____

Involvement With Other Regulatory Programs

Please describe any and all prior contact with any state or federal environmental regulatory programs or agencies which relate to the property in question, especially any orders, permits, notices of violations, or inspections. Indicate if there has been no prior contact. Attach additional sheets as necessary. _____

Please provide any and all state and federal identification numbers related to the property in question, including any solid waste, leaking petroleum storage tank (PST), CERCLIS, RCRIS, etc., registration numbers which have been assigned. _____

Applicant's Intended Response Action Objectives (Cleanup Levels)

___ Not known at this time. Applicant wishes to receive guidance form VCP staff prior to the signing of a VCP agreement.

___ Cleanup to Background (i.e. Risk Reduction Standard 1).

___ Cleanup to Generic Risk-Based Levels (following Risk Reduction Standard 2 or PST Plan A requirements).

___ Cleanup to Site Specific Risk-Based Levels not relying on engineering or institutional controls (following Risk Reduction Standard 3 or PST Plan B requirements).

___ Cleanup to Site Specific Risk-Based Levels which rely on engineering or institutional controls (following Risk Reduction Standard 3 or PST Plan B requirements).

___ Other (explain)_____

_____

_____

Environmental Assessment

An environmental assessment must be attached with this application and include the required information as follows:

1. a legal description of the site, including a site map;
2. the physical characteristics of the site;
3. the operational history of the site, to the extent the history is known by the applicant;
4. information that the applicant is aware of concerning the nature and extent of any relevant contamination and/or release at the site and immediately contiguous to the site, or wherever the contamination came to be located; and
5. relevant information the applicant is aware of concerning the potential for human and environmental exposure to contamination at the site.

Intent to Participate

The undersigned requests oversight by the TNRCC of investigation and cleanup activities of possible contamination at the property described above and intends to negotiate in good faith a written agreement with the TNRCC to provide voluntary oversight. This Intent to Participate does not constitute such an agreement, and neither TNRCC or the undersigned will be bound to proceed with voluntary oversight unless such an agreement is executed. Applicants should be aware, that in order for the TNRCC to issue a Certificate of Completion for an entire site, the applicant must provide adequate information to document that the entire site meets the applicable standards. As an alternative, the applicant may pursue a Certificate of Completion for only a portion of the site, as a partial response action area. The agreement will describe the project activities of each party and will require Applicant A (unless indicated otherwise on page 2 of this form) to reimburse the TNRCC for all of its oversight costs. By completing and signing this Intent to Participate, the undersigned does affirm the applicant's financial capability to perform the voluntary cleanup. The Executive Director may request additional information to support this affirmation.

With this Intent to Participate, the undersigned does not admit or assume liability for investigation or cleanup of the site. In addition, the undersigned may terminate the Intent to Participate at any time. If the TNRCC rejects the application, it will notify the applicant and explain the reasons for rejection, and will refund half of the application deposit, unless the applicant indicates a desire to resubmit a corrected application.

Deposit of Oversight Costs

The applicant must submit with this application, a deposit in the amount of one thousand dollars ($1,000), made payable to the Texas Natural Resource Conservation Commission. Deposits may be made in the form of company or personal checks. Cash deposits will not be accepted.

Please execute this Intent to Participate in the space below and return it to:

Attention: Cashier
Texas Natural Resource Conservation Commission
MC- 214
P.O. Box 13088
Austin, Texas 78711-3088

For overnight or express mail please use the following street address:

Attention: Cashier
Texas Natural Resource Conservation Commission
MC-214
12100 Park 35 Circle
Austin, Texas 78753

Correctness of Information

The undersigned affirm that the information contained in this application is true and accurate to the best of their knowledge.

Applicant's Signatures

Applicant A

By:_____ Name:_____
(signature of authorized representative) (print or type)

Date:_____ Title:_____

Company:_____ Phone:( ) -_____

Applicant B

By:_____ Name:_____
(signature of authorized representative) (print or type)

Date:_____ Title:_____

Company:_____ Phone:_____

Applicant C

By:_____ Name:_____
(signature of authorized representative) (print or type)

Date:_____ Title:_____

Company:_____ Phone:_____

Applicant D

By:_____ Name:_____
(signature of authorized representative) (print or type)

Date:_____ Title:_____

Company:_____ Phone:_____

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION VOLUNTARY CLEANUP PROGRAM

Program Application - Additional Applicants Form

Applicant E

By:_____ Name:_____
(signature of authorized representative) (print or type)

Date:_____ Title:_____

Company:_____ Phone:( ) -

Applicant F

By:_____ Name:_____
(signature of authorized representative) (print or type)

Date:_____ Title:_____

Company:_____ Phone:( ) -

Applicant G

By:_____ Name:_____
(signature of authorized representative) (print or type)

Date:_____ Title:_____

Company:_____ Phone:( ) -

Applicant H

By:_____ Name:_____
(signature of authorized representative) (print or type)

Date:_____ Title:_____

Company:_____ Phone:( ) -

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

VOLUNTARY CLEANUP AGREEMENT

INTRODUCTION

This Agreement is entered into voluntarily by _____ _____ and the Executive Director of the Texas Natural Resource Conservation Commission (TNRCC). This Agreement is not and shall not be construed as an admission of any liability under the Texas Solid Waste Disposal Act or any other law or as a waiver of any defense to such liability. No approval hereunder or receipt of funds hereby shall be taken as a warranty as to sufficiency or efficacy of the response action. The purpose of this agreement is to detail the obligations and functions of each party, related to the voluntary cleanup process at the _____ (site), Voluntary Cleanup Program (VCP) number _____.

The activities conducted by the applicant under this Agreement are subject to approval by TNRCC. The activities conducted by the applicant shall be consistent with this Agreement, all applicable laws and regulations and any appropriate guidance documents. Applicant shall employ sound scientific, engineering and construction practices.

STATEMENT OF ELIGIBILITY

The Executive Director has determined that the application submitted by the applicant is complete and that the applicant is eligible to participate in the VCP established under Subchapter S of Chapter 361 of the Health and Safety Code (HSC). If the agency determines that the applicant withheld or misrepresented information that would be relevant to the applicant's eligibility, the Executive Director may exercise his right to withdraw from this Agreement.

PARTIES BOUND

This Agreement shall apply to and be binding upon the applicant, its officers, directors, principals, employees, receivers, trustees, agents, successors, subsidiaries, and assigns and upon the TNRCC, its employees, agents and successors. The signatories to this Agreement certify that they are fully authorized to execute and legally bind the parties they represent. No change in ownership, corporate, or partnership status of the applicant shall in any way alter its status or responsibilities under this agreement unless applicant or TNRCC withdraws from this Agreement.

The applicant shall provide a copy of this Agreement to any subsequent owners or successors before ownership rights are transferred. The applicant shall provide a copy of this Agreement to all contractors, subcontractors, laboratories, and consultants which are retained to conduct any work performed under this Agreement, within fourteen (14) days after the effective date of this Agreement or within 14 days of the date of retaining their services.

DEFINITIONS

"Site" means the area described in the VCP application, attached and incorporated herein as Exhibit "A".

ADDRESSES FOR ALL CORRESPONDENCE

Documents, including reports, approvals, notifications, disapprovals, and other correspondence to be submitted under this Agreement, may be sent by certified mail, return receipt requested, hand delivery, overnight mail or by courier service to the following addresses or to such addresses as the applicant or TNRCC may designate in writing.

Documents to be submitted to TNRCC should be sent to:

Mailing Address	Physical Address
Project Manager Voluntary Cleanup Section MC 221 P.O. Box 13087 Austin, TX 78711-3087	Project Manager Voluntary Cleanup Section MC 221 12100 Park 35 Circle Austin, TX 78753

Documents to be submitted to the applicant should be sent to:
(provides this information)

(phone number)

COMPLIANCE WITH APPLICABLE LAWS

All work undertaken by the applicant pursuant to this Agreement shall be performed in compliance with all applicable federal, state and local laws, ordinances and regulations, including, but not limited to, all Occupational Safety and Health Administration, Department of Transportation and Resource Conservation and Recovery Act regulations. In the event of a conflict in the application of federal, state, or local laws, ordinances and regulations, the applicant shall comply with the more/most stringent such laws, ordinances, or regulations, unless provided otherwise in writing by TNRCC. Federal requirements shall be followed if they are the more/most stringent. However, as provided by HSC, Section 361.611 a state or local permit shall not be required,

although the applicant must coordinate with ongoing federal and state hazardous waste programs and must comply with the substantive requirements of an otherwise required state permit. Where it is determined that a permit is required under federal law, the applicant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals. The applicant shall be responsible for obtaining all federal permits which are necessary for the performance of any work hereunder.

APPLICABLE RULES AND REGULATIONS

The VCP rules, 30 Texas Administrative Code (TAC) 333, and the following rules or regulations are specifically designated as being directly applicable for the site and must be followed. Citation of these rules does not imply that they are the only applicable rules.

___ 30 TAC 334 (Petroleum Storage Tank Rules)
___ 30 TAC 335 (Industrial Solid Waste & Municipal Hazardous Waste Rules, i.e., Risk Reduction Rules)
___ Other_____

SUBMITTALS AND SCHEDULES

In compliance with the aforementioned rules or regulations, the required submittals shall include a monthly status report, which details activities completed for the current month and those planned for the upcoming month, along with the following:_____
_____
_____.

The schedule for submittals shall be as follows:_____
_____
_____
_____.

Proposed future land use to be achieved:

___ residential (i.e., unrestricted)
___ non-residential (i.e., commercial/industrial)
___ other (e.g., agricultural or recreational)_____

DESIGNATED PROJECT MANAGER

On or before the effective date of this Agreement, the TNRCC and the applicant shall each designate a project manager. Each project manager shall be responsible for overseeing the implementation of this Agreement. The TNRCC project manager will be the TNRCC designated representative at the site. To the maximum extent possible, communications between the applicant

and TNRCC and all documents (including reports, approvals, and other correspondence) concerning the activities performed pursuant to the terms and conditions of this Agreement shall be directed through the project managers. During implementation of this Agreement, the project managers shall, whenever possible, operate by consensus and shall attempt in good faith to resolve disputes informally through discussion of the issues. Each party has the right to change its respective project manager by notifying the other party in writing at least five (5) days prior to the change.

ACCESS

To the extent that the site or other areas where work is to be performed hereunder is presently owned or controlled by parties other than those bound by this Agreement, the applicant shall obtain, or shall use its best efforts to obtain access agreements from the present owners. Best efforts shall include at a minimum, a certified letter from applicant to the present owner of such property requesting access agreements to permit applicant, TNRCC and their authorized representatives access to such property. Any such access agreements shall be incorporated by reference into this Agreement. Such agreements shall provide access for TNRCC and authorized representatives of TNRCC, as specified below. In the event that such access agreements are not obtained, the applicant shall so notify TNRCC, which may then, at its discretion, assist the applicant in gaining access.

The applicant shall provide authorized representatives of TNRCC access to the site and other areas where work is to be performed at all reasonable times. Such access shall be related solely to the work being performed on the site and shall include, but not be limited to: inspecting records, operating logs and contracts related to the site; reviewing the progress of the applicant in carrying out the terms of this agreement; conducting such tests, inspections, and sampling as TNRCC may deem necessary; using a camera, sound recording, or other documentary type equipment for field activities; and, verifying the data submitted to TNRCC by the applicant hereunder. The applicant shall permit TNRCC's authorized representatives to inspect and copy all records, files, photographs, documents, and other writings, including all sampling and monitoring data, which pertain to this Agreement and over which the applicant exercises control. All persons with access to the site pursuant to this Agreement shall comply with submitted health and safety plans. The TNRCC does not approve health and safety plans.

DISPUTE RESOLUTION

This section (Dispute Resolution) shall apply to any dispute arising under any section of this Agreement, unless specifically excepted. It should be noted, that as provided for in HSC, Section 361.607, the executive director or the applicant in its sole discretion may terminate the Agreement by giving 15 days advance written notice to the other.

The parties shall use their best effort to, in good faith, resolve all disputes or differences of opinion informally. If, however, disputes arise concerning this Agreement which the parties are unable to resolve informally, the applicant may present written notice of such dispute to TNRCC and set forth specific points of dispute and the position of the applicant. This written notice shall be submitted no later than five (5) calendar days after the applicant discovers the project managers are unable to resolve the dispute. The applicant's project manager shall notify the TNRCC's project manager immediately by phone or other appropriate methods of communication prior to written notice, when he/she believes the parties are unable to resolve a dispute.

Within ten (10) days of receipt of such a written notice, the TNRCC shall provide a written response to the applicant setting forth its position and the basis therefore. During the five (5) calendar days following the receipt of the response, the parties shall attempt to negotiate in good faith a resolution of their differences. If during this negotiation period, the TNRCC concurs with the position of the applicant, the applicant shall be notified in writing and this Agreement shall be modified to include any necessary extensions of time or variances of work.

Following the expiration of the previously described time periods, if no resolution of the disputed issue(s) has been reached the Executive Director or their designee, shall make a determination regarding the dispute, based upon and consistent with the terms of this Agreement, and shall provide written documentation of such determination to the applicant.

At this juncture, if dispute resolution fails, and either or both parties exercise their right to withdraw from the Agreement by giving 15 days advance written notice to the other, only those costs incurred or obligated by the TNRCC before notice of termination of the Agreement are recoverable under the Agreement.

RESERVATION OF RIGHTS

TNRCC and applicant reserve all rights and defenses they may have pursuant to any available legal authority unless expressly waived herein.

Nothing herein is intended to release, discharge, or in any way affect any claims, causes of action or demands in law or equity which the parties may have against any person, firm, partnership or corporation, not a party to this Agreement for any liability it may have arising out of, or relating in any way to the generation, storage, treatment, handling, transportation, release or disposal of any materials, hazardous substances, hazardous waste, contaminants or pollutants at, to or from the site. The parties to this agreement expressly reserve all rights, claims, demands, and causes of action they have against any and all other persons and entities who are not parties to this Agreement, and as to each other for matters not covered hereby.

The applicant reserves the right to seek contribution, indemnity, or any other available remedy against any person other than TNRCC found to be responsible or liable for contribution, indemnity or otherwise for any amounts which have been or will be expended by the applicant in connection with the site.

During the term of this agreement, TNRCC will not bring an enforcement action against applicant for any violations of statutes or regulations for the specific violations or releases that are being remediated by this Agreement, unless the applicant withdraws from this Agreement prior to completion of the cleanup. However, a responsible party remains liable for contamination it caused, should cleanup standards change or additional contamination be discovered. Non-responsible party applicants have a release from liability upon issuance of the Certificate of Completion subject to statutory conditions in Section 361.610(b) HSC.

ADMINISTRATIVE COSTS

Applicant A, unless indicated otherwise in Exhibit "A", agrees to reimburse TNRCC for all of its costs associated with implementation of this Agreement. These costs may include direct and indirect costs of overhead, salaries, equipment, and utilities, and legal, management, and support costs associated with the review of the applicant's work plans and reports, and oversight of field activities.

TNRCC will track all costs to the TNRCC for review and oversight activities related to the site and provide quarterly invoices to the person responsible, per this agreement for said costs. If TNRCC costs are less than the application fee of one thousand ($1,000) dollars, the remaining balance in the site account will not be refunded. The applicant shall pay these invoiced costs to the TNRCC within 30 days after the date the applicant receives notice that these costs are due and owing. If payment is not made within thirty days, the TNRCC shall request that the attorney general bring action to recover all costs allowed by law.

Checks shall be made payable to the Texas Natural Resource Conservation Commission and be mailed along with a transmittal letter stating the site name, VCP number, and addressed to the Texas Natural Resource Conservation Commission; MC-214; Attention: Cashier; P.O. Box 13088, Austin, Texas, 78711-3088.

In the event that this Agreement is terminated for any reason, applicant A, unless indicated otherwise in Exhibit "A", agrees to reimburse TNRCC for all costs incurred or obligated by the TNRCC before notice of termination of the Agreement.

NOTICE OF BANKRUPTCY

As soon as applicant has knowledge of its intention to file bankruptcy or no later than 7 days prior to the actual filing of a voluntary bankruptcy petition, applicant shall notify TNRCC of its intention to file a bankruptcy petition. In the case of an involuntary bankruptcy petition, applicant shall give notice to the TNRCC as soon as it acquires knowledge of such petition.

INDEMNIFICATION

The applicant agrees to indemnify and save and hold the State of Texas, its agencies, successors, departments, agents, and employees, harmless from any and all claims, damages, or causes of action arising from, or on account of, the negligent acts or omissions of the applicant, its officers, directors, principals, employees, receivers, trustees, agents, successors, subsidiaries, and assigns in carrying out the activities pursuant to this Agreement.

EFFECTIVE DATE AND SUBSEQUENT MODIFICATION

The effective date of this Agreement shall be the date on which this Agreement is signed by the Executive Director of TNRCC or his authorized representative.

This Agreement may be amended by mutual agreement of TNRCC and the applicant. Amendments shall be in writing and shall be effective when signed by the Executive Director of TNRCC or his authorized representative.

TERMINATION AND SATISFACTION

The provisions of the Agreement shall be satisfied when TNRCC gives the applicant written notice in the form of a Final Certificate of Completion that the applicant has demonstrated to TNRCC's satisfaction that all terms of this Agreement have been completed, including the selection and implementation of a remedial action, when appropriate.

Nothing in the Agreement shall restrict the State of Texas from seeking other appropriate relief to protect human health or the environment from pollution or contamination at or from this site not remediated in accordance with this Agreement.

SIGNATURES

Applicant A

By:_____
(signature of authorized representative)

Name:_____
(print or type)

Date:_____

Applicant B

By:_____
(signature of authorized representative)

Name:_____
(print or type)

Date:_____

Applicant C

By:_____
(signature of authorized representative)

Name:_____
(print or type)

Date:_____

Applicant D

By:_____
(signature of authorized representative)

Name:_____
(print or type)

Date:_____

TNRCC Representative

By:_____
(signature of authorized representative)

Name:_____
(print or type)

Date:_____

Title:_____

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

VOLUNTARY CLEANUP AGREEMENT

ADDITIONAL APPLICANTS FORM

Applicant E

By:_____ Name:_____
(signature of authorized representative) (print or type)

Date:_____

Applicant F

By:_____ Name:_____
(signature of authorized representative) (print or type)

Date:_____

Applicant G

By:_____ Name:_____
(signature of authorized representative) (print or type)

Date:_____

Applicant H

By:_____ Name:_____
(signature of authorized representative) (print or type)

Date:_____

Historical and Statutory Notes

1995 Legislation

For severability and applicability provisions of the 1995 Act, see notes following V.T.C.A., Health & Safety Code § 361.560.

§ 361.567. Venue

Venue for prosecution for an alleged violation under this section is in the county in which the violation is alleged to have occurred or in Travis County.

Added by Acts 1995, 74th Leg., ch. 448, § 1, eff. Sept. 1, 1995.

Historical and Statutory Notes

1995 Legislation

For severability and applicability provisions of the 1995 Act, see notes following V.T.C.A., Health & Safety Code § 361.560.

SUBCHAPTER S. VOLUNTARY CLEANUP PROGRAM

Subchapter S, Voluntary Cleanup Program, consisting of §§ 361.601 to 361.613, was added by Acts 1995, 74th Leg., ch. 986, § 1.

For another Subchapter S, Medical Waste; Criminal Penalties, added by Acts 1995, 74th Leg., ch. 448, § 1, see § 361.560 et seq., ante.

§ 361.601. Definitions

In this subchapter:

(1) "Contaminant" includes:

(A) solid waste;

(B) hazardous waste;

(C) a hazardous waste constituent listed in 40 C.F.R. Part 261, Subpart D, or Table 1, 40 C.F.R. Section 261.24;

(D) a pollutant as defined in Section 26.001, Water Code; and

(E) a hazardous substance:

(i) as defined in Section 361.003; or

(ii) subject to Sections 26.261–26.268, Water Code.

(2) "Environmental assessment" means the assessment described by Section 361.604.

(3) "Response action" means the cleanup or removal of a hazardous substance or contaminant from the environment, excluding a waste, pollutant, or substance regulated by or that results from an activity under the jurisdiction of the Railroad Commission of Texas under Chapter 91 or 141, Natural Resources Code, or Chapter 27, Water Code.

(4) "Voluntary cleanup" means a response action taken under and in compliance with this subchapter.

Added by Acts 1995, 74th Leg., ch. 986, § 1, eff. Sept. 1, 1995.

§ 361.602. Purpose

The purpose of the voluntary cleanup program is to provide incentive to remediate property by removing liability of lenders and future landowners. The program does not replace other voluntary actions and is restricted to voluntary actions.

Added by Acts 1995, 74th Leg., ch. 986, § 1, eff. Sept. 1, 1995.

§ 361.603. Eligibility for Voluntary Cleanup Program

(a) Any site is eligible for participation in the voluntary cleanup program except the portion of a site that is subject to a commission permit or order.

(b) A person electing to participate in the voluntary cleanup program must:

(1) enter into a voluntary cleanup agreement as provided by Section 361.606; and

(2) pay all costs of commission oversight of the voluntary cleanup.

Added by Acts 1995, 74th Leg., ch. 986, § 1, eff. Sept. 1, 1995.

§ 361.604. Application to Participate in Voluntary Cleanup Program

(a) A person who desires to participate in the voluntary cleanup program under this subchapter must submit to the commission an application and an application fee as prescribed by this section.

(b) An application submitted under this section must:

(1) be on a form provided by the executive director;

(2) contain:

(A) general information concerning:

(i) the person and the person's capability, including the person's financial capability, to perform the voluntary cleanup; and

(ii) the site;

(B) other background information requested by the executive director; and

(C) an environmental assessment of the actual or threatened release of the hazardous substance or contaminant at the site;

(3) be accompanied by an application fee of $1,000; and

(4) be submitted according to schedules set by commission rule.

(c) The environmental assessment required by Subsection (b) must include:

(1) a legal description of the site;

(2) a description of the physical characteristics of the site;

(3) the operational history of the site to the extent that history is known by the applicant;

(4) information of which the applicant is aware concerning the nature and extent of any relevant contamination or release at the site and immediately contiguous to the site, or wherever the contamination came to be located; and

(5) relevant information of which the applicant is aware concerning the potential for human exposure to contamination at the site.

(d) An application shall be processed in the order in which it is received.

(e) Fees collected under this section shall be deposited to the credit of the hazardous and solid waste remediation fee fund.

Added by Acts 1995, 74th Leg., ch. 986, § 1, eff. Sept. 1, 1995.

§ 361.605. Rejection of Application

(a) The executive director may reject an application submitted under Section 361.604 if:

(1) an administrative, state, or federal enforcement action is pending that concerns the remediation of the hazardous substance or contaminant described in the application;

(2) a federal grant requires an enforcement action at the site;

(3) the application is not complete or accurate; or

(4) the site is ineligible under Section 361.603.

(b) If an application is rejected because it is not complete or accurate, the executive director, not later than the 45th day after receipt of the application, shall provide the person with a list of all information needed to make the application complete or accurate. A person may resubmit an application without submitting an additional application fee.

(c) If the executive director rejects the application, the executive director shall:

(1) notify the person that the application has been rejected;

(2) explain the reasons for rejection of the application; and

(3) inform the person that the commission will refund half the person's application fee unless the person indicates a desire to resubmit an application.

Added by Acts 1995, 74th Leg., ch. 986, § 1, eff. Sept. 1, 1995.

§ 361.606. Voluntary Cleanup Agreement

(a) Before the executive director evaluates any plan or report detailing the remediation goals and proposed methods of remediation, the person desiring to participate in the voluntary cleanup program must enter into a voluntary cleanup agreement that sets forth the terms and conditions of the evaluation of the reports and the implementation of work plans.

(b) A voluntary cleanup agreement must provide for:

(1) recovery by the commission of all reasonable costs:

(A) incurred by the commission in review and oversight of the person's work plan and reports and as a result of the commission's field activities;

(B) attributable to the voluntary cleanup agreement; and

(C) in excess of the amount of fees submitted by the applicant under Section 361.604;

(2) a schedule of payments to the commission to be made by the person for recovery of all commission costs fairly attributable to the voluntary cleanup program, including direct and indirect costs of overhead, salaries, equipment, and utilities, and legal, management, and support costs; and

(3) appropriate tasks, deliverables, and schedules.

(c) The voluntary cleanup agreement shall:

(1) identify all statutes and rules that must be complied with;

(2) describe any work plan or report to be submitted for review by the executive director, including a final report that provides all information necessary to verify that all work contemplated by the voluntary cleanup agreement has been completed;

(3) include a schedule for submitting the information required by Subdivision (2); and

(4) state the technical standards to be applied in evaluating the work plans and reports, with reference to the proposed future land use to be achieved.

(d) If an agreement is not reached between a person desiring to participate in the voluntary cleanup program and the executive director on or before the 30th day after good faith negotiations have begun:

(1) the person or the executive director may withdraw from the negotiations; and

(2) the commission retains the person's application fee.

(e) The commission may not initiate an enforcement action against a person who is in compliance with this section for the contamination or release that is the subject of the voluntary cleanup agreement or for the activity that resulted in the contamination or release.

Added by Acts 1995, 74th Leg., ch. 986, § 1, eff. Sept. 1, 1995.

§ 361.607. Termination of Agreement; Cost Recovery

(a) The executive director or the person in its sole discretion may terminate the agreement by giving 15 days' advance written notice to the other. Only those costs incurred or obligated by the executive director before notice of termination of the agreement are recoverable under the agreement if the agreement is terminated.

(b) Termination of the agreement does not affect any right the executive director has under other law to recover costs.

(c) If the person does not pay to the commission the state's costs associated with the voluntary cleanup before the 31st day after the date the person receives notice that the costs are due and owing, the attorney general, at the request of the executive director, shall bring an action in the name of the state in Travis County to recover the amount owed and reasonable legal expenses, including attorney's fees, witness costs, court costs, and deposition costs.

Added by Acts 1995, 74th Leg., ch. 986, § 1, eff. Sept. 1, 1995.

§ 361.608. Voluntary Cleanup Work Plans and Reports

(a) After signing a voluntary cleanup agreement, the person shall prepare and submit the appropriate work plans and reports to the executive director.

(b) The executive director shall review and evaluate the work plans and reports for accuracy, quality, and completeness. The executive director may approve a voluntary cleanup work plan or report or, if a work plan or report is not approved, notify the person concerning additional information or commitments needed to obtain approval.

(c) At any time during the evaluation of a work plan or report, the executive director may request the person to submit additional or corrected information.

(d) After considering future land use, the executive director may approve work plans and reports submitted under this section that do not require removal or remedy of all discharges, releases, and threatened releases at a site if the partial response actions for the property:

(1) will be completed in a manner that protects human health and the environment;

(2) will not cause, contribute, or exacerbate discharges, releases, or threatened releases that are not required to be removed or remedied under the work plan; and

(3) will not interfere with or substantially increase the cost of response actions to address the remaining discharges, releases, or threatened releases.

Added by Acts 1995, 74th Leg., ch. 986, § 1, eff. Sept. 1, 1995.

§ 361.609. Certificate of Completion

(a) If the executive director determines that a person has successfully completed a voluntary cleanup approved under this subchapter, the executive director shall certify that the action has been completed by issuing the person a certificate of completion.

(b) The certificate of completion shall:

(1) acknowledge the protection from liability provided by Section 361.610;

(2) indicate the proposed future land use; and

(3) include a legal description of the site and the name of the site's owner.

(c) The executive director shall file a copy of the certificate of completion in the real property records of the county in which the site is located.

(d) If the executive director determines that the person has not successfully completed a voluntary cleanup approved under this subchapter, the executive director shall notify the person who undertook the voluntary cleanup and the current owner of the site that is the subject of the cleanup of this determination.

Added by Acts 1995, 74th Leg., ch. 986, § 1, eff. Sept. 1, 1995.

§ 361.610. Persons Released from Liability

(a) A person who is not a responsible party under Section 361.271 or 361.275(g) at the time the person applies to perform a voluntary cleanup is released, on certification under Section 361.609, from all liability to the state for cleanup of areas of the site covered by the certification, except for releases and consequences that the person causes.

(b) The release from liability is not effective if a certificate of completion is acquired by fraud, misrepresentation, or knowing failure to disclose material information.

(c) If a certificate of completion for a site is issued by the commission, an owner who acquires the property on which the site is located or a lender who makes a loan secured by that property after the date of issuance of the certificate is released from all liability for cleanup of contamination released before the date of the certificate for the areas covered by the certificate unless the owner or lender was originally included as a responsible party under Section 361.271 or 361.275(g). A release of liability does not apply to a person who changes land use from the use specified in the certificate of completion if the new use may result in increased risks to human health or the environment.

Added by Acts 1995, 74th Leg., ch. 986, § 1, eff. Sept. 1, 1995.

§ 361.611. Permit Not Required

(a) A state or local permit is not required for removal or remedial action conducted on a site as part of a voluntary cleanup under this subchapter. A person shall coordinate a voluntary cleanup with ongoing federal and state hazardous waste programs.

(b) The commission by rule shall require that the person conducting the voluntary cleanup comply with any federal or state standard, requirement, criterion, or limitation to which the remedial action would otherwise be subject if a permit were required.

Added by Acts 1995, 74th Leg., ch. 986, § 1, eff. Sept. 1, 1995.

§ 361.612. Public Participation

The commission may adopt rules pertaining to public participation in voluntary cleanup decisions.

Added by Acts 1995, 74th Leg., ch. 986, § 1, eff. Sept. 1, 1995.

§ 361.613. Cost Report; Budget Allocation

(a) The executive director annually shall calculate the commission's costs to administer the voluntary cleanup program under this subchapter and shall publish in the Texas Register the rates established for the purposes of identifying the costs recoverable by the commission under this subchapter.

(b) Costs recovered under this subchapter and appropriated to the commission shall be budgeted and distributed to each organizational unit of the commission solely on the basis of costs fairly attributable to the voluntary cleanup program.

Added by Acts 1995, 74th Leg., ch. 986, § 1, eff. Sept. 1, 1995.

CHAPTER 362. SOLID WASTE RESOURCE RECOVERY FINANCING ACT

SUBCHAPTER B. OPERATION OF SYSTEM

Section
362.013. Contract Terms and Procedures.

SUBCHAPTER B. OPERATION OF SYSTEM

§ 362.013. Contract Terms and Procedures

(a) The provisions of Chapter 2253, Government Code, that relate to performance and payment bonds apply to a contract entered into by an issuer.

[See main volume for (b) to (d)]

Amended by Acts 1995, 74th Leg., ch. 76, § 5.95(17), eff. Sept. 1, 1995.

CHAPTER 363. MUNICIPAL SOLID WASTE

SUBCHAPTER A. GENERAL PROVISIONS

Section
363.003. Findings.
363.004. Definitions.

SUBCHAPTER B. COMMISSION POWERS AND DUTIES

363.021. Commission Rulemaking Authority.
363.022. Commission Powers and Duties.
363.023. Application for Federal Funds; Contracts and Agreements With Federal Government.
363.024. Disbursement of Federal Funds.

Section
SUBCHAPTER C. ADVISORY COUNCIL

363.041. Composition of Advisory Council.
363.042. Terms; Vacancies.
363.043. President.
363.044. Payment of and Reimbursement for Expenses.
363.046. Duties.

SUBCHAPTER D. REGIONAL AND LOCAL SOLID WASTE MANAGEMENT PLANS

363.061. Commission Rules; Approval of Regional and Local Solid Waste Management Plans.

Proposal publication date: January 2, 1996

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

♦ ♦ ♦

Chapter 333. Voluntary Cleanup Programs

Subchapter A. Voluntary Cleanup Program Section

- 30 TAC §§333.1-333.11

The Texas Natural Resource Conservation Commission (TNRCC, commission, or agency) adopts new §§333.1-333.11, concerning the voluntary cleanup program (VCP). Sections 333.1-333.11 are adopted with changes to the proposed text as published in the November 7, 1995, issue of the *Texas Register* (20 TexReg 9255).

The statutory basis for the proposed rules is found in House Bill (HB) 2296, 74th Legislature, (the statute) which establishes the existence of a Voluntary Cleanup Program in Subchapter S of the Solid Waste Disposal Act (SWDA), Chapter 361, Health and Safety Code. The commission is developing a guidance document for the VCP concurrent with the development of the VCP rules. Subchapter S and the new rules will be included as attachments to the guidance document.

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated, §2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to implement House Bill (HB) 2296, 74th Legislature, which created the voluntary cleanup program. The VCP was primarily created to provide incentives to encourage the cleanup of thousands of contaminated sites in Texas which require remedial actions in order to complete real estate transactions. The VCP rules will substantially advance this specific purpose by establishing rules where required by statute, clarifying statutory provisions, and providing flexibility in order to promote the redevelopment of contaminated sites. Promulgation and enforcement of these rules could affect private real property which is the subject of the rules.

However, the following exceptions to the application of the Texas Government Code, Chapter 2007 listed in Texas Government Code, §2007.003(b) apply to these rules: the action is taken in response to a real and substantial threat to public health and safety; the action significantly advances the health and safety purpose; and the action imposes no greater burden than is necessary. Sites to be addressed by the VCP represent a real and substantial threat to public health and safety through contaminated soil, groundwater, surface water, and air. Humans may be exposed to these contaminants through many different pathways such as ingestion, dermal contact, and inhalation. The health and safety purpose is significantly advanced because the VCP will promote the expeditious remediation of many contaminated sites in Texas. The rules do not present a greater burden than is necessary to promote the expeditious remediation of contaminated sites because the rules utilize agency risk-based regulatory programs which provide the necessary degree of investigation and remediation while being protective of human health and safety.

The commission accepted public comment on the proposed rules for 30 days following publication on November 7, 1995. A public hearing to accept verbal and written comment on the proposed rule was held at commission offices in Austin, Texas on December 5, 1995. The City of Houston provided oral comment at the public hearing. Written comments were received from the following: Brown McCarroll & Oaks Hartline (Brown McCarroll); Colonial Pipeline Company (Colonial); Cook-Joyce, Inc. (Cook-Joyce); Exxon Chemical Company (Exxon Chemical); City of Houston (COH); Jenkins & Gilchrist; Lloyd, Gosselink, Fowler, Blevins & Mathews, P.C. (Lloyd, Gosselink) on behalf of The Sabine Mining Co., City of Waco, City of Garland, Maxim Technologies, Inc., and Cook-Joyce, Inc.; Locke Purnell Rain Harrell (Locke Purnell) on behalf of itself and JPI Texas Development, Inc.; Railroad Commission of Texas (RRC); Texas Chemical Council (TCC); Texas General Land Office (GLO); Texas Utilities Services, Inc. (TU); the University of Texas System (UT); and Roy F. Weston, Inc (Weston).

The proposal, the commission defined the term "person" and utilized term "Texas Natural Resource Conservation" in the rule. The agency is currently attempting to streamline agency rules. Toward that end, definitions of terms that are common across all agency programs are being consolidated into one new chapter, proposed 30 TAC Chapter 3. Chapter 3 is expected to be effective in May, 1996. "Person" is a term that will appear in new Chapter 3; therefore, it is not necessary to define that term in these rules. It does not appear in the final rule. In addition, the commission is attempting to more appropriately utilize the terms "commission" and "agency" while ceasing to use "TNRCC" or "Texas Natural Resource Conservation Commission" in its rules. In line with the philosophy, "Texas Natural Resource Conservation Commission" has been replaced with "commission" in the definition of "site subject to a commission permit or order."

The commission received a number of general comments. TU expressed general support for the voluntary cleanup program, believing it will provide incentives for cleanup of contaminated sites by streamlining the cleanup process and providing important assurance regarding environmental liability for future owners. The commission received requests from TCC to incorporate the statutory requirements found in HB 2296 in order to make the requirements of the VCP more accessible. These comments were submitted as general comments and comments specific to proposed §§333.2-333.7, and §333.10. The commission responds that *Texas Register* guidance does not consider the adoption of statutes to be acceptable rulemaking, and therefore the commission believes it appropriate to keep the statute and the rule separate. As noted earlier the VCP Guidance Document will include copies of both the rule and the statute. This should alleviate concerns that separating the two creates confusion.

GLO requested that any documents subject to the Texas Open Records Act be made easily available upon request for public review. The commission responds that a standard procedure exists for responding to Texas Open Records Act requests. All documents submitted to the VCP are subject to the Texas Open Records Act and will be easily accessible. The commission has added the following language to the proposed §333.1 of the VCP rule to ensure that adequate copies are available: "(b) the applicant shall submit two copies of all documents, one of which the Voluntary Cleanup Program will file in the agency central records." The original proposed language in §333.1 is located in §333.1(a) in the final rule. In this regard, certain applicants must also notify the agency regional office of activity on a site. Persons entering the VCP and utilizing the Risk Reduction Rules must notify the appropriate agency Regional Office as required by §335.8(c) of 30 TAC Chapter 335.

Cook-Joyce and Lloyd, Gosselink suggested the establishment of a certification program similar to the Petroleum Storage Tank (PST) certification program for persons preparing the applications, workplans and remedial actions. The purpose of such a program would be to ensure quality control of materials submitted and work performed under the VCP and the Risk Reduction Rules found in 30 TAC Chapter 335, relating to Industrial Solid Waste and Municipal Hazardous Waste. The commission notes that the VCP will require applicants to meet PST requirements for certification of persons preparing PST work plans and reports. To remain consistent with other remediation programs using the Risk Reduction Rules, the VCP will not require certification of persons preparing work plans and reports under the Risk Reduction Rules; however, a certification program for environmental professionals may be considered in the future.

UT requested the addition of an applicability section to establish eligibility for the VCP to address how liability protection will be afforded to various categories of applicants, assignment of a voluntary cleanup agreement, liability protection for a subsequent buyer while remediation is ongoing, and when liability protection is effective for the original owner and the buyer. The commission responds that eligibility for entering the VCP is defined by statute. Two categories of applicants are of particular importance, Responsible Parties (RPs) and non-RPs. RPs are not eligible for receiving a liability release as defined by statute. Non-RPs are eligible, but the date of the release depends on their actions. The commission would not allow assignment of a VCP agreement due to the statutory provision that applicants must submit an application and an application fee. Section 361.610(a) of the statute differentiates between applicants and future owners and lenders. Specifically, it states that an applicant "at the time the person applies to perform a voluntary cleanup is released, on certification under §361.609...". The commission interprets this language to allow an effective release date for applicants to be the date of application.

However, concerning future owners and lenders, §361.610(c) of the statute states "an owner who acquires the property on which the site is located or a lender who makes a loan secured by the property after the date of issuance of the certificate is released from all liability for cleanup of contamination released before the date of the certificate." The commission believes that this language is clear that the effective date of release for these persons is the date of the certificate of completion. However, those non-RPs who are not original applicants and who wish to gain liability release prior to the certificate of completion must file a new application, pay the fee, and sign an agreement. This can occur even if there is a prior agreement on file. Thus for example, the VCP may accept an application and fee from a prospective purchaser who is not an RP at the time of their application prior to completion of remediation who will then receive a release of liability beginning at the date of their application upon issuance of the certificate of completion. The original owner is only able to receive the liability protection when they are not an RP; the same is true of a buyer.

Lloyd, Gosselink requested clarification on whether and to what extent compliance with the Texas VCP will satisfy the investigation and notice requirements mandated by the National Contingency Plan (NCP) for parties seeking contribution under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Parties may satisfy the requirements of the NCP under the VCP; however, the VCP may not require several actions required under the NCP (e.g. public participation, remedy selection, notification requirements) to preserve cost recovery. It will be the responsibility of parties wishing to preserve future cost recovery to ensure that NCP requirements are met under the terms of the VCP agreement.

Lloyd, Gosselink also supports agency's pursuit of an agreement with the Environmental Protection Agency (EPA) for every certificate of completion in order to prevent federal enforcement action. The commission responds that the VCP is attempting to gain the maximum assurances from EPA with respect to their endorsement of the Texas VCP. Negotiations are ongoing with EPA Region VI to develop a memorandum of agreement (MOA) which describes a partnership with EPA to accomplish the goal of promoting response actions through the VCP. A key point of the draft MOA states that if a certificate of completion is issued for a site, Region VI will not plan or anticipate any federal action under CERCLA unless Region VI determines the site poses an imminent and substantial endangerment or emergency situation. Also, EPA will suspend further action or take no action at sites being investigated or remediated under the VCP.

Lloyd, Gosselink commented that not all responsible persons should be excluded from the release of liability. The rules should only require that to be excluded from the protections afforded by a certificate of completion, the contamination caused by the RP must constitute an imminent and substantial endangerment. The commission notes that the VCP rule does not include any language regarding persons released from liability. All criteria concerning liability release are stated by statute. The VCP statute does not speak to the issue of imminent and substantial endangerment; therefore, the commission is not addressing this issue. It only references the Health and Safety Code, §361.271 and §361.275(g), which discuss RP status. Lloyd, Gosselink also believes that the TNRCC has the authority to delineate situations in which lenders will be exempted from site liability if they are financing VCP activities, and further believes the agency should address in guidance when lender activities and financing of cleanups may expose them as responsible persons. Persons released from liability are defined under of the Texas Health and Safety Code, Chapter 361. Unlike the Federal Superfund Statute (CERCLA), there is no secured creditor exemption in the Texas Health and Safety Code. However, lenders have other legal protection possibilities under the VCP statute. If the lender is concerned about liability due to a loan to a responsible party prior to a cleanup, the lender should become an applicant. The lender can then gain liability protection by becoming an applicant as contemplated in the statute. It should be noted that if the response actions are not completed, the lender may become a responsible party depending on their activities related to the site. If the response actions are successfully completed, the lender gains the liability release from the lender's application date once a certificate of completion is issued. Lenders who make a loan after a certificate of completion is issued automatically receive liability protection under the statute, after the date of issuance.

Lloyd, Gosselink requested a clarification of the relationship among the Texas Environmental, Health, and Safety Audit Privilege Act (Texas House Bill 2473, 74th Legislature Regular Session (1995)) (the audit bill), the proposed Spill Rules (30 TAC §327.1-327.5) and the VCP. The audit bill has an exclusion for documents required by law to be submitted to the commission. The VCP statute sets out the documentation required to be submitted to that program; therefore, those documents are not privileged when submitted for that program. Concerning the proposed spill rules, there is nothing in either the VCP rules or the spill rules which would preclude a spill cleanup from entering the VCP, once the emergency response to the spill has been completed according to the applicable rules.

Lloyd, Gosselink also requested that the commission create an internal policy stating that staff members will minimize costs as much as possible and provide free technical assistance to VCP applicants whenever requested. The commission believes the statute prevents VCP staff from reviewing plans and reports submitted to the VCP until the agreement is signed. In addition, §361.603(b)(2) of the statute states that a person participating in the VCP must pay all costs for commission oversight. VCP staff typically provide pre-application assistance through discussions regarding the VCP guidance documents. Staff will provide effective and efficient review of all submittals.

Lloyd, Gosselink requested clarification in the preamble on whether facilities not having a permit for their activities but participating in closure actions, which do not do so under enforcement action or order, are eligible for the VCP. Brown McCarroll requested clarification as to when a Resource Conservation and Recovery Act (RCRA) permitted facility can participate in the VCP. Both commenters believe that interim status hazardous waste facilities at the time interim status is acknowledged by the commission should be allowed into the VCP. This comment regarding interim status was made as a general comment as well as a comment specifically targeting certain sections in the proposed rule. Their concern is that the commission is being more restrictive than statutory authority by including interim status facilities in the definition of the phrase "subject to a permit." The agency wishes to clarify its position that interim status facilities do, in fact, meet that definition and are therefore excluded from the VCP. Interim status is a federal regulatory classification. As cited in §3005(a) and (e) of RCRA (Permit requirements for Hazardous Waste Management (HWM) facilities) and 40 CFR Parts 265.1 and 270, owners and operators of existing hazardous waste management facilities or of hazardous waste management facilities in existence on the effective date of statutory or regulatory amendments under the act render the facility subject to the requirement to have a RCRA permit. Facility owners and operators with interim status are treated as having been issued a permit (40 CFR Part 270) until either a permit is issued under 3005 of RCRA or until applicable Part 265 closure and post-closure responsibilities are fulfilled. Owners and operators of such facilities are eligible for interim status on an ongoing basis if the facility is in existence on the effective date of any regulatory changes under RCRA which cause the facility to be subject to RCRA Subtitle C regulation. In addition, RCRA authorization prohibits the state from being less stringent than federal regulation. Because interim status facilities fall under federal definition and regulation, such a facility cannot be allowed to use less stringent state regulations to be relieved of federal regulatory requirements.

The commission understands the commenter's interpretation that the phrase "subject to permit" could be interpreted to mean a permit has been issued; however, the commission defines the phrase to include interim status facilities because existing federal regulatory requirements in RCRA, §3005 (a) and (e) state that such facilities "are required to have a permit" ... and "shall be treated as having been issued such permit". The intent of the VCP statute is that some RCRA regulated facilities, including interim status facilities, are subject to a permit and other applicable federal regulatory requirements and should be omitted from the VCP; RCRA federal requirements must take precedence over state authorized cleanup programs.

Concerning §333.1, the commission received one comment. The RRC would like the section amended to clarify the jurisdiction of the Railroad Commission of Texas over certain cleanups. The commission responds that jurisdiction is already clarified by statute, specifically SWDA, §361.601(3), and the Texas Water Code, §26.131; therefore, the commission does not believe it is necessary to amend the rules. However, persons wishing to enter the VCP should note that Chapter 333 does not apply to the cleanup or removal of any waste, pollutant,

or substance regulated by or that results from exploration, development, and production of oil or gas or geothermal resources under the jurisdiction of the Railroad Commission.

The commission received several comments regarding the proposed definitions in §333.2. Concerning "Initiate an enforcement action," Jenkins & Gilchrist requested that the definition be limited to instances where the executive director's Preliminary Enforcement Report has been issued, believing the Notice of Violation (NOV) stage is too early because the violation is only alleged, and no findings of violation have been made. The commission believes the commenter has confused the term "Initiate an enforcement action" with "Pending enforcement action". "Initiate an enforcement action" under the VCP rule provides clarification of the types of actions which the State is prevented from initiating while a party is complying with the terms of the Voluntary Cleanup (VC) agreement. On the other hand if there is a "Pending enforcement action" and the executive director, for example, finds that it is in the best interest of the agency or it will promote the effective use of agency resources or it will expedite a cleanup, the executive director may, but is not required to, allow applicants to enter the voluntary cleanup program. It should be noted that by the time an NOV has been issued, a great deal of agency effort has been expended. To begin again in the VCP would possibly be a significant duplication of effort. For this reason, the commission believes that this is the appropriate point in time to allow the executive director to determine the appropriate program to handle the cleanup. Specifically, regarding "Pending enforcement action," Brown McCarroll, Lloyd, Gosselink, and Jenkins & Gilchrist requested clarification that cleanups are ineligible for the VCP due to enforcement orders or pending orders only to the extent that such orders actually address the remediations at issue. The commission agrees, and the definition now reads "Concerning the remediation of the hazardous substance or contaminant described in the application, a notice of violation has been issued and further administrative, state, or federal enforcement action is under evaluation or an enforcement action is required by federal grant, or the State has incurred unreimbursed costs under the Texas Health and Safety Code, Chapter 361, Subchapter F."

Regarding the definition of "Exposure Assessment Model," TCC requested that probabilistic models be included in the definition. The commission intends for persons to develop a conceptual model of the site based on site-specific exposures, and considers the term "conceptual model" in the current definition to be sufficiently broad to allow the agency to accept any valid model. GLO requested clarification of the term "reasonably anticipated" in the definition. The VCP guidance documents will provide further clarification how "reasonably anticipated" is used in the VCP. Although no comments were received concerning "Partial response action," the commission believes that the proposed definition can be clarified by adding the statement, "if any" and replacing "site" with "partial response action area" in the definition so that it now reads, "A response action which is limited to an areal portion of the site and off-site areas, if any, contaminated due to releases which have migrated from the partial response action area onto property owned or controlled by others, inclusive of all media." Lloyd, Gosselink suggested the definition of "Site" should address portions of site. The commission responds that the statute separately addresses the terms "site" and "portion of a site;" therefore, they should not be combined in the rule. Consistent with general comments on the issue of interim status hazardous waste facilities, Lloyd, Gosselink commented that the definition of "Site subject to a commission permit or order" is overly restrictive given the statutory language of HB 2296, and interim status hazardous waste facilities should be allowed to enter into the VCP. The commission disagrees with this comment based upon the reasons elaborated earlier in the preamble; however, the language in the definition has been modified to alleviate confusion. The proposal stated that "these also include interim status hazardous waste facilities, at the time interim status is granted." The final rule states, "these also include hazardous waste facilities, which are operating under interim status."

Section 333.3 contains the stated purpose of the VCP rules. Several comments were received addressing this section. Lloyd, Gosselink and Weston requested that the rule be amended to state that the purpose also is intended to provide a timely and efficient process. The commission agrees and the language has been changed by adding the following language to the end of the section, ". . . and to provide a process by which voluntary response actions can be completed in a timely and efficient manner". The GLO commented that the VCP does not remove liability for injuries to natural resources by an unauthorized release of hazardous substances or discharge of petroleum under federal law. UT wanted clarification that the release of liability is only from the State and not from the federal government. The commission emphasizes that the statute only releases liability to the State under State law for cleanup of sites and does not affect federal liabilities. Release of liability by the State does not apply to natural resource damage or restoration under federal law. Finally, UT requested clarification as to whether the program removes liability of only future lenders or all lenders. The commission responds that future lenders who are not RPs will be released from liability, as set out in the statute. Also, lenders who are not RPs and are applicants will be released from liability upon issuance of the certificate of completion (see earlier discussion).

Section 333.4 concerns the application to participate in the VCP. Exxon Chemical suggested including a provision to allow the applicant the right to withdraw an application and cancel an agreement at any time during the review process. The commission does not believe such a change is necessary. The right to withdraw an application is discussed in the Texas Health and Safety Code, §361.606. If the applicant withdraws from the program, all commission costs incurred or obligated before notification of termination must be paid. Termination of an agreement is discussed in the Texas Health and Safety Code, §361.607.

Regarding the 45-day time limit for acceptance or rejection of the application, the commission received two comments. GLO requested that the time period to accept or reject an application should be longer, because 45 days is not adequate to coordinate with other agencies if necessary. UT wanted clarification on what happens if the agency does not respond in 45 days. The commission is statutorily obligated under the Texas Health and Safety Code, §361.605 to notify an applicant if the application is rejected, within 45 days after application submittal. The management of the agency will oversee the timeliness of staff review. In addition, a Writ of Mandamus is available to force the agency to comply with the statutory deadlines.

Lloyd, Gosselink stated that the TNRCC should not initiate enforcement actions during the pendency of the review of VCP applications or immediately following rejection of an application. According to Lloyd, Gosselink's comment, the rule should also recognize that privileged information under the Texas Environmental, Health, and Safety Audit Privilege Act remains protected under the VCP, and the entity does not lose the benefits of any applicable immunities. The commission agrees with the first part of the comment. The section is amended by adding language that the agency shall not initiate enforcement action on a VCP applicant during the pendency of the agency review of an application. The commission does not agree to restrict itself after rejection of an application since there may be circumstances such as fraud where immediate enforcement action is appropriate. For the reasons stated earlier in this preamble, the commission does not believe the audit bill protects those documents required by statute to be submitted to the VCP for the contamination or release that is the subject of the Voluntary Cleanup Agreement.

Section 333.5 sets forth standards for rejecting an application. UT wanted clarification that the executive director may reject the application for only the two stated reasons identified in the proposed rule. The commission disagrees noting that §361.605 of the statute details other reasons for the executive director to reject an application. GLO believes an ongoing natural resource damage assessment (NRDA) or pre-assessment (PA) should be cause for rejecting an application because an ongoing assessment would indicate that significant natural resource injury has occurred or is suspected to have occurred. The commission notes that acceptance into the VCP does not preclude NRDA or PA actions from proceeding or being initiated since the VCP statute only prevents the commission from initiating enforcement action. It does not prohibit actions by other state agencies or actions pursuant to federal law. Therefore, the VCP will not reject applications based upon these reasons. The VCP will utilize the applicable rules and guidance to ensure that natural resources are adequately protected.

Concerning §333.5(1), TCC requested its removal because the paragraph is vague, and §361.603 and §361.605, the SWDA, and §333.5(2) are adequate. The commission agrees and the paragraph is not included in the final rule. Lloyd, Gosselink recommended any changes to the definition of "Pending enforcement action" and "Site" should be

incorporated into this paragraph. The paragraph has been removed, and there is no need to make corresponding changes. Weston requested clarification of the term "Under enforcement." According to the commenter, a property owner may be under enforcement without realizing it because there has been no response from the commission for an extended period of time. Weston further suggested setting up a single "hot line" so that someone may determine if they are under enforcement in any agency program. The commission responds that the term "under enforcement" is not used in the rule. However, "pending enforcement action" is defined in §333.2, and the commission has clarified in this preamble what is meant by the term. Persons may contact the Litigation Support Division to inquire whether or not their site is on the agency's enforcement log.

The commission received two comments regarding §333.5(2). UT wanted to know when all costs are recoverable and when payment must be made to the fund. The commission responds that payment must be made to the fund prior to acceptance of a VCP application. Lloyd, Gosselink suggested elimination of this paragraph as an option for rejecting an application, because it believes the agency's authority under HB 2296 to assess costs retroactively is questionable. The commission disagrees and is retaining proposed paragraph (2) as an option for rejecting a VCP application. The commission further disagrees that it cannot collect past costs, believing that the SWDA provides that authority. Cost recovery is authorized in Health and Safety Code, Chapter 361, Subchapter F. If its costs are not reimbursed voluntarily, the commission would seek to enforce an order compelling reimbursement; therefore, the commission considers that enforcement is "pending." However, the commission is amending the definition of "Pending enforcement action" to clarify its authority to reject an application for failure to pay such costs. The commission retains paragraph (2) as proposed; however, the removal of proposed paragraph (1) eliminates the necessity of a paragraph number.

Section 333.6 concerns the voluntary cleanup agreement. Colonial recommended that a cost schedule be developed to assist the responsible parties in identifying and estimating their potential project costs. In response, the agency can provide rough estimates of its oversight costs on a case-by-case basis per request from the applicant. Factors which may affect these costs include the complexity of the site and the quality and quantity of the work submitted to the VCP. Another comment suggested adding language requiring the agency to complete its technical review of workplans or reports submitted under a voluntary cleanup agreement within 45 days. Colonial suggested that within the 45-day period, the agency must approve the work plan/report, approve portions of the work plan/report, or disapprove the work plan/report. If the work plan/report is approved in whole or in part the applicant can move forward and undertake actions approved. If disapproved, the applicant has 45 days to revise the work plan/report. The commission responds that staff will make every attempt to review a submittal within 45 days, but it does not believe adopting a specific time frame as a rule is appropriate. The VCP must balance the work load and the number of staff in order to provide the most efficient review time and the lowest oversight cost.

Specifically regarding §333.6(a), the commission received two comments. UT recommended changing the term "both parties" to "TNRCC and the applicant." The commission agrees with the concept, and has replaced the term "both parties" with " the applicant and the executive director or his representative. " Brown, McCarroll and Exxon Chemical believe the statement that an agreement must be signed prior to any response action being implemented does not appear to allow owners of sites which have already undergone voluntary remediation to participate in the VCP. The commenters believe the rule should allow sites previously cleaned up under the guidance and direction of other TNRCC programs to enter into the VCP. If cleanup has previously been approved, the applicant should not be required to meet more stringent cleanup standards. The commission responds that parties who have gained agency final approval of the completed remediation prior to the effective date of the VCP rules may apply to enter the VCP. The executive director has the discretion to reject the application. However, if the application is accepted, the VCP will require submission of all information initially submitted for review to receive the prior approval and may require additional information regarding the site if the previously approved response action did not address all contaminants in contaminated media within the proposed site or partial response action area, if contaminant management practices were initiated or changed since the previous approval date, or regulatory requirements have changed since that approval. The proposed rule has been amended to clarify this. Additionally, the applicant shall pay the application fee and oversight costs. A VC agreement must be signed by the agency representative and the applicant prior to agency review. Sites initiating response actions after the effective date of these rules without signed VC agreements will not be allowed into the VCP. The requirement in §333.6(a) that the VC agreement be signed prior to the implementation of any response actions ensures that the response actions are clearly understood and agreed to by both the applicant and the agency representative. Site investigations may begin prior to completion of the application and agreement, although the commission encourages persons to coordinate these activities with the agency after completion of the application and agreement. The commission does agree with the commenters that a language change will clarify this. The following sentences have been added to the rule, "However, for response actions initiated or completed prior to the effective date of these rules, the executive director at his discretion may allow sites to enter the Voluntary Cleanup Program. After the effective date of these rules, persons initiating response actions prior to a signed Voluntary Cleanup agreement may not enter the Voluntary Cleanup Program."

Section 333.7 discusses VCP work plans and reports. Lloyd, Gosselink supports this section as proposed. Exxon Chemical stated that the TNRCC should be required to provide an estimate of oversight costs at the time the commission approves the work plans and reports. In response, the VCP will provide non-binding estimates of oversight costs to the applicant at that time, upon request.

The commission received several comments specific to §333.7(a). UT stated that this section should be modified to state that the exposure assessment model shall examine all currently discovered and reasonably anticipated future exposure pathways for all targeted contaminants and media of concern. The commission responds that in developing a conceptual exposure assessment for a site prior to completing an investigation, it is inappropriate to exclude potential contaminants of concern without proper determination of exposure to human health and the environment. However, the results of a site investigation may provide sufficient information to target the contaminants of concern for remediation purposes. The recommended change is not included in the final rule. UT also requested clarification that "media of concern" refers to soil or groundwater rather than air, except in limited circumstances. The commenter provided no criteria for distinguishing between air, water, and soil. The commission is responsible for protection of human health and the environment including air; therefore, the commission has not changed the proposal.

GLO requested that the agency identify existing guidelines that will be used by the executive director to evaluate and maintain consistency in the evaluation of the full nature and extent of contamination at a site. The commission responds that the criteria for determining the nature and extent of contamination are described in the Risk Reduction Rules, PST guidance, and the VCP guidance. It should be noted, though, that the nature and extent of contamination may be determined on a site-by-site basis through the preparation of an exposure assessment model which may not require an investigation of the full nature and extent of contamination. Flexibility in determining the limits of an investigation based on an exposure assessment model is described in the PST and VCP guidance. Additionally, TCC wanted to know if models proposed by parties outside the agency will be accepted. Finally, TCC wanted to know how the agency will handle narrowing down the list of samples and constituents in the VCP to a reasonable number. The agency will determine the acceptability or appropriateness of proposed models based on whether the models provide an accurate assessment of the nature and extent of contamination. Because the second question is fact-specific and can only be answered upon site-specific review, no general comment on an approach to limit numbers of samples or constituents required can be given.

Regarding §333.7(b), COH suggested replacing "migrated onto property owned or controlled by other" with "migrated onto property where an interest is held by another person." In response, the commission believes the inclusion of this language would effectively exclude parties from initiating partial response actions in areas such as cities with pervasive easements. However, we agree that persons who perform their work in easements, rights-of-way, etc. should be alerted to potential exposure to hazardous substances; therefore §333.11 has been modified to provide this notice.

Concerning §333.7(c)(1), Jenkins & Gilchrist requested that the agency

that the only inquiry is whether the person had some responsibil- the active release on the off site property, and that the issue of er the person had passively allowed the release to migrate under perty is not at issue in this requirement. The commission agrees iis comment. For this reason, the language has been changed to the terms "suffer" and "allow" from the rule. Persons should be hat the certificate of completion will only pertain to contamina- ists before the date of the certificate and will not release contamination which migrates onto the site after the issu- of the certificate. Persons should take all necessary actions to off-site contamination from continuing to migrate on-site to avoid liabilities.

commented on §333.7(c)(2) stating that the approach to cleanup ed by this paragraph is flawed because the source of contamina- nay not be addressed. The commenter believes the TNRCC d address a site's entire contamination, including the source area it contamination if it presents a risk to human health and the onment. In response, the commission believes the partial re- se action provides incentives to remediate properties which would therwise be remediated. The VCP agreement which precludes ing an enforcement action will only pertain to the partial response n area, thus preserving the commission's enforcement authority emaining contaminated areas including sources. Applicants wish- o address only portions of the site as a partial response action d also note §361.608(d) of the statute which limits situations in n partial response actions may be approved by the executive tor.

on 333.8 addresses response action standards. The commission ved a number of comments on the proposed section. Concerning .8(a), the commission received two comments. GLO requested all media which exceed ecological risk based cleanup levels ld be addressed through response actions. Without these, the nenter contends that a person could still be liable for natural urce damages on the site or affected by the site. The commission rstands the commenter's concern and the final rule states "... ed the health-based and environmental cleanup levels..." As noted er, participation in the VCP does not prevent a natural resource age action. UT noted that an exposure assessment model may onably demonstrate that an exposure pathway does not exist, but it ot prove that a pathway does not exist. To clarify the use of ssessment models, the commission is removing the portion) which discusses limitations associated with an exposure ssment model. Exposure assessment models are already dis- ed in §333.7(a) concerning the site investigation, which is the opriate location to include the use of such models. Section 8(a) will now read "Excepting areal limitations with partial response ns, all media which exceed the health-based and environmental nup levels shall be addressed..."

requested clarification on the extent to which the applicant shall ct a response action and what role TNRCC will have in selecting esponse in §333.8(b). The commission responds that the applicant have the ability to select the response action, and the agency will ew the selected response action to ensure that the action is able of meeting the response action objectives. For State erfund sites, a public meeting to receive comments on the pro- ed remedy is required by statute. However, the remedy selection ria set out in 30 TAC Chapter 335, Subchapter K (relating to ardous Substance Facilities Assessment and Remediation) are not icable to sites in the Voluntary Cleanup Program. Lloyd, Gosselink ested that the applicant limit its evaluation to one proposed remedy er than all possible remedies. The commission responds that as as the proposed remedy meets the requirement of 333.8(b), the icant is not required to evaluate additional remedies.

cifically concerning §333.8(c), Lloyd, Gosselink recommended ng the following language to the end of the subsection, "unless n requirements are inconsistent with a specific provision of this chapter." The commission partially agrees with the comment noting these rules cannot supersede federal or state statutes, federal s, or other agencies' rules. The following language has been added e proposed rule, "... unless such commission rule requirements are nsistent with a specific provision of this subchapter". GLO stated when contaminants have migrated or threaten to migrate onto lands under the management of GLO, a surface easement must d to support the remedial engineering proposed on those lands. The commission responds that this rule speaks only to permits, not the necessity for easements. Permission of the landowner is one method of achieving access to clean up a site. If access is denied, the commission may utilize its authority under the Texas Water Code and Texas Health and Safety Code to obtain access for the applicant. COH requested that the rule be amended to state that persons in the VCP are still required to comply with local codes and ordinances, and may need to obtain building, sewer, or fire permits. The commission believes that the rule requires clarification to limit the exemption from state and local permits to remedial actions and removals under the VCP. The proposed language has been amended to state, "State or local permits are not required for removal or remedial action under the Voluntary Cleanup Program..." to qualify when state or local permits are not required. The commission disagrees with the second half of the comment. The statute is clear that no state or local permits are required for this type of activity. Moreover, the statute does not require that the local substantive requirements are met, although the city may have other legal justification for the imposition of these requirements on an applicant. The commission believes that this issue is unsettled in law and will have to be determined by the courts or by negotiation. The language in the statute is virtually identical to that in the State Superfund Statute, Texas Health and Safety Code, §361. 196, and is similar in relevant aspects to the exemption from permitting under CERCLA. The commission received a comment from Jenkins & Gilchrist that this subsection should specify whether state permits that are issued pursuant to federally delegated programs such as RCRA and Treatment, Storage and Disposal (TSD) permits are covered by the permitting exclusion. In response, permits must be obtained if required by federal law or regulation or by a federal program.

Section 333.9 concerns deed certification. For purposes of this discussion, "deed certification" and "deed recordation" are used interchangeably. Locke, Purnell strongly supported the section as proposed. UT believes that filing the certificate of completion in the deed records should satisfy the deed certification requirement of this section. The commission partially agrees with the commenter. In order to simplify the deed certification process, for applicants in the VCP the commission will only require one instrument, the certificate of completion, to be recorded into the deed record. Specific deed certification provisions of the applicable rules (i.e, petroleum storage tank or risk reduction rules) will be included in the certificate of completion, as appropriate. These specific provisions will be determined by the actions taken on the site by the applicant, such as the use of engineering controls, which will require a specific provision to be included in the certificate of completion. For those sites which do not rely upon engineering or institutional controls, or post-closure care or are maintaining remediation systems, no additional provisions will be included in the certificate of completion over what is required to meet the statutory requirements for certificates of completion. The proposed language has been changed to indicate that for the VCP the filing of the certificate of completion into the deed record, as required by statute, will satisfy the deed certification requirements of 30 TAC Chapters 334 and 335 (i.e, petroleum storage tank and risk reduction rules) for the areas covered by the certificate of completion. There are two types of certificates of completion. Final certificates are issued when no more response actions are necessary. Conditional certificates are issued when the applicant is satisfactorily maintaining the engineering controls, remediation systems, or post-closure care or non-permanent institutional controls are utilized pursuant to the Voluntary Cleanup agreement. The preamble further elaborates on final and conditional certificates of completion in the discussion concerning §333.10. GLO stated that deed certification should be required whenever any residual contamination is left on site; however, the certificate could specify that residential health based limits were achieved. The commission disagrees and believes that the stigma of deed certification inappropriately burdens the property title when no contaminants exist above health based levels. Lloyd, Gosselink recommended that the rule be amended so that sites that achieve industrial health-based levels should not require deed certification. The commission partially agrees with the commenter. No additional "deed certification" provisions will be included in the certificate of completion, since the statute requires that the certificate of completion indicate the proposed future land use. Applicants should note the statutory language in §361.610(c) which states "a release of liability does not apply to a person who changes land use from the use specified in the certificate of completion if the new use may result in increased risks to human health or the environment." Thus a future owner who does not maintain compliance with the terms of the certifi-

cate of completion will be changing the use of the site and will lose his release of liability. Since the situation that led to the certificate of completion may not be restorable after such a change in use, subsequent purchasers also do not receive a release of liability. However, they may re-enter the VCP prior to purchase and receive liability protection due to their own actions which may include additional response actions. Locke Purnell suggested adding a statement that deed recordation will not be required under the Risk Reduction Rules if health-based levels are achieved. This comment was addressed above, in that the certificate of completion will satisfy the deed recordation requirements for the areas covered by the certificate of completion; for areas not covered by the certificate of completion (i.e. potentially off-site areas), deed certification will be required under 30 TAC Chapters 334 and 335 when residential health-based levels are not achieved and/or non-permanent institutional controls (e.g, zoning), post-closure care, remediation systems, or engineering controls are utilized.

Jenkins & Gilchrist suggested notice be given to future landowners, both residential and non-residential, in place of deed recordation. In addition, deed recordation for off-site properties should not be required. The commenter believes this will eliminate the stigma created by deed recordation, and, in the case of off-site properties, eliminate a possible cause of action by the owner of that property. The commission disagrees and believes deed certification is an appropriate requirement under the circumstances noted earlier. In addition, the filing of a certificate of completion is required by statute. The commission has attempted to minimize filing requirements by allowing the certificates of completion to serve as deed certification. Finally, the commission believes that the filing of the certificate of completion should not damage properties but may enhance the value of the property due to evidence of approval by the State of the cleanup action and the statement of liability release for future lenders and owners of the property. Exposure to a cause of action by the off-site landowner is the choice of the applicant selecting a remedy which is not satisfactory to the off-site interest holder.

Brown McCarroll recommended amending the section to allow sites that have previously achieved a residential health-based level under the 30 TAC Chapter 335, Subchapter S, Risk Reduction Rules to supplement the deed record with a statement that the deed certification was made under circumstances that no longer require deed certification. As noted earlier, the amended language no longer requires deed certification for the areas covered by the certificate of completion. Moreover, The commission agrees with the comment and responds that upon filing of the certificate of completion, the party may supplement the deed record with a statement that the certificate of completion will supersede prior deed recordation requirements pertaining to the area described in the certificate of completion. The rule has been changed to reflect that possibility by adding new subsection (e) to §333.10 which states, "The executive director may allow the applicant to file a statement in the deed records stating that the certificate of completion supersedes prior deed certification requirements."

The commission received many comments on proposed §333.10 which discusses the certificate of completion. Lloyd, Gosselink supports the language as proposed. In conjunction with other comments regarding previous sections, Brown McCarroll requested that the section be amended to add a certificate of completion specifically for sites previously remediated under the Risk Reduction Rules. The commission responds that it does not have the authority to issue retroactive certificates of completion for sites previously approved by the agency. However, sites which have received agency review and approval prior to the effective date of the VCP rule may enter the VCP for evaluation to determine if current response action requirements are satisfied. The agency will issue a certificate of completion for previously approved sites only if currently appropriate response actions for all contaminants within the area described in the certificate of completion have been completed. The final rule contains a new, §333.10(c) which includes this provision. Proposed §333. 10(c) is §333.10(d) in the final rule.

Brown McCarroll also requested a provision in the Health and Safety Code, §361.610, be added to the rule. The specific language states that a "released" party cannot ever be held responsible by the State for existing contamination at the site that was not detected in the course of the voluntary cleanup investigation unless there was fraud, misrepresentation, or knowing failure to disclose material information. The commenter believes this will clarify that those who are not RPs at the time the certificate of completion is issued are released from undiscovered contamination at a site where a good faith investigation of contamination has been made. The commission agrees with the commenter that a released party cannot ever be held responsible by the State for existing contamination at the site unless the conditions stated under the Health and Safety Code, §361.610(b) exist or the previously released person changes the land use from that in the certificate of completion if the new use may result in increased risks to human health and the environment as stated in §361.610(c). In this regard, a non-RP may become liable in spite of the liability release if he changes the land use to one which may result in increased risks. A change in use includes not maintaining an engineering control, remediation system, or post closure care, or non-permanent institutional controls. The commission believes that it is not necessary to adopt the statutory language in the rule. However, the commission is adding a definition of "Change in land use" to clarify the intent of the statutory language in §361.610(c). GLO commented that the certificate of completion should not release a site from natural resource liability under federal law. The commission agrees and notes that parties are not released from federal liabilities under the VCP statute.

The commission received several comments regarding the specific subsections of §333.10. Concerning §333.10(a), COH suggested additional language to clarify that there are some minimum standards and approval necessary for a final report. The commission agrees and the language in the paragraph has been changed to read, "If reports acceptable to the executive director that are submitted..." Regarding §333.10(b), UT wanted clarification that the term "legal description" does not necessarily require a survey but must only provide adequate detail such that the areal extent and location of the site is obvious. The commission disagrees with this comment. The certificate will be recorded in the county property records. Without an adequate legal description of the property affected, those who rely upon the property records, such as title companies, may be misled. The legal description should consist of a metes and bounds survey completed by a registered professional surveyor. Jenkins & Gilchrist submitted a comment on proposed §333.10(c) stating that the certificate of completion should only be filed in deed records on property owned by the applicant. In response, the statute requires that the certificate of completion be filed in the real property records for the site. If contamination is addressed for off-site properties, the commission will extend the certificate of completion to those areas, unless the applicant requests otherwise. However, if the certificate of completion is not recorded for the offsite properties, the deed certification requirements, if any, of other applicable rules (e.g, risk reduction rules) must be met for cleanups which do not achieve residential health-based levels in all media of concern and/or cleanups that include engineering controls, remediation systems, or post-closure care or non-permanent institutional controls. As noted earlier, exposure to a cause of action by the offsite landowner is the choice of the applicant selecting a remedy which is not satisfactory to the off-site interest holder. The commission wishes to clarify the intent of proposed §333.10(c). The commission understands that certain transactions are time-sensitive, and §333.10(c) was proposed to allow applicants the opportunity to expedite the process of filing a certificate of completion. The commission believes that additional language is necessary to ensure that the commission's intent is clear in the rule. Therefore, the following language has been added to proposed §333.10(c), "The applicant must file the copy of the certificate of completion prior to the sale or transfer of the property, but not later than 60 days after the date of issuance of the certificate of completion." As stated earlier, proposed §333.10(c) in the proposed rule, is §333.10(d) in the final rule.

In the preamble to the proposed rule, the commission requested comment on the concepts of conditional certificates of completion and certificates of completion for phased cleanups. The commission has determined that it will designate certificates as either final certificates or conditional certificates. Final certificates are issued when no more response actions are necessary. Conditional certificates are issued when the applicant is satisfactorily maintaining the engineering controls, remediation systems, or post-closure care, or non-permanent institutional controls are utilized pursuant to the Voluntary Cleanup agreement. For example, demonstration of "satisfactorily maintaining a remediation system" for a ground-water cleanup can be accomplished by showing declining contaminant concentrations and hydraulic control over the contaminant plume, in dedicated monitoring wells. Conditional certificates would be issued prior to final completion of the response action in instances where long-term actions or engineering controls

, groundwater pump and treat, cap and monitoring, non-permanent utional controls) are necessary. As noted in the preamble to the osal, the statute does not specifically authorize the issuance of a ficate of completion prior to attainment of final remediation goals n long-term response actions or engineering controls are imple-. However, the commission believes the purpose of the statute, e incentives to remediate property by removing liability of non-licants, future landowners, and lenders would be advanced by ing conditional certificates of completion in these instances. The mission would issue a final certificate of completion when the onse actions have met the final remediation goals for the site. The sed approach would allow parties to divide remediation of a con-inated area into separate phases with separate schedules under a le voluntary cleanup agreement. Authorization to conduct a phased onse action will be granted only when, in the executive director's luation, the schedule is reasonable, and §333.10(a) in the final rule ludes this qualification for approval of a phased approach. At the mpletion of each phase, a certificate of completion would be issued the portion of the contaminated area that has been remediated. The tificates in a phased project may be either final or conditional rtificates of completion, depending upon the specific circumstances each phase. The commission believes issuing conditional certificates d allowing phased cleanups will provide parties the flexibility to oritize cleanup activities for portions of contaminated areas but still responsible for remediating the entire area.

he commission received several comments in response to its re-uests. All comments supported both the conditional certificate of mpletion and certificates for phased projects. Several commenters ad specific recommendations. Regarding the conditional certificate of mpletion, Weston recommended issuing the conditional certificate nce a remediation system has been installed. This would allow the roperty transfer to take place. The commenter stated that if the ystem fails, it should be clear the TNRCC will pursue the original wner and not a new owner or new lender. The commission disagrees with the comment and notes the statute of the Texas Health and Safety Code, §361.610(b) and (c) states the conditions for liability for non-RP pplicants, future owners or lenders once a certificate has been issued. The original owner and other responsible parties (under the Health and Safety Code, §361.271 and §361.275(g)), as well as those who change se, would be targeted for enforcement if the remediation is not rted per the terms of the voluntary cleanup agreement. Other-, the release from liability granted to non-RP applicants, lenders, and subsequent purchasers would not be revoked. UT suggested three different types of conditional certificates. Option 1 would create a separate engineering controls agreement requiring the applicant to post a performance bond or deposit money into an escrow account sufficient to ensure completion of the engineering controls. Option 2 would allow a subsequent buyer to file an amended application without paying the application fee and become a co-applicant. The co-applicant would then be held responsible for completion of the work. The commission has addressed this comment in response to a general comment earlier in the preamble. Option 3 would simply grant a partial certificate of completion for all work except the engineering controls. The commission believes that its proposed solution is preferable to Option 3, since this will result in a full certificate of completion with full liability release. The commission disagrees with Option 1 concerning the need to create a separate "engineering controls" agreement, however a demonstration of financial capacity to complete the response action will be required. The commission believes that the statutory provision in the SWDA, §361.604, which requires that the applicant submit information concerning their financial capability to perform the voluntary cleanup allows the VCP to request documentation for demonstrating financial capacity for long-term response actions. In addition, the commission retains its enforcement power against the responsible parties. The commission interprets §361.606(e) of the statute to only protect RPs from enforcement during the term of the agreement. After the agreement is terminated, an RP is subject to enforcement should cleanup standards change or additional contamination be discovered. The commission will monitor the success of these controls in the future and if they are found to be inadequate, may propose statutory provisions related to financial assurance. Lloyd, Gosselink believes it is appropriate for the agency to cut off an applicant's ability to unreasonably delay the completion of a response action for a final certificate of completion; however, the menter is concerned that the proposal preamble did not provide nce on how long an applicant had to complete a response action. this reason the commenter requested that TNRCC provide guidance that sets out some general criteria that will allow applicants to adequately predict applicable time constraints, but the commenter believes that specific time lines do not seem realistic given the wide range of possible response actions. The commission agrees. The VCP will negotiate schedules for achieving the response actions based on site-specific considerations. This schedule will enable the agency to ensure that voluntary parties are actively remediating sites. If schedules are not met, the commission may terminate a voluntary cleanup agreement under §361.607 of the statute.

The commission received several comments specific to the certificates of completion for phased projects. Weston believes they are necessary to expedite property transactions, and further notes a certificate issued under this scenario should not be voided if additional phases are not completed. If a transaction has occurred and the phased project is not completed, the original owner should be held accountable, not the purchaser or the purchaser's lender. The commission agrees with the comment. In the proposal preamble, the commission proposed an alternative of requiring the off-site contamination to be remediated or the on-site certificate becomes void. Lloyd, Gosselink opposed this because the commenter believes it will serve as a disincentive to those wanting to enter the VCP. The commission agrees with this comment and is not pursuing this alternative. The first phase certificate will not become void if the second phase is not remediated. Locke Purnell believes the statute allows TNRCC the discretion to allow both conditional and phased projects. According to their comments, to do otherwise would defeat the entire purpose of the program since most sites will probably require some type of engineering or control or monitoring. The commenter further stated that HB 2296 does not expressly require all non-permanent institutional or engineering controls to be removed before the certificate of completion is issued. As noted earlier, the commission agrees with the commenter that to not allow conditional certificates would seriously undermine the intent of the program; however, the statute uses the terms "successfully completed" and "has been completed" as prerequisites for issuing a certificate of completion. Therefore, the commission is adding a new definition of "completion" to the rule. "Completion" means that no more response actions are necessary or the applicant is satisfactorily maintaining the engineering controls, remediation systems, or post-closure care, or non-permanent institutional controls are utilized pursuant to the Voluntary Cleanup agreement. Section 333.10(a) is amended by stating, "If reports acceptable to the executive director that are submitted under this subchapter demonstrate that no further action is required to protect human health and the environment, the executive director shall certify such facts by issuing the person a final certificate of completion. If the applicant is satisfactorily maintaining the engineering controls, remediation systems, or post-closure care, or non-permanent institutional controls are utilized pursuant to an agreement, the executive director shall certify such facts by issuing the applicant a conditional certificate of completion."

Section 333.11 addresses public participation in the VCP process. The commission received a number of comments on this section. UT stated that the section should be entitled "Public notice." The commission agrees with this comment and is adopting this section under its general rulemaking authority. The statute states that the commission may adopt rules concerning public participation, but it is choosing not to at this time in order to expedite response actions under the VCP. GLO stated that notice to the public should be placed in local newspapers and the *Texas Register* 30 days prior to signing a voluntary cleanup agreement, and public comment should be requested. Along those lines, UT recommended amending the proposed rule to establish a time period for receipt of comments from other landowners. The commission disagrees with this comment and does not believe that notifying the public and receiving comments prior to the signing of a voluntary cleanup agreement is warranted in the Voluntary Cleanup Program. The suggested language would result in unnecessary delays in site cleanups. In spite of the lack of a rule for commenting by landowners, an off-site property owner may use all available legal remedies to require the responsible person to alter a remediation plan. For public entities, COH recommended notice be given to the Chief Clerk or the city secretary.

Several other comments were received requesting additional notice requirements. GLO requested amendment of the section to require certified return receipt requested letter to the Commissioner of the GLO whenever the site in the VCP is located adjacent to state owned lands. GLO also requested that TNRCC project managers should be required

to notify the Director of the NRDA program at GLO of VCP applications by certified mail return receipt requested. The commission disagrees. The commission does not consider it necessary to notify persons when no contamination has been released to adjacent properties. Where contamination has been released to an off-site property, the final rule requires various forms of notification depending on the level of contamination which has migrated off-site. COH requested that the rule require a good faith effort to give personal notice first.

Other comments received believe that less public notice is warranted. Weston believes public participation should be limited to adjacent landowners where contamination has migrated unless specifically required by other regulations or statutes such as RCRA, CERCLA, etc. Jenkins & Gilchrist believes that notification should be limited to property owners where contamination exists above residential health-based levels in any media of concern or where engineering or institutional controls are required. UT requested that the rules state minimum requirements for a sufficient notice including the type of publication, frequency, and deadlines, but the type of notification would be subject to the discretion of the executive director. Finally, Lloyd, Gosselink believes that public notice should be limited to letters to individual households and personal contacts, and TNRCC should not advertise the list of VCP applications on the agency electronic bulletin board service.

The commission believes that notice should be provided to all affected property owners, not just adjacent landowners, including non-adjacent landowners where contamination has migrated, as well as the owner of the site when the applicant is a lessee. The proposed rule has been changed to require that applicants shall use the notification form as provided by the executive director at a minimum, but may include additional language as desired. The applicant shall notify property owners with concentrations of contaminants on their property at or below the residential health-based levels for any media. However, notification will not be required when concentrations are at or below background. This notice will occur prior to initiation of the on-site response actions and within two weeks after agency approval of the Site Investigation Report or other final report confirming the nature and extent of contamination at the site. The notice will indicate that the contaminants are at concentrations protective of any future land use and that the commission will not require further investigation or remediation off-site. The notice shall also state the availability for inspection and copying of reports in the commission files concerning the site. For notification under these circumstances, the applicant will have the option of providing public notice in local newspapers, block advertisements, letters to individual households and businesses, or other personal contacts. Proof of such notice is required in the final rule. The final rule requires direct notice in the form of letters to individual households, businesses, and other interest holders when concentrations of contaminants exceeding residential health-based levels have migrated off-site. The notice shall state that concentrations of contaminants exceed the residential health-based level on the off-site property. The notice shall also state the availability for inspection and copying of the reports in the commission files concerning the site. The commission agrees that the frequency and deadlines for notification should be specified. Once the investigation confirms that concentrations of contaminants exceed residential health-based levels off-site, the applicant must provide the direct notice to all affected property owners and interest holders and submit copies of the notice letter delivered with the recipient's signature and date of delivery to the agency within two weeks after initial discovery of the off-site contamination or within two weeks after the effective date of the VCP agreement. If any initial notification attempts are unsuccessful, the applicant shall repeat the process monthly until all affected parties are notified or at least four failed attempts are documented to the satisfaction of the executive director. Proof of such notification is required in the final rule. Notice to governmental entities shall be delivered to the chief clerk or city secretary. The proposed rules have been amended to incorporate these recommended changes. Furthermore, §333.11 has been organized into two paragraphs: paragraph (1) addresses notification requirements for off-site migration at or below residential health-based levels; and paragraph (2) addresses notification requirements for off-site migration above residential health-based levels. The agency currently provides access to the VCP site database through the agency electronic bulletin board service.

COH recommended revising the language in §333.11 to address persons who hold an interest in a piece of property other than owners of property such as leaseholders, easements, etc. In addition, COH commented that the executive director "shall require verification" rather than "may require verification." The commission agrees and has changed the language to reflect these concerns.

The new sections are adopted under the Texas Water Code, §5.103 and §26. 011, which provide the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state. The sections are also adopted under the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.017, and §361.024, which provide the commission the authority to regulate industrial solid waste and municipal hazardous wastes and all other powers necessary or convenient to carry out its responsibilities. Additional authority is provided in §382.017, Texas Health and Safety Code. The Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.604, §361.611, and §361.612 provide specific authority to promulgate the sections for the Voluntary Cleanup Program.

§333.1. Requirements.

(a) The requirements of the Voluntary Cleanup Program are found in this Subchapter and in the Texas Solid Waste Disposal Act, Subchapter S, Texas Health and Safety Code, Chapter 361.

(b) The applicant shall submit two copies of all documents, one of which the Voluntary Cleanup Program will file in the agency central records.

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

Change in land use–A change in use from a less protective risk classification to a more protective risk classification (e.g., non-residential to residential) or not maintaining an engineering control, remediation system, or post-closure care or non-permanent institutional control as set out in the conditional Certificate.

Completion–No more response actions are necessary or the applicant is satisfactorily maintaining the engineering controls, remediation systems, or post-closure care or non-permanent institutional controls are utilized pursuant to the Voluntary Cleanup agreement.

Exposure assessment model–A conceptual model of the physical site conditions, contaminants of concern by media, release mechanisms, environmental fate and transport, and potential receptors, and the interaction of each as it relates to site risk. The model identifies the universe of on-site and off-site current and reasonably anticipated future human and environmental exposure pathways and receptors. The purpose of the model is to design and focus site investigations and to assist in the determination of site response action objectives.

Initiate an enforcement action–The issuance of a notice of violation by the executive director or referral to the United States Environmental Protection Agency or Attorney General's Office for a possible enforcement action.

Partial response action–A response action which is limited to an areal portion of the site and off-site areas, if any, contaminated due to releases which have migrated from the partial response action area onto property owned or controlled by others, inclusive of all media.

Partial response action area–The area of the site and off-site within which the partial response action will be conducted in accordance with a plan approved by the executive director.

Pending enforcement action–Concerning the remediation of the hazardous substance or contaminant described in the application, a notice of violation has been issued and further administrative, state, or federal enforcement action is under evaluation or an enforcement action is required by federal grant, or the state has incurred unreimbursed costs under the Texas Health and Safety Code, Chapter 361, Subchapter F.

Response action objectives–The goals of the response actions, which may include both qualitative and quantitative goals.

(b) For partial response actions, the certificate of completion shall pertain only to the partial response action area and shall include a legal description of that area.

(c) For sites approved prior to the effective date of this rule, agency will issue a certificate of completion for sites only if currently appropriate response actions for all contaminants within the area described in the certificate of completion have been completed.

(d) The executive director may allow the applicant to file the copy of the certificate of completion into the site deed record on the executive director's behalf if the applicant provides subsequent documentation of the filing. The applicant must file the copy of the certificate of completion prior to the sale or transfer of the property, but not later than 60 days after the date of issuance of the certificate of completion.

(e) The executive director may allow the applicant to file a statement in the deed records stating that the certificate of completion supersedes prior deed certification requirements.

§333.11. Public Notice. Where contamination is located on property owned by another person or on property where an interest such as a fee ownership, leasehold, easement, or right-of-way is held by another person, the applicant must provide notification to all such property owners and interest holders. At a minimum, applicants shall use the notification form provided by the executive director, but may include additional language as desired.

(1) Notice to property owners and interest holders, who more likely than not due to migration off-site have concentrations of contaminants on their property at or below the residential health-based levels for any media, shall occur within two weeks after agency approval of a report describing the nature and extent of contamination at the site, and prior to initiation of response actions. However, notification will not be required when concentrations are at or below background. The notice will indicate that the contaminants are at concentrations protective of any future land use and that the TNRCC will not require further investigation or remediation off-site. The notice shall also state the availability for inspection and copying of reports in the commission files concerning the site. Under these circumstances, the applicant may provide notice in local newspapers, block advertisements, letters to individual households and businesses, or other personal contacts. The executive director shall require verification that such activity has been completed.

(2) Direct notice is required, in the form of letters to affected individual households, businesses, and other interest holders, when concentrations of contaminants exceeding residential health-based levels have migrated off-site. The notice shall state that concentrations of contaminants exceed the residential health-based levels on the off-site property. The notice shall also state the availability for inspection and copying of reports in the commission files concerning the site. The applicant shall submit copies of the notice letter delivered with the recipient's signature and date of delivery to the agency within two weeks after initial discovery of the off-site contamination or two weeks after the effective date of the VCP agreement. If initial notification attempts are unsuccessful, the applicant shall repeat the process monthly until all affected parties are notified or at least four failed attempts are documented to the satisfaction of the executive director. Notice to governmental entities shall be delivered to the chief clerk or city secretary.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on March 29, 1996.

TRD-9604401 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Effective date: April 19, 1996

Proposal publication date: November 7, 1995

For further information, please call: (512) 239-6087

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part I. Texas Department of Public Safety

Chapter 16. Commercial Driver's License

Application Requirements and Examinations

• 37 TAC §16.49

The Texas Department of Public Safety adopts an amendment to §16.49, concerning pre-trip inspection, without changes to the proposed text as published in the February 16, 1996, issue of the *Texas Register* (21 TexReg 1249).

The justification for this section will be to reduce or prevent commercial motor vehicle accidents, fatalities, and injuries by permitting only qualified individuals to hold licenses to drive these vehicles and ensuring that applicants are properly tested and approved.

The amendment is necessary in order for the department to conform to legislation that requires the department to issue and administer tests for commercial driver's licenses by defining exactly what a pre-trip inspection is to include.

No comments were received regarding adoption of the amendment.

The amendment is adopted pursuant to Texas Transportation Code, Chapter 522, §522.005,which provides the department may adopt rules necessary to carry out this chapter and the federal act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on March 25, 1996.

TRD-9604590 James R. Wilson
Director
Texas Department of Public Safety

Effective date: April 23, 1996

Proposal publication date: February 16, 1996

For further information, please call: (512) 424-2890

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Chapter 21. Equipment and Vehicle Standards

• 37 TAC §21.2

The Texas Department of Public Safety adopts an amendment to §21.2, concerning motorcycle operators' and passengers' protective headgear, minimum safety standards, and medical exemption for motorcycle protective headgear, without changes to the proposed text as published in the February 16, 1996, issue of the *Texas Register* (21 TexReg 1249).

The justification for this section will be a means of obtaining a medical exemption waiver for more than ten days.

The amendment changes the exemption process for the wearing of protective headgear due to a medical condition. The amendment is necessary due to the passage of Senate Bill 1363, 74th Legislature, 1995.

No comments were received regarding adoption of the amendment.

The amendment is adopted pursuant to Texas Transportation Code, Chapter 661, which provides the Texas Department of Public Safety with the authority to adopt rules necessary for the administration and enforcement of this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Site–The property as described in the legal description pro-ded in the voluntary cleanup agreement.

Site subject to a commission permit or order–A site or rtion of a site concerning which an order or permit has been ued by the commission. These also include hazardous waste ilities, which are operating under interim status.

33.3. Purpose. The purpose of the Voluntary Cleanup Program is provide incentives to remediate property by removing liability of ure landowners and lenders and to provide a process by which luntary response actions can be completed in a timely and effi-nt manner.

33.4. Application to Participate in the Voluntary Cleanup Pro-am (VCP). An application submitted to the Voluntary Cleanup ogram must be accepted or rejected within 45 days of receipt by commission. The commission shall not initiate enforcement ion on a Voluntary Cleanup Program applicant during the pen-ncy of the agency review of an application for the contamination release that is the subject of the Voluntary Cleanup agreement or activity that resulted in the contamination or release.

33.5. Rejection of Application. The executive director may reject application submitted to the Voluntary Cleanup Program when all sts recoverable under the Texas Solid Waste Disposal Act, bchapter F, Texas Health and Safety Code, Chapter 361 (State perfund) for the site are not paid in full to the hazardous and solid ste remediation fee fund by the applicant.

33.6. Voluntary Cleanup Agreement.

(a) The voluntary cleanup agreement must be signed by the plicant and the executive director or his representative prior to iation of any response action being implemented, with the excep-n of emergency measures which should be coordinated with the propriate emergency response authorities. However, for response ions initiated or completed prior to the effective date of these es, the executive director at his discretion may allow sites to enter Voluntary Cleanup Program. After the effective date of these es, persons initiating response actions prior to a signed Voluntary anup Agreement may not enter the Voluntary Cleanup Program. certificate of completion may not be issued for sites which have eived agency approval for response actions completed prior to the ective date of the rule if:

(1) the action did not address all contaminants or con-inated media within the site or partial response action area;

(2) contaminant management practices were initiated or nged since the previous approval date; or

(3) regulatory requirements have changed since the ap-val date.

(b) In the case of partial response actions, the commission ins the authority to issue an enforcement action regarding re-ses or contamination not addressed by the partial response action.

3.7. Voluntary Cleanup Work Plans and Reports.

(a) Voluntary cleanup work plans and reports shall include investigation of the full nature and extent of contamination in all dia unless the person demonstrates to the satisfaction of the cutive director that site conditions warrant a focused investiga-. This may be demonstrated with an exposure assessment model. exposure assessment model shall examine all currently discov-d and reasonably anticipated future exposure pathways for all taminants and media of concern. Contaminated media within the estigation area shall be addressed according to the appropriate blished technical standards.

(b) The requirements of subsection (a) of this section apply partial response action when a contaminant release originating from a partial response action area has migrated onto property owned or controlled by others.

(c) The requirements of subsection (a) of this section apply to all voluntary cleanup response actions with the following exceptions:

(1) when a person demonstrates to the satisfaction of the executive director that the source of contamination is from off-site and the person did not cause the release, the person may address only contamination on the site or the partial response action area within the site according to the appropriate established technical standards.

(2) when a contaminant release is present outside the site or partial response action area, but on property owned or otherwise controlled by the applicant, addressing the areal extent of contamination outside the site or partial response action area is not required under the Voluntary Cleanup Program; however, the contaminant release within the partial response action area shall be addressed according to the appropriate established technical standards.

§333.8. Response Action Standards.

(a) Excepting areal limitations with partial response actions, all media which exceed the health-based and environmental cleanup levels shall be addressed through the appropriate response action and in accordance with the appropriate technical standards based upon the site characteristics and site contaminants.

(b) The applicant shall select a response action for the response action area which will achieve the response action objectives.

(c) State or local permits are not required for removal or remedial action under the Voluntary Cleanup Program. The person conducting the voluntary cleanup shall comply with any federal or state standard, requirement, criterion, or limitation to which the response action would otherwise be subject if a permit were required unless such commission rule requirements are inconsistent with a specific provision of this subchapter.

§333.9. Deed Certification. The filing of the certificate of completion into the deed record shall satisfy the deed certification requirements of Chapter 334 of this title (relating to Underground and Aboveground Storage Tanks) and Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste) for the areas covered by the certificate of completion. However, if the certificate of completion is not recorded for the off-site properties, the deed certification requirements, if any, of other applicable rules must be met for cleanups which do not achieve residential health-based levels in all media of concern and/or cleanups that include engineering controls, remediation systems, or post-closure care or non-permanent institutional controls.

§333.10. Certificate of Completion.

(a) If reports acceptable to the executive director that are submitted under this subchapter demonstrate that no further action is required to protect human health and the environment, the executive director shall certify such facts by issuing the person a final certificate of completion. If the applicant is satisfactorily maintaining the engineering controls, remediation systems, or post-closure care, or if non-permanent institutional controls are utilized pursuant to an agreement, the executive director shall certify such facts by issuing the applicant a conditional certificate of completion. The executive director may authorize an applicant to conduct a phased response action only when, in the executive director's evaluation, the schedule is reasonable.

Public Notification Letter

I. M. VCP Applicant Letterhead

Date
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

U. R. Landowner
123 Main Street
Anywhere, TX 00000

SUBJECT: Notification of Off-Site Contamination
[Describe Type of Off-Site Release]
Site Address (123 Main Street)
Anywhere, Texas 00000; Some County
VCP Project Number: VCP # XXX

Dear Landowner:

This letter is to inform you that contaminants are present on your property above the residential health-based level, as determined by the standards of the Texas Natural Resource Conservation Commission (TNRCC). The rules for the Texas Voluntary Cleanup Program 30 TAC 333.11 require that we notify property owners and submit proof of notification, within two weeks of when it is discovered in the course of an environmental investigation, that contamination exceeding the residential health-based level has migrated onto property owned or controlled by others.

If you would like to review or make copies of the report which details the environmental investigation, please contact the TNRCC's Records Services at (512) 239-2920. The physical address is TNRCC Building D, Room 190, 12118 N. Interstate 35, Austin, Texas 78753. The operating hours are 8 a.m. - 5 p.m. Monday through Friday. Please refer to the Voluntary Cleanup Program number [VCP #XXX] when contacting the TNRCC. You may contact **[VCP Project Manager]** at **[telephone with area code for contact]** with questions concerning this notice. Should you have any questions of I. M. VCP applicant, please contact the undersigned at (XXX) XXX-XXXX.

Please sign and date this form immediately, in order for us to provide evidence of notification to the TNRCC.

_____ _____

Recipient's Name
(print or type)

Recipient's Signature

_____

Date

GENERAL PUBLIC NOTIFICATION

This notice is to inform property owners and interest holders that more likely than not, contaminants have migrated off-site from **[site name and address/legal description]** onto adjacent property. The concentration levels are at or below the residential health-based levels, as determined by the standards of the Texas Natural Resource Conservation Commission (TNRCC). The rules for the Texas Voluntary Cleanup Program 30 TAC 333.11 require that [Applicant] notify property owners and interest holders, within two weeks after agency approval of a report describing the nature and extent of contamination at the site, and prior to initiation of response actions. The contaminants are at concentrations protective of any future land use and the TNRCC does not require further investigation or remediation off-site.

If you would like to review or make copies of the report which details the environmental investigation, please contact the TNRCC's Records Services at (512) 239-2920. The physical address is TNRCC Building D, Room 190, 12118 N. Interstate 35, Austin, Texas 78753. The operating hours are 8 a.m. - 5 p.m. Monday through Friday. Please refer to the Voluntary Cleanup Program number [VCP #XXX] when contacting the TNRCC. You may contact **[VCP Project Manager]** at **[telephone with area code]** with questions concerning this notice. Should you have any questions of [Applicant], please contact _____ at (XXX) XXX-XXXX.

Public Notification Letter

I. M. VCP Applicant Letterhead

Date
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

U. R. Landowner
123 Main Street
Anywhere, TX 00000

SUBJECT: Notification of Off-Site Contamination
[Describe Type of Off-Site Release]
Site Address (123 Main Street)
Anywhere, Texas 00000; Some County
VCP Project Number: VCP # XXX

Dear Landowner:

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If you would like to review or make copies of the report which details the environmental investigation, please contact the TNRCC's Records Services at (512) 239-2920. The physical address is TNRCC Building D, Room 190, 12118 N. Interstate 35, Austin, Texas 78753. The operating hours are 8 a.m. - 5 p.m. Monday through Friday. Please refer to the Voluntary Cleanup Program number [VCP #XXX] when contacting the TNRCC. You may contact **[VCP Project Manager]** at **[telephone with area code for contact]** with questions concerning this notice. Should you have any questions of I. M. VCP applicant, please contact the undersigned at (XXX) XXX-XXXX.

Please sign and date this form immediately, in order for us to provide evidence of notification to the TNRCC.

_____ _____

Recipient's Name (print or type)

Recipient's Signature

_____

Date

GENERAL PUBLIC NOTIFICATION

This notice is to inform property owners and interest holders that more likely than not, contaminants have migrated off-site from **[site name and address/legal description]** onto adjacent property. The concentration levels are at or below the residential health-based levels, as determined by the standards of the Texas Natural Resource Conservation Commission (TNRCC). The rules for the Texas Voluntary Cleanup Program 30 TAC 333.11 require that [Applicant] notify property owners and interest holders, within two weeks after agency approval of a report describing the nature and extent of contamination at the site, and prior to initiation of response actions. The contaminants are at concentrations protective of any future land use and the TNRCC does not require further investigation or remediation off-site.

If you would like to review or make copies of the report which details the environmental investigation, please contact the TNRCC's Records Services at (512) 239-2920. The physical address is TNRCC Building D, Room 190, 12118 N. Interstate 35, Austin, Texas 78753. The operating hours are 8 a.m. - 5 p.m. Monday through Friday. Please refer to the Voluntary Cleanup Program number [VCP #XXX] when contacting the TNRCC. You may contact **[VCP Project Manager]** at **[telephone with area code]** with questions concerning this notice. Should you have any questions of [Applicant], please contact _____ at (XXX) XXX-XXXX.

MEMORANDUM OF AGREEMENT
BETWEEN THE
TEXAS NATURAL RESOURCE CONSERVATION COMMISSION
AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 6

I. Purpose

The Texas Natural Resource Conservation Commission (TNRCC) and Region 6 of the United States Environmental Protection Agency (EPA), enter into this Memorandum of Agreement (MOA), for the purposes of supporting the TNRCC Voluntary Cleanup Program (VCP) and defining the roles and responsibilities of EPA and TNRCC with respect to activities conducted under the authority of the TNRCC VCP.

II. Eligibility for VCP

TNRCC and EPA agree that sites where ranking packages have been submitted to EPA Headquarters proposing their inclusion on the National Priorities List (NPL), or sites listed on the NPL, are ineligible for the TNRCC VCP.

TNRCC and EPA further agree that sites, or portions of sites, regulated under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901, are generally eligible for consideration under the TNRCC VCP. However, hazardous waste facilities which are currently operating under a RCRA permit, have been issued a RCRA § 3008(h) Order or are currently operating under interim status permit authority are ineligible for participation in the TNRCC VCP.

This MOA will apply to all sites given VCP Certificates of Completion by TNRCC on or after September 1, 1995, the effective date of the VCP.

III. Background

EPA and the TNRCC believe the revitalization of contaminated properties, or properties perceived to be contaminated (often called "Brownfields"), will provide a significant benefit to the environment and economies of the local communities of the State of Texas. To the extent possible, EPA and the TNRCC seek to simplify the revitalization of industrial and commercial properties by addressing the existing regulatory impediments to the financing, transfer and appropriate use of these properties. Both agencies will work in a cooperative and coordinated effort to ensure that successful implementation of this endeavor is accomplished and pledge to employ their authorities and their resources in mutually complementary, non-duplicative methods.

EPA and the TNRCC seek to protect human health and the environment by encouraging the voluntary investigation and cleanup of properties in Texas by implementing the following strategic goals:

1. Promoting appropriate investigations and cleanups by groups/individuals participating in the VCP.

2. Developing partnerships between EPA, the TNRCC, other State and local governmental agencies and external stakeholders in Texas, including representatives from citizen/community groups and the private sector.

3. Providing necessary information to property owners, prospective purchasers, lenders, public and private developers, citizens, municipalities, counties and elected officials to allow for informed decision-making.

4. Providing public involvement activities to ensure the affected public is informed of response actions related to the VCP. Activities conducted by VCP applicants to inform the affected public may include notices in local newspapers, block advertisements, letters to individual households and businesses or other personal contacts regarding the contamination. The TNRCC will make available for inspection and copying all reports on its position regarding voluntary cleanup sites. The TNRCC will respond to all public inquiries and comments regarding voluntary cleanup activities in a timely manner.

5. Promoting mitigation of exposure to contaminated media cost-effectively, consistent with projected future uses at the sites and applicable federal and state law.

6. Promoting response action objectives when approving mitigation measures for the sites.

To accomplish these goals, EPA will help and support the TNRCC in further developing and expanding the use of the VCP. EPA recognizes the VCP as instrumental in developing and implementing successful strategies to help promote voluntary investigation, cleanup and revitalization of Brownfields properties. The TNRCC will assist and support efforts to promote and implement the EPA Brownfields initiatives. The TNRCC and EPA recognize each other as key partners in the ongoing success of the VCP. TNRCC also recognizes the role of EPA in addressing the uncertainty of financing, transferring and developing Brownfields sites by quantifying the risks of federal liability.

IV. Implementation

TNRCC and EPA should work in a coordinated effort to ensure there is no duplication of effort at the sites, and that site cleanups continue in a timely fashion. TNRCC will notify EPA when sites are being addressed under the VCP. While a RCRA site is being addressed under the VCP, TNRCC will code that site in the Resource Conservation Recovery Information System (RCRIS) to reflect that site's status. While a Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) site is being addressed under the VCP, EPA will code that site in Comprehensive Environmental Response Compensation Liability Information System (CERCLIS) to reflect that site's status.

In the unlikely event that a RCRA facility which is being considered for the VCP is also listed on the EPA Region 6 Corrective Action Prioritization System (R6CAPS) as a medium or high priority facility, the facility will not be excluded from consideration for federal investigation or remedial action. Attachment A to this document is a listing of high and medium priority facilities currently ranked on the R6CAPS. Facilities are ranked as high or medium priority on R6CAPS as a result of the size and complexity of the facility's operations and/or environmental issues. Facilities will be added periodically to the R6CAPS after consultation with the TNRCC. Consideration for adding facilities to R6CAPS will be based upon the size and complexity of the facility's operations and/or environmental issues. High and medium priority RCRA facilities that complete response actions at a facility or portions of a facility and receive a certificate of completion under the VCP, may request that they be reevaluated under R6CAPS. This reevaluation may result in removal from high or medium priority categories.

Once any necessary response action at all involved portions of a site is complete, EPA will archive from CERCLIS those sites remediated under the authority of the VCP and for which TNRCC has issued a Certificate of Completion. At a minimum, TNRCC and EPA should discuss the status of sites monthly.

While a site with an ongoing investigation or remediation remains in compliance with the terms of a VCP agreement, or when a site investigation or remediation has been completed according to the practices and procedures of the VCP and the TNRCC has issued a Certificate of Completion for the site upon a review and approval of the Response Action Completion Report or other final report, or the TNRCC has issued a Certificate of Completion for part of the site, EPA will not

plan or anticipate any federal action under CERCLA, 42 U.S.C. § 9601, et seq., or RCRA, 42 U.S.C. § 6901 et seq., for that part of the site, unless it is determined that the site poses a threat to human health or the environment, an imminent and substantial endangerment or emergency situation, and as a result, Federal response actions are warranted.

In addition, in accordance with Section IV of this MOA, EPA and TNRCC will suspend further action or take no action at sites being investigated or remediated under the VCP. EPA may resume or initiate response actions at such sites only if: (a) the VCP applicant fails or refuses to complete the necessary cleanup, and TNRCC is unable to ensure completion of response actions at those sites; or (b) an emergency situation arises that would require Federal intervention.

In all cases, the EPA decision not to take federal response action for sites implementing investigation and cleanup under the VCP will be based strictly on the information known by EPA and TNRCC at the time of the TNRCC determination concerning the site.

If, following the issuance of the Certificate of Completion by the TNRCC, conditions at the site, previously unknown to TNRCC and EPA, indicate that the response action undertaken pursuant to the VCP is not protective of human health and the environment, TNRCC and EPA reserve the right to take necessary response action to protect human health and the environment.

TNRCC will continue to demonstrate that its VCP has adequate resources to ensure that voluntary response actions are conducted in an appropriate and timely manner, and that meaningful outreach efforts are available to affected interest-holders. TNRCC shall continue to make available to current and prospective owners, lenders, and affected interest-holders, both technical assistance and streamlined procedures to ensure adequate involvement through notification and expeditious voluntary response actions.

EPA will continue to work with TNRCC to remove any concerns about federal activity under CERCLA and RCRA so as to encourage the financing, transfer, and appropriate development and reuse of properties in Texas. EPA and TNRCC will provide technical assistance to local and state governmental agencies in order to facilitate the revitalization of contaminated or potentially contaminated properties in Texas.

EPA may provide, in its sole discretion, and after consultation with the TNRCC, resources to local and state governmental agencies in order to support Brownfields initiatives in Texas.

V. Protectiveness

The VCP shall ensure that voluntary response actions are protective of human health and the environment. Upon the assessment of a site, the VCP should determine whether the site poses a threat to human health and the environment, and whether mitigation of the potential exposure of human and ecological receptors to contaminated media is warranted, consistent with applicable Federal and State law. Protective contaminant concentrations in a media will be determined by the VCP, consistent with projected future uses at the site.

Mitigation of exposure to contaminated media shall be conducted cost-effectively, consistent with projected future uses at the site, and consistent with applicable Federal and State law. Mitigation measures may include one or more of the following: (1) Treatment of contaminated media to acceptable exposure levels; (2) Containment of contaminated media to acceptable exposure levels; (3) Transport to off-site treatment; or (4) Restricted access to and/or use of the site through institutional controls.

VI. Reporting

On a monthly basis the TNRCC will report to EPA on the following:

1. Number, names and types of sites participating in the VCP and the status of those sites;

2. Number, names and types of sites applying for or entering the VCP the previous month;

3. Sites having received Certificates of Completion from the TNRCC of full or partial completions in the previous month; and

4. Notifications of any VCP non-completions or defaults.

VII. Modification

EPA and TNRCC may modify this MOA from time to time to simplify and/or define the procedures contained herein. EPA and TNRCC shall keep the other informed of any relevant proposed modifications to its statutory or regulatory authority, forms, procedures, or priorities. This MOA shall be revised, as necessary, by the adoption of such modifications. The MOA should be reviewed on an annual basis by EPA and TNRCC staff to determine if revisions, are necessary. A modification must be in writing and signed by the signatories or their designees to become effective.

VIII. Reservations of rights

EPA and TNRCC reserve any and all rights or authority that they respectively have, including but not limited to, legal, equitable, or administrative rights. This specifically includes EPA and TNRCC's authority to conduct, direct, oversee, and/or require environmental response in connection with any facility or site which participates in the VCP. Notwithstanding any other provision of this MOA, nothing herein affects or limits EPA or TNRCC's authority or ability to take any enforcement action authorized by law.

This MOA has been developed by mutual cooperation and consent.

For the Texas Natural Resource Conservation Commission

Barry R. McBee, Chairman
Texas Natural Resource Conservation Commission

5/1/96
Date

For the Environmental Protection Agency

Jane N. Saginaw, Regional Administrator
U.S. Environmental Protection Agency

5/1/96
Date

ATTACHMENT A

U.S. EPA REGION 6
RCRA CORRECTVE ACTION PRIORITIZATION SYSTEM (R6 CAPS)
TEXAS FACILITIES IN THE R6 CAPS DATA BASE

FACILITY NAME	EPA ID	STREET ADDRESS	CITY	COUNTY	ZIP	RANK
3M COMPANY	TXD001806868	U.S. HIGHWAY 337 - SOUTH	BROWNWOOD	BROWN	76801	H
AC LIQUIDATING CORP	TXD087612834	11011 FAIRMONT PARKWAY	LA PORTE	HARRIS	77572	H
AGE REFINING & MARKETING	TXD049754047	7811 S PRESA ST	SAN ANTONIO	BEXAR	78223	H
AMBER REFINING CORPORATION	TXD064248768	2500 PREMIER STREET	FORT WORTH	TARRANT	76101	H
AMERICAN THERMOPLASTICS	TXD048798177	1235 KRESS STREET	HOUSTON	HARRIS	77020	H
ARCO CHEMICAL COMPANY - LYONDELL PLANT	TXD083472266	8280 SHELDON ROAD	CHANNELVIEW	HARRIS	77530	H
ARMCO INC. HOUSTON	TXD000802942	13100 INDUSTRIAL RD	HOUSTON	HARRIS	77013	H
ARMCO, INC.	TXD000802959	12527 GREENS BAYOU ROAD	HOUSTON	HARRIS	77013	H
ATCHISON, TOPEKA AND SANTA FE RAILROAD	TXD000778621		SOMERVILLE	BURLESON	77879	H
ATOCHEM N.A. - PENWALT LUCIDOL CORP	TXD043750512	18000 CROSBY EASTGATE RD	CROSBY	HARRIS	77532	H
AZTEC CERAMIC CORP.	TXD000820404	4735 EMIL ROAD	SAN ANTONIO	BEXAR	78219	H
BELL HELICOPTER TXTRN	TXD980626006	600 EAST HURST BLVD	FORT WORTH	TARRANT	76053	H
BORGER REFINERY & NGL	TXD980626774	SH 119 2 MI. N. OF BORGER	BORGER	HUTCHINSON	79008	H
BP CHEMICAL (SOHIO-VISTRON)	TXD000751172	TX HWY 185	GREEN LAKE	CALHOUN	77979	H
CELANESE - SEABROOK	TXD000719286	11087 PORT RD.	SEABROOK	HARRIS	77586	H
CELANESE ENGINEERING RESINS, INC.	TXD008113441		BISHOP	NUECES	78343	H
CENTURY FOREST INDUSTRIES, INC.	TXD990706517	STATE HIGHWAY 103	LUFKIN	ANGELINA	75901	H
CHEMICAL RECYCLING INC.	TXD053131223	802 W. KIRBY STREET	WYLIE	COLLIN	75098	H
CHEVRON USA, INC.	TXD054256391	6501 TRONBRIDGE AVE	EL PASO	EL PASO	79905	H
CHEVRON USA, INC. (CLARK)	TXD008090409	WEST 7TH STREET	PORT ARTHUR	JEFFERSON	77641	H
COASTAL REFINERY AND MARKETING, INC.	TXD008132268	1300 CANTWELL DR.	CORPUS CHRISTI	NUECES	78407	H
COLORADO CITY LANDFILL	TXD980624274	TWO MILES NORTH OF ALTAIR, HWY 71	ALTAIR	COLORADO	77412	H
DAL-CHROME COMPANY, INC.	TXD042687061	3044 MORRELL STREET	DALLAS	DALLAS	75216	H
DIAMOND SHAMROCK	TXD990709966		THREE RIVERS	LIVE OAK	78071	H
DIXIE CHEMICAL CORPORATION	TXD008088247	10701 BAY AREA BLVD	PASADENA	HARRIS		H
DOW - FREEPORT	TXD008092793	SH 288, 332 AND FM 523	FREEPORT	BRAZORIA	77541	H
DOW CHEMICAL - LA PORTE	TXD000017756		LA PORTE	HARRIS	77572	H
E I DUPONT DE NEMOURS	TXD063101794		INGLESIDE	SAN PATRICIO	78362	H
E-SYSTEMS. INC.	TXD007365984	FM 1510 MAJOR FIELD	GREENVILLE	HUNT	75401	H
E.I. DUPONT DE NEMOURS	TXD008079212		LA PORTE	HARRIS	77571	H
EL PASO REFINERY	TXD007399637	6500 TROWBRIDGE DRIVE	EL PASO	EL PASO	79905	H
ELTEX CHEMICAL & SUPPLY COMPANY	TXD074196338	4050 HOMESTEAD ROAD	HOUSTON	HARRIS	77028	H
ENCYCLE (ASARCO, INC.)	TXD008117186		CORPUS CHRISTI	NUECES	78407	H
ERICKSON REFINING CORPORATION	TXD089792121		PORT NECHES	JEFFERSON	77651	H
ETHICON INC	TXD002560233	3348 PULLIAM STREET	SAN ANGELO	TOM GREEN	76905	H
ETHYL CORPORATION	TXD008096158	1000 NORTH SOUTH STREET	PASADENA	HARRIS	77503	H
EXXON CHEMICAL COMPANY	TXD082684002	8230 STEDMAN STREET	HOUSTON	HARRIS	77029	H
EXXON COMPANY BAYTOWN	TXD000782698	DECKER DRIVE (S.H. 330 & S.H. 201)	BAYTOWN	HARRIS		H
FINA OIL AND CHEMICAL, BIG SPRING, TX	TXD008013468		BIG SPRING	HOWARD	79720	H
FORCE ROAD OIL & VACUUM TRUCK CO.	TXD000633453	1722 COUNTY ROAD 573	ARCOLA	BRAZORIA	77011	H
FORMOSA PLASTICS CORP, TEXAS	TXT490011293	P.O. BOX 400, 101 FORMOSA DRIVE	POINT COMFORT	CALHOUN	77978	H
GARLAND CREOSOTING COMPANY	TXD007330053	EASTMAN ROAD	LONGVIEW	GREGG	75606	H
GATX, INC.	TXD026481523	906 CLINTON DRIVE	GALENA PARK	HARRIS	77547	H
GNB INCORPORATED (GOULD METALS)	TXD006451090	7471 SOUTH 5TH STREET	FRISCO	COLLIN	75034	H
GNB, INC.	TXD007331879	1880 VALLEY VIEW LANE	FARMERS BRANCH	DALLAS	75234	H
GULF CHEMICAL & METALLURGICAL CORP.	TXD074195678	302 MIDWAY ROAD	FREEPORT	BRAZORIA	77541	H
HEAVY FUELS & PRODUCTS, INC	TXD980628028	6038 FM 517	SAN LEON	GALVESTON	77573	H
HOECHST CELANESE CHEMICAL CO	TXD007376700		PAMPA	GRAY	79065	H
HOECHST CELANESE CORP (TECHNICAL CENTER)	TXD069450278		CORPUS CHRISTI	NUECES	78409	H
HOUSTON LGTNG & PWR - GREENS BAYOU STA.	TXD000837435	12070 BEAUMONT HIGHWAY	HOUSTON	HARRIS	77001	H
HOUSTON LIGHT & POWER - WEBSTER GEN. STATION	TXD000837369	19301 STATE HIGHWAY 3	WEBSTER	HARRIS	77598	H
HOUSTON LIGHTING & PWR S.R. BERTRON	TXD000761833	MILLER CUTOFF RD	DEER PARK	HARRIS	77536	H
HOUSTON SCRAP	TXD005928130	3799 JENSEN DR.	HOUSTON	HARRIS	77026	H

FACILITY NAME	EPA ID	STREET ADDRESS	CITY	COUNTY	ZIP	RANK
HUBER TECHNOLOGY CORPORATION	TXD980874135	FM 1559 (PO BOX 2831)	BORGER	HUTCHINSON	79008	H
HUNTSMAN CORP	TXD000820928	SAVANNAH AVENUE, GATE 24	PORT ARTHUR	JEFFERSON	77641	H
INTERCONTINENTAL TERMINALS CO. (ITC)	TXD073912974		DEER PARK	HARRIS		H
INTERNATIONAL PAPER COMPANY	TXD008077356	HIGHWAY 6	NAVASOTA	GRIMES		H
INTERNATIONAL SHOE COMPANY	TXD008071227	CARSON AND FINFEATHER ROADS	BRYAN	BRAZOS	77868	H
ISO-TEX	TXD072206311	1511 COUNTY ROAD 129	FRIENDSWOOD	BRAZORIA	77801	H
JCS WASTE BATTERY PROCESSING	TXD000741702		CANTON	VAN ZANDT	77546	H
JERRELL B. THOMPSON	TXD000751107		CANTON	VAN ZANDT	75103	H
KERR-MCGEE CHEMICAL COMPANY	TXD057111403	155 BUCHANAN ROAD	TEXARKANA	BOWIE	75149	H
KOCH REFINING COMPANY	TXD088474663	COUNTY ROAD NO. 51-A AND UP RIVER ROAD	CORPUS CHRISTI	NUECES	75501	H
KOPPERS COMPANY	TXD008089021	INDUSTRIAL ROAD @ ARMCO GATE 2	HOUSTON	HARRIS	78403	H
LA GLORIA OIL & GAS CO.	TXD007333800	1702 E. COMMERCE STREET	TYLER	SMITH	77015	H
LEAD PRODUCTS CO INC	TXD008080715	709 N VELASCO ST	HOUSTON	HARRIS	75710	H
LONE STAR STEEL COMPANY	TXD007323397	HIGHWAY 259 SOUTH	LONE STAR	MORRIS	77003	H
LUBRIZOL COMPANY	TXD041067638		DEER PARK	HARRIS	75668	H
LYONDELL PETROCHEMICAL COMPANY	TXD082688979	1200 LAWNDALE RD	HOUSTON	HARRIS	77015	H
LYONDELL PETROLEUM (ARCO CHEMICAL)	TXD058275769	8280 SHELDON ROAD	CHANNELVIEW	HARRIS	77017	H
MAGNA - ODESSA	TXD047872890	410 E HILLMONT RD	ODESSA	HARRIS	77530	H
MAGNA/CHARDONOL/COOK COMPOSITES & POLYMERS	TXD000807875	2434 HOLMES ROAD	HOUSTON	ECTOR	79762	H
MILES CORPORATION (BAYER)	TXD058260977	8500 WEST BAY ROAD	BAYTOWN	HARRIS	77051	H
MOBIL OIL-BEAUMONT REFINERY	TXD990797714		BEAUMONT	HARRIS	77520	H
MONARCH TILE MANUFACTURING	TXD008041048	333 MARSHALL STREET	MARSHALL	JEFFERSON	77704	H
MONSANTO-CHOCOLATE BAYOU PLANT	TXD001700806	P.O. BOX 77511	ALVIN	HARRISON	75670	H
MURMUR CORPORATION	TXD079348397	2823 N. WESTMORELAND	DALLAS	BRAZORIA	77511	H
NECHES RIVER TREATMENT CORP (NTRC-LNVA)	TXD074204991	GULF STATES ROAD 2.MILES EAST OF US HWY 90	BEAUMOUNT	DALLAS	75247	H
NIBCO OF TEXAS	TXD008092306	723 SOUTH FREDONIA STREET	NACOGDOCHES	JEFFERSON	77704	H
OCCIDENTAL CHEMICAL CORP., INGLESIDE TX	TXD982286932	POST OFFICE DRAWER CC	INGLESIDE	NACOGODOCHES	75801	H
ODESSA NATURAL & SUPPLY (AMERICAN CENTRAL GAS)	TXD051379006	UNIVERSITY & MERCEDES	ODESSA	SAN PATRICIO	78359	H
OXY CHEMICAL (CAIN CHEMICALS)	TXD000836445	1501 MCKINZIE ROAD	CORPUS CHRISTI	ECTOR		H
PHELPS DODGE COPPER PRODUCTS	TXD048924989	897 HAWKINS BLVD.	EL PASO	NUECES	78460	H
PHILLIPS 66 COMPANY - SWEENY	TXD048210645		SWEENY	EL PASO		H
PHILLIPS RUBBER CO.	TXD091263558	NORTH SIDE OF HIGHWAY 136	BORGER	BRAZORIA	77463	H
PPG INDUSTRIES, INC.	TXD020805446	GULF STATES ROAD	BEAUMONT	HUTCHINSON	79007	H
PRIDE REFINING, INC.	TXD005964598	5 MILES N. OF ABILENE ON HWY 277/83	ABILENE	JEFFERSON	77704	H
PROLOR INTERNATIONAL	TXD000742403		VINTON	JONES	79604	H
QUANEX CORPORATION	TXD000449397		ROSENBERG	EL PASO	79833	H
QUANTUM CHEMICAL CORPORATION	TXD058276130	MILLER CUT-OFF ROAD	DEER PARK	FORT BEND	77471	H
QUEBECOR PRINTING (MAXWELL COMMUNICATION)	TXD081744849	4800 SPRING VALLEY RD	FARMERS BRANCH	HARRIS	77536	H
REXENE PRODUCTS COMPANY	TXD980626014	2400 SOUTH GRANDVIEW AVENUE	ODESSA	DALLAS	75240	H
ROGERS DELINTED COTTONSEED COMPANY	TXD980873160		ROBSTOWN	ECTOR	79766	H
ROHM AND HAAS	TXD065096273	STATE HIGHWAY 225	DEER PARK	NUECES	78380	H
RSC SERVICES INC	TXD030923361	7500 GREENWOOD DRIVE	CORPUS CHRISTI	HARRIS	77536	H
SHELL DEER PARK MANUFACTURING COMPLEX	TXD067285973	P.O. BOX 100	DEER PARK	NUECES	78415	H
SHELL OIL COMPANY - ODESSA	TXD026896290	SOUTH GRANDVIEW ST. 3 MI. S. OF DOWNTOWN	ODESSA	HARRIS	77536	H
SOUTHERN PACIFIC TRANSPORT	TXD000820266	4910 LIBERTY ROAD	HOUSTON	ECTOR	79763	H
STAR ENTERPRISE	TXD980626022		PORT NECHES	HARRIS	77001	H
STAR ENTERPRISE (TEXACO REFINING AND MARKETING)	TXD008097529	SPUR 214	PORT ARTHUR	JEFFERSON	77651	H
STRUCTURAL METALS INC.	TXD008119414	FM 464	SEGUIN	JEFFERSON	77640	H
TEMPLE-EASTEX, INC.	TXD000821199		DIBOLL	GUADALUPE	78155	H
TEMPLE-EASTEX-(TEMPLE INLAND)	TXD980626741		DIBOLL	ANGELINA	75941	H
TEXACO REFINING & MARKETING	TXD007378995	315 S. GRAND ST.	AMARILLO	ANGELINA	75941	H
TEXANA TANK CAR & MANUFACTURING INC.	TXD043195221	P.O. BOX 650	NASH	POTTER	79104	H
TEXAS EASTMAN COMPANY	TXD007330202		LONGVIEW	BOWIE	75569	H
TEXAS ECOLOGIST, INC.	TXD069452340	PETRONICA ROAD	ROBSTOWN	GREGG	75607	H
TEXAS INSTRUMENTS INTEGRATED WASTE	TXD982759706		SHERMAN	NUECES	78380	H
TEXAS TANK CAR WORKS	TXD027002112	600 NORTH BAGE ST	SAN ANGELO	GRAYSON	75090	H
THOMAS STEEL DRUMS INC	TXD026462697	2517 NORTHEAST 35TH STREET	FORT WORTH	TOM GREEN	76902	H
				TARRANT	76111	H

FACILITY NAME	EPA ID	STREET ADDRESS	CITY	COUNTY	ZIP	RANK
TINSE CHEMICAL	TXD982551780	1145 DOCK ROAD	TEXAS CITY	GALVESTON	77592	H
TRINITY VALLEY ...N & STEEL COMPANY	TXD980626048	3400 BRYCE AVENUE	FORT WORTH	TARRANT		H
TU ELECTRIC TRADINGHOUSE STATION	TXD000792895	FARM ROAD 2957	WACO	MCLENNAN		H
TU ELECTRIC- COMANCHE PEAK	TXD020332078	FARM ROAD 201	GLEN ROSE	SOMERVELL		H
UNION CARBIDE	TXD008114092	STAR ROUTE BOX 90	BROWNSVILLE	CAMERON	76043	H
UNION CARBIDE CORPORATION	TXD041515420	FM 185, 2 MILES S. OF STATE HWY 35	SEADRIFT	CALHOUN	78520	H
US AIR FORCE CARSWELL	TX0571924042		FORT WORTH	TARRANT	77979	H
US AIR FORCE DYESS AFB	TX3571924643		ABILENE	TAYLOR	76127	H
US AIR FORCE KELLY AFB	TX2571724333		SAN ANTONIO	BEXAR	79607	H
US AIR FORCE LAUGHLIN	TX2571524105	SEGMENT 2304 OF RIO GRANDE BASIN	DEL RIO	VAL VERDE	78241	H
US AIR FORCE REESE AFB	TX8571524091		LUBBOCK	LUBBOCK	78840	H
US ARMY - CAMP STANLEY	TX2210020739	25800 RALPH FAIR RD	BOERNE	BEXAR	79489	H
US ARMY FORT BLISS AIR DEFENSE ARTILLERY	TX4213720101		FORT BLISS	EL PASO	78006	H
US ARMY FORT HOOD	TX8214020424	US HIGHWAY 190	KILLEEN	BELL	79916	H
US ARMY LONE STAR AMMUNITION PLANT	TX7213821831		TEXARKANA	BOWIE	76544	H
US ARMY LONGHORN AMMUNITION PLANT	TX6213820529		WASKOM	HARRISON	75501	H
US DLA DRMO KELLEY AFB	TX6570024939	BLDG 3050, KELLY AIR FORCE BASE	SAN ANTONIO	BEXAR	75661	H
US DOE PANTEX	TX4890110527		AMARILLO	CARSON	78241	H
US NAVY NAS CHASE	TX3170024738	S.H. 202	BEEVILLE	BEE	79120	H
USAF PLANT #4 LOCKHEED	TX7572024605	SOUTH SHORE OF LAKE WORTH	FORT WORTH	TARRANT	78103	H
USAF SHEPPARD AFB	TX3571524161		WICHITA FALLS	WICHITA	76108	H
VOUGHT AIRCRAFT CO	TX6170022770	9314 WEST JEFFERSON	DALLAS	DALLAS	76301	H
WITCO CHEMICAL CORPORATION	TXD049213127	BUSSEY RD. OFF HWY 59 NORTH	MARSHALL	HARRISON	75211	H
WITCO ORGANICS PLANT	TXD065078826	1520 ALMEDA	HOUSTON	HARRIS	75670	H
WOOD INDUSTRIES	TXD027070655	11373 SOUTHON RD	SAN ANTONIO	BEXAR	77045	H
A.B. CHANCE COMPANY	TXD079417515	12317 ALMEDA ROAD	HOUSTON	HARRIS	78221	H
ACID DELINTERS, INC.	TXD981912728	5TH STREET AND AVENUE E	SHALLOWATER	LUBBOCK	77045	M
AGRICULTURE WAREHOUSE	TXD081547291		ENNIS		79363	M
AIR PRODUCTS MANUFACTURING CORP.	TXD990757486	412 DAVIDSON ROAD	PASADENA	HARRIS	75119	M
ALCOA	TXD068980267	ROUTE 79 NORTH	PALESTINE	ANDERSON	77506	M
ALLIED TUBE & CONDUIT	TXD079932257	1100 F/M 3361	LIBERTY	LIBERTY		M
ALUMINUM COMPANY OF AMERICA	TXD008091712	STATE ROUTE 1786	ROCKDALE	MILAM	77575	M
AMERICAN CHROME & CHEMICALS	TXD098818339		CORPUS CHRISTI	NUECES	76567	M
AMOCO CHEMICAL COMPANY	TXD050309012	CHOCOLATE BAYOU PLANT, P.O. BOX 1488	ALVIN	BRAZORIA	78408	M
AMOCO OIL COMPANY LAND FARM	TXD072181381	BOURDER LOOP 197	LA MARQUE	GALVESTON	77571	M
AQUA SOLUTIONS	TXD988078879	6913B HWY 225	DEER PARK	HARRIS	77590	M
ARCO CHEMICAL CO. BAYPORT PLANT	TXD058265067	10801 CHOATE RD	PASADENA	HARRIS	77536	M
ARISTECH CHEMICAL CORPORATION	TXD980808778	4403 LAPORTE HIGHWAY 225	PASADENA	HARRIS	77507	M
AT&T TECHNOLOGIES, INC.	TXD050858182	3000 SKYLINE DR.	MESQUITE	DALLAS	77501	M
ATCHINSON, TOPEKA & SANTA FE RR SITE	TXD050129543	502 EAST HENDERSON STREET	CLEBURNE	JOHNSON	75149	M
ATOCHEM-PENNWALT CORP - ORGANIC	TXD008090011		HOUSTON	HARRIS		M
AZTEC MANUFACTURING COMPANY	TXD008012148	400 NORTH TARRANT ST.	CROWLEY	TARRANT	77015	M
BARLOWS WILLS POINT PLATING	TXT982813750	US HIGHWAY 80 3 MILES EAST OF WILLS POINT	WILL POINT	VAN ZANDT	76036	M
BELL HELICOPTER TEXTRON - GRAND PRAIRIE	TXD000764498	HWY 360 @ AVENUE K	GRAND PRAIRIE	DALLAS	75169	M
BIG THREE INDUSTRIES	TXD982290934	403 NORTH CHURCH STREET	GONZALES	GONZALES	75050	M
BORDEN INC	TXD046933867	3221 EAST RANDOL MILL RD	ARLINGTON	TARRANT	77253	M
BORDER STEEL MILLS, INC.	TXD007398175	I-10 AT VINTON ROAD	EL PASO	EL PASO	76111	M
BOYLES GALVANIZING	TXD005966452	625 WEST HURST BOULEVARD	HURST	TARRANT	79912	M
CACTUS PAINT MANUFACTURERS, INC.	TXD008012353	EAST HW 80	BIG SPRING	HOWARD		M
CALGON CORP.	TXD086476850	9640 BAYPORT BLVD	PASADENA	HARRIS	79720	M
CAPITOL METAL FINISHING	TXD048452064		AUSTIN	TRAVIS	77507	M
CATALYST RESOURCES, INC.	TXD077874634	10001 CHEMICAL ROAD	PASADENA	HARRIS	78704	M
CENTRAL POWER & LIGHT	TXD007924772	PO BOX 2121	CORPUS CHRISTI	NUECES	77507	M
CHAMPION CHEMICALS, INC.	TXD000803106	115 PROCTOR ROAD	ODESSA	ECTOR	78403	M
CHAPARRAL STEEL COMPANY	TXD066362559	300 WARD ROAD	MIDLOTHIAN	ELLIS	79763	M
CHEMICAL WASTE MANAGEMENT, INC. - CORPUS CHRISTI	TXD000761254	GREENWOOD DRIVE	CORPUS CHRISTI	NUECES	76065	M
CHEMICAL WASTE MANAGEMENT, INC. - PORT ARTHUR	TXD000761262	HIGHWAY 73	PORT ARTHUR	JEFFERSON	78417	M

FACILITY NAME	EPA ID	STREET ADDRESS	CITY	COUNTY	ZIP	RANK
CHEMICAL WASTE MANAGEMENT, PORT ARTHUR	TXD000838896	HIGHWAY 73	PORT ARTHUR	JEFFERSON	77640	M
CROWN CENTRAL PETROLEUM CORPORATION	TXD008091290	11 RED BLUFF RD.	PASADENA	HARRIS	77506	M
DETREX CORPORATION SOLVENTS & ENVIRON. SERVICES	TXD980626154	322 INDUSTRIAL PARKWAY	ARLINGTON	TARRANT	76011	M
DIXICO INCORPORATED	TXD098423536	1300 SOUTH POLK STREET	DALLAS	DALLAS	75224	M
DIXIE METALS CO.	TXD068999622	3030 MCGOWAN STREET	DALLAS	DALLAS	78216	M
DOWELL SCHLUMBERGER, INC.	TXD000803247		MONAHANS	WARD	79756	M
DOWELL SCHLUMBERGER, INC.	TXD000793018	32 INDUSTRIAL LOOP	MIDLAND	MIDLAND	79701	M
DREW CHEMICAL CORPORATION	TXD079388955	6121 ALMEDA - GENOA	HOUSTON	HARRIS	77048	M
DYNAGEN, INC.	TXD057422685	BETWEEN S. GRANDVIEW RD & DIXIE BLVD.	ODESSA	ECTOR	79760	M
E.I. DUPONT DE NEMOURS	TXD008081101		BEAUMONT	JEFFERSON	77704	M
E.I. DUPONT DE NEMOURS, INC.-SABINE RIVER WORKS	TXD008079642	3 MILES SW OF ORANGE, TEXAS	ORANGE	ORANGE	77631	M
ELF ATOCHEM	TXD074180019		BEAUMONT	JEFFERSON	77704	M
EXXON RESEARCH CENTER	TXD040314338	4500 BAYWAY DRIVE	BAYTOWN	HARRIS	77520	M
FMC CORPORATION	TXD083570051		PASADENA	HARRIS	77507	M
GAINESVILLE FOUNDRY, INC.	TXD007322589	2301 NORTH WEAVER STREET	GAINESVILLE	COOKE		M
GARY AEROSPACE CORPORATION	TXD008110637	HONDO MUNICIPAL AIRPORT	HONDO	MEDINA	78861	M
GENERAL AMERICAN TRANSPORTATION CORPORATION	TXD000835207	US HWY 79, 1.25 MILE SW OF HWY 190	HEARNE	ROBERTSON		M
GEORGIA GULF	TXD093565653	3503 PASADENA FREEWAY	PASADENA	HARRIS	77501	M
GIBRALTAR (AMERICAN ECOLOGY)	TXD000742304	P.O. BOX 248	WINONA	SMITH	75032	M
GLO METALS, INCORPORATED	TXD092405695	134 INDUSTRIAL STREET	LANCASTER	DALLAS	75134	M
GOODYEAR CHEMICAL	TXD008077190		BEAUMONT	JEFFERSON	77704	M
GOODYEAR TIRE AND RUBBER CORPORATION	TXD074185141	13441 BAY AREA BLVD	LA PORTE	HARRIS	77571	M
GULF COAST WASTE DISPOSAL AUTHORITY	TXD000835249	MALONE ROAD	TEXAS CITY	GALVESTON	77590	M
GULF STATE UTILITIES - SABINE STATION	TXD980626030	FM 1442	BRIDGE CITY	ORANGE	77611	M
GYRO CHEMICAL AND EQUIP., CO., INC.	TXT982813578	5206 RAILROAD AVE	DEER PARK	HARRIS	77536	M
HALTERMANN, LTDDD	TXD096037932	16717 JACINTOPORT BLVD	HOUSTON	HARRIS	77015	M
HEAT ENERGY ADVANCED TECHNOLOGY	TXD980624035	4460 SINGLETON BLVD.	DALLAS	DALLAS	75212	M
HILL COUNTRY METALS	TXT982812927	SIA RD., 0.1 MI. NORTH OF FM 2673	CANYON LAKE	COMAL	78133	M
HOECHST CELANESE CHEMICAL COMPANY	TXD026040709	FM 3057 & FM 2668	BAY CITY	MATAGORDA	77414	M
HOECHST-CELANESE CORPORATION	TXD078432457		LAPORTE	HARRIS	77507	M
HOUSTON CHEMICAL SERVICES	TXD010791184	BAYPORT INDUSTRIAL COMPLEX	LAPORTE	HARRIS	77507	M
HOUSTON LIGHTING & POWER (H.O. CLARK GEN. STA.)	TXD000837385		HOUSTON	HARRIS	77049	M
HOUSTON LIGHTING & POWER (T.H. WHARTON GEN. STA.)	TXD000837351	1603 WEST MONTGOMERY ROAD	HOUSTON	HARRIS		M
HOUSTON LIGHTING & POWER CO., BAYTOWN STATION	TXD000761841	FARM HIGHWAY 1405	BAYTOWN	CHAMBERS		M
HOUSTON POWER & LIGHT (ROBINSON STATION)	TXD000837401	HIGHWAY 146, 1 MILE SOUTH OF FM 517	BACLIFF	GALVESTON	77518	M
ICO INC (BAKER TUBULAR SVC INC)	TXD098874795	700 REED ROAD	SUGARLAND	FORT BEND	77478	M
INTERNATIONAL GALVANIZERS, INC.	TXD050293794	500 INDUSTRY ROAD	CHEEK	JEFFERSON		M
INTERNATIONAL SPECIALTY PRODUCTS	TXD044452324	HIGHWAY 146 AT INDUSTRIAL AVENUE	TEXAS CITY	GALVESTON	77590	M
ISK BIOTECH	TXD000836486	2239 HADEN ROAD	HOUSTON	HARRIS	77015	M
JAMIESON MANUFACTURING COMPANY	TXD007367469	US HIGHWAY 77 NORTH	ITALY	ELLIS	76651	M
JASPER CREOSOTING COMPANY	TXD008096240	NORTH MCQUEEN STREET	JASPER	JASPER	75951	M
KERLEY INDUSTRIES, INC.	TXD981150923	12 MILES EAST OF BIG LAKE ON US HWY 67	BIG LAKE	REAGAN	76932	M
LONZA, INC.	TXD084970169	9700 BAYPORT BLVD.	PASADENA	HARRIS	77507	M
LUBRIZOL	TXD089741532	WINFREE ROAD		CHAMBERS		M
LUFKIN CREOSOTING COMPANY	TXD008063661	NORTH SIDE OF HIGHWAY	HOMER	ANGELINA		M
LYONDELL POLYMERS	TXD020800371	9802 FAIRMONT PARKWAY	PASADENA	HARRIS	77507	M
MALONE SERVICE COMPANY	TXD027147115	21 21ST STREET SOUTH	TEXAS CITY	GALVESTON	77590	M
MARATHON LETOURNEAU COMPANY	TXD990797441	2400 SOUTH MACARTHUR ST.	LONGVIEW	GREGG	75601	M
MARATHON PETROLEUM	TXD008079501		TEXAS CITY	BRAZORIA		M
MERICHEM COMPANY	TXD008106999	1914 HADEN ROAD	HOUSTON	HARRIS	77015	M
MERRITT TOOL COMPANY	TXD007340342	703 OLD GLADEWATER HIGHWAY	KILGORE	GREGG	75662	M
MILES INC	TXD084972777		HOUSTON	HARRIS	77017	M
MOBIL CHEMICAL POLYETHYLENE PLANT	TXD000807909	HIGHWAY 90 WEST	BEAUMONT	JEFFERSON	77707	M
MOTOROLA INC., ED BLUESTEIN FACILITY	TXD069450997	3501 BLUESTEIN BLVD.	AUSTIN	TRAVIS	78721	M
MURRAY CORPORATION	TXD053115978	2202 TILE FACTORY ROAD	PALESTINE	ANDERSON	75801	M
NALCO CHEMICAL COMPANY	TXD095217766	12205 WEST COUNTY ROAD 125	ODESSA	MIDLAND	79765	M
NATIONAL CHROME PLATING CO	TXD007351778	2404 EAST R.L. THORNTON	DALLAS	DALLAS	75226	M

EXHIBIT "A"
TEXAS NATURAL RESOURCE CONSERVATION COMMISSION
VOLUNTARY CLEANUP PROGRAM
LEGAL DESCRIPTION OF RESPONSE ACTION AREA
VCP No. ___

The response action area is a ___ acre tract, more or less, out of the (Company/Site Name)'s ___ acre tract located at *address, City* in the (Name) League (No.), Abstract (No.), recorded in Volume (No.), Page (No.) of the Deed of Records _____ County, Texas, said ___ acre response action area is more particularly described as follows:

(Insert metes and bounds description here)

draft

EXHIBIT "B__"
TEXAS NATURAL RESOURCE CONSERVATION COMMISSION
VOLUNTARY CLEANUP PROGRAM
AFFIDAVIT OF COMPLETION OF RESPONSE ACTION
APPLICANT ___

_____ (the applicant), has completed response actions, if necessary, pursuant to Chapter 361, Subchapter S, SWDA, at the tract of land described in Exhibit "A" to this certificate that pertains to _____ ____ (the Site), VCP No. ____ located at ___*Address*__, in City, (_____County), Texas that is currently owned by _____Owner_____. The applicant has submitted and received approval from the TNRCC Voluntary Cleanup Section on all plans and reports required by the Voluntary Cleanup Agreement. The plans and reports were prepared using a prudent degree of inquiry of the *Site or Partial Response Action Area* consistent with accepted industry standards to identify all contaminated media of regulatory concern. The response actions, for the *Site or partial response action area* have achieved response action levels acceptable for *Residential, Commercial/Industrial, Agricultural, or Recreational* and use as determined by the standards of the TNRCC. The response action will eliminate substantial or future risk to protect public health and safety and the environment from releases and threatened releases of hazardous substances and/or contaminants at or from the *Site or partial response action area*. Further information concerning the response action at this site may be found in the final report at the central office of the TNRCC under VCP No. ___.

The preceding is true and correct to the best of my knowledge and belief.

Applicant or Authorized Representative

By: _____

Print Name: _____

STATE OF _____
COUNTY OF _____

This instrument was acknowledged before me on _____, 19___, by

_____
Notary Public in and for the State of
(State)

My Commission Expires:

_____

_____
Typed or Printed Name of Notary

EXCEL

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

VOLUNTARY CLEANUP PROGRAM
FINAL CERTIFICATE OF COMPLETION

As provided for in §361.609, Subchapter S, Solid Waste Disposal Act (SWDA), Texas Health and Safety Code.

I, BARRY J. WILLIAMS, DEPUTY DIRECTOR OF THE OFFICE OF WASTE MANAGEMENT, TEXAS NATURAL RESOURCE CONSERVATION COMMISSION, CERTIFY UNDER §361.609, SWDA, TEXAS HEALTH AND SAFETY CODE, THAT NECESSARY RESPONSE ACTIONS HAVE BEEN COMPLETED AS OF ____*(date)* _____ FOR THE TRACT OF LAND DESCRIBED IN EXHIBIT "A", BASED ON THE AFFIDAVIT OF RESPONSE ACTION COMPLETION FOR VCP NO. ____ EXHIBIT "B" , WHICH ARE FURTHER DESCRIBED IN THE APPROVED FINAL REPORT FOR THE SITE, AND DO NOT REQUIRE MAINTENANCE OF ENGINEERING CONTROLS, REMEDIATION SYSTEMS, POST CLOSURE CARE, OR NON-PERMANENT INSTITUTIONAL CONTROLS. AN APPLICANT WHO ON THE DATE OF APPLICATION SUBMITTAL WAS NOT A RESPONSIBLE PARTY UNDER §361.271 OR §361.275(g), SWDA AND ALL FUTURE OWNERS AND LENDERS ON THE DATE OF ISSUANCE OF THIS CERTIFICATE, WHO WERE NOT RESPONSIBLE PARTIES UNDER §361.271 OR §361.275(g), SWDA, ARE QUALIFIED TO OBTAIN THE PROTECTION FROM LIABILITY PROVIDED BY §361.610, SUBCHAPTER S, SWDA

EXECUTED this _____ day of _____, 19____.

_____

Barry J. Williams, Deputy Director
Office of Waste Management

STATE OF TEXAS
(_____) COUNTY

BEFORE ME, on this the _____ day of _____, personally appeared Barry J. Williams, Deputy Director, Office of Waste Management, of the Texas Natural Resource Conservation Commission, known to me to be the person and agent of said commission whose name is subscribed to the foregoing instrument, and he acknowledged to me that he executed the same for the purposes and in the capacity therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this the _____ day of _____, 19____.

_____

Notary Public in and for the State of Texas,
County of

_____

My Commission Expires

_____

Impact of Contamination on Property Value

"Home Alone"

Rudy R. Robinson III, MAI
Scott R. Lucas

Rudy R. Robinson III, MAI

Rudy Robinson is associated with Austin Valuation Consultants, Inc., a commercial real estate appraisal firm based in Austin, Texas. Mr. Robinson's twenty-five years in real estate appraising and consulting have included very diverse and challenging assignments with the majority of his projects involving commercial and residential real estate litigation. An MAI for the past sixteen years, he has testified at the city, county, state and federal levels as an expert witness. He and members of the firm have also testified as land use experts in hearings before the Texas Department of Health, the Texas Water Commission, TNRCC and the Texas Railroad Commission involving permits for projects such as municipal utility districts, landfills and mining operations.

Over the last eighteen years, Mr. Robinson has been specializing in appraising and consulting on environmentally sensitive real estate and has dealt with issues including soils and groundwater contamination from gasoline products, landfills, electric transmission lines, State and Federal Superfund, CERCLA and RCRA sites. He also has been very active in the appraisal of endangered species habitat lands and has worked with private and public clients on mitigation studies. He has consulted on environmental projects in Alaska, Arizona, Alabama, California, Colorado, New Mexico, New York, Oklahoma, Ohio, Mississippi, Florida and numerous regions of the State of Texas. Past assignments have involved the quantification of real property losses associated with the presence/proximity of asbestos, heavy metals, arsenic, radioactive materials, TCE, solvents, volatile organics, acids and other chemicals, toxins and hazardous waste/substances.

Mr. Robinson received his undergraduate degree from The University of Texas at Austin in 1971 with a Bachelor's Degree in Psychology. His background and education in chemistry and other sciences have been very helpful in his day-to-day practice as an environmental specialist is appraising. Beside his education at UT and the Appraisal Institute, he has completed numerous environmental courses and seminars on hazardous waste/materials management, storage and disposal/treatment, environmental and regulatory matters. Rudy is a past president of the local chapter of the Appraisal Institute and has served in numerous capacities for the Appraisal Institute on local, statewide and regional levels.

Rudy is married to Judy Robinson, has three children and currently resides in Marble Falls.

THE IMPACT OF CONTAMINATION ON PROPERTY VALUE

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THE IMPACT OF CONTAMINATION ON PROPERTY VALUE

The process of appraising the damages associated with contaminated real estate involves a thorough, time consuming study of the area impacted by the presence or proximity of the contaminants, the nature of and extent of the contamination, and an analysis of each property which is either invaded by the contaminant or is close enough to be negatively influenced. The estimated area of influence is often defined as a certain perimeter impacted by the areal extent of the contamination plume. This perimeter is set by scientific studies such as public health and toxicological opinions based on physical examination and research. In some rare cases involving groundwater and soil contamination, public health officials may further define the affected area by evacuation or quarantine if an event causes physical destruction of property or casualties.

Only rarely is a community well informed or even partially informed of environmental risks associated with hazardous contaminants within their neighborhood unless the condition of the site of concern is so hazardous that it qualifies for listing on the EPA's National Priority List (NPL) and is classified as a Superfund site. Even in Superfund sites, only limited objective information may be available to the public, particularly when litigation is pending from both the PRP/Defendants and innocent landowner/plaintiffs or media attention is strong. In cases involving leaking underground storage tanks from which contaminants have migrated off- site, some adjacent, down-gradient property owners may be first informed by a request for installation of a monitor or recovery well associated with an ongoing investigation or remediation program. Other mechanisms for public notification are deed recordation, written notification by the responsible party or regulatory agency, or word of mouth from neighborhood activists, neighbors or other third parties. In some cases, odorous gases and visual observation of remedial or construction activity can be the primary mode of detection.

This paper will illustrate four recognized techniques for analyzing and quantifying the influence of contaminants on property values. The techniques discussed on the following pages are **LINEAR REGRESSION ANALYSIS, MULTIPLE REGRESSION ANALYSIS, PAIRED SALES ANALYSIS** and **CASE STUDIES ANALYSIS.**

LINEAR REGRESSION ANALYSIS

One method of measuring the impact of contamination on property values is linear regression analysis. As defined in *The Appraisal of Real Estate*, 10th edition, "In simple linear regression analysis, one independent variable, or property characteristic, is used to reflect a relationship that changes on a straight-line basis... The basic regression equation is **Y = a + bX**." For example, if an appraiser were attempting to define the relationship between the amount of square feet in a set of buildings and their sales prices, **Y** would be the dependent and unknown variable representing the building's value, **a** would be a constant determined by the regression model, **b** would be the price per square foot, and **X** would be the known, independent variable representing the square footage of the building.

The actual regression calculations are complex and somewhat difficult to describe in layman's terms. The calculations can be performed by hand or on a calculator but are lengthy and tedious. Fortunately, inexpensive computer software can perform the calculations with one or two keystrokes or mouse clicks, leaving the analyst only to insure that the data entry is accurate. Using the example of defining the square feet / price relationship, the regression computations (in visual terms) involve plotting a two dimensional chart using the square feet of each building as an X-coordinate and using the sales price as the Y-coordinate. Then, a straight line is plotted that best describes the relationship between square feet and price. From this line, the analyst can predict the sales price of a building with a given number of square feet.

An important statistic is the coefficient of determination, notated by "r^2." The coefficient of determination is a measure of "the approximate percentage of variation in the dependent variable which is explained by the regression." To use our example, a high r^2 indicates a strong relationship between square feet and sales price. There is no exact minimum r^2 that indicates an acceptably strong relationship; that depends somewhat on the analyst's judgment. However, an r^2 above 50% indicates that the two variables are strongly related, and one above 90% indicates a near-perfect relationship. An r^2 approaching zero reflects an almost random pattern and a weak relationship.

In 1993, the authors used linear regression to research the effects of chemical contamination of single family homes southeast of Houston, Texas. The Southbend subdivision is located adjacent to a national Superfund site known as Brio/Dixie Oil Processing, or Brio for short. The Brio site is an abandoned industrial complex used in the manufacture, distillation and storage of several substances, including copper catalysts, diesel fuel, jet fuel, naphtha, and kerosene. Extensive on- and off-site contamination had been documented as early as 1984, but for various reasons the site was not officially placed on the National Priorities List until 1989. The contamination of property also caused health problems in some residents. By 1993, the contamination and the resultant highly negative publicity led to the closure of the subdivision's elementary school, inability of residents to get mortgage insurance, and eventual purchase of the entire subdivision by HUD and FHA through foreclosures and direct buyouts. During 1989-1992, real estate agents selling properties within South Bend provided a litany of newspaper articles and EPA press releases to prospective purchasers. Buyers were required to sign each individual article along with the contract-to-purchase. Most were scared away, but despite the media attention and public awareness of possible environmental hazards, over 100 transactions between private parties took place within Southbend from 1989 through 1992.

The Southbend sales were compared to several hundred single family residence sales in several outlying subdivisions in which the impact of the Brio site was minimal or non-existent. These subdivisions consisted of houses built primarily during the early to mid 1980s and were similar in curb appeal and access to local businesses and other amenities. Using linear regression, the authors found a strong relationship between the square footage of each house and its sale price. Within the Southbend subdivision, the coefficient of determination was 59%, and within other subdivisions, the coefficient was 79%. The coefficient for Southbend was lower probably due to the uncertainties involved with greater risks of ownership near the Superfund site. Using the expected price for an average, 1,750 SF house, the authors found a diminution of 20%-34% for Southbend properties when comparing them to each of the other subdivisions. Studies of paired sales indicated diminution in value to specific properties within Southbend of 29%-50%.

The advantage of linear regression is that it can reduce a large, sprawling database to a meaningful pattern. When an analyst is testing a hypothesis, isolated data can prove or disprove almost anything, but linear regression shows an overall picture. One advantage of linear over multiple regression is that it is much easier to explain. Although multiple regression may be more accurate, explaining a simple square foot / price relationship is far easier than describing a formula with five to fifty variables. Considering that few, if any, jury members will have extensive backgrounds in mathematics, ease of explanation is a vital factor in expert witness testimony.

BRIO / DIXIE OIL PROCESSING SITE

The Brio/Dixie Oil Processing Site (Brio) is located on a 58 acre tract of land approximately 20 miles southeast of Houston, Texas, on Dixie Farm Road. According to a report by consulting engineers, the Brio Site was in operation from 1957 until 1982 and was used for the "regeneration of copper catalysts; reclamation of chemicals and petrochemicals; storage of spent caustic; production of fuel oil, diesel, residual oil, naphtha, kerosene, fuel gas, and jet fuel." The portion on the northwest side of Dixie Farm Road is approximately 49 acres in size and was used primarily for storage. The southeast side is about nine acres and was used for processing activities. Ten different companies owned the property over its operating period, and operations at the site ceased in December 1982 because of the bankruptcy of the property owner, Brio Refining, Inc., which abandoned the property.

In 1984, various public agencies and private concerns began a program of on- and off-site testing of air, surface water, ground water, surface soils and subsoils. Testing was also performed on the water supply of the South Bend Municipal Utility District and on small mammals captured near the Brio Site for absorption of toxic materials. By October, the U.S. Environmental Protection Agency had formally announced that the Brio Site had been nominated for placement on the National Priorities List (NPL) under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), also known as the Superfund. The EPA assessed the Brio Site to determine its "hazard ranking," which is a measure of the source and degree of contamination and possible pathways and receptors of the contamination. A score of 28.50 out of 100 possible points is necessary for placement on the NPL; the Brio Site received a score of 50.28.

A Phase I environmental study was performed in 1985 by Resource Engineering, Inc. and the Texas Air Control Board (TACB). Among the findings of this study: no asbestos, pesticides or radioactive materials were found; all water supplies met regulatory standards, although one well at a nearby baseball field did not meet aesthetic standards; concentrations of benzene, toluene, vinyl chloride and tetrachloroethelyne were higher than TACB standards but apparently did not adversely affect health conditions; the Brio Site contained 21 pits with 182,650 cubic yards of residual wastes and fill material; 150-200 container drums were on-site, some of which were leaking; 34 container vessels were on-site with approximately 4,360 barrels of material; a large quantity of processed sewage sludge was found on-site; and, studies of small mammals near the Brio Site did not reveal any adverse health conditions.

The proposed remedial action plans included as many as four different solutions: (1) cap and cover with a gas collection system from $6,770,000 to $31,530,000; (2) a vault-in-place stabilization in enclosures, transport to on-site vault from $12,870,000 - $60,580,000; (3) biological treatment - excavate in enclosures, treatment in liquid or solid phase biological treatment system with placement of treatment residue in pits from $14,335,000 to $56,770,000; and (4) incineration - excavate in enclosures, transport to on-site rotary kiln or infrared incinerator, backfill ash to pits from $15,120,000 to $73,770,000. The Remediation Investigation/Feasibility Study indicated that methods 3 and 4 were the most feasible and effective.

The referenced affected soils cost estimates, which range from a low of $6,770,000 to a high of $73,770,000, did not include ground water treatment costs. The ground water treatment costs were estimated at $1,832,000 including recovery and treatment of a non-drinking water supply. This process involves the collecting and treatment of discharges to surface water in what was identified as a mud gully. The water treatment plans included treatment at an on-site package treatment plant. This plan

was accepted by the Texas Water Commission in 1986. The Consent Decree, which bound the Principally Responsible Parties (PRP) to a particular course of action, was signed by the PRPs and the EPA in early 1989. In this case the PRPs were a group of companies which had commerce with Brio Refining Inc. over the years. Brio Refining was bankrupt and was not a PRP. The PRPs adopted the name of Brio Site Task Force (BSTF).

Further action was delayed for a variety of reasons. For one, the assets of Brio Refining were still controlled by the bankruptcy court. A study by the U.S. Geological Survey, which questioned the thoroughness of previous studies, and U.S. Representative Jack Brooks demanded that further tests be performed. Although the Consent Decree was signed in early 1989, it was not approved in federal court (as required by law) until April 1991 because of questions raised by the U.S.G.S. and other groups. Various subdivisions and neighborhood groups appealed the judge's decision but the Decree was reaffirmed in December 1991.

Dismantling of the tanks began in December 1992. According to the most recent newsletter published by the Brio Site Task Force, tank dismantling was to be completed in February 1993, but a personal inspection of the site in March 1993 revealed that many tanks were still in place. Construction of the incinerator was completed in 1993, but the EPA disallowed the incineration of hazardous materials and ordered additional studies and public input. As of 1996, the facility is being used as a hazardous waste lanfill and monitored continuously.

Despite the EPA's insistence from the mid 1980s to the early 1990s that the Brio Site posed no immediate health threat, the site dramatically affected the South Bend subdivision, which is directly adjacent to the site to its northwest. An article in the South Belt - Ellington Leader in November 1984 noted residents' complaints about odors from the site, particularly during the summer when the humidity was highest and wind direction was prevalently from the southeast. Residents also complained of the lack of fencing and warning signs around the site despite the fact the Texas Department of Water Resources had admitted that the site contained known carcinogens.

On April 27, 1989, the Farm and Home Savings Association, which owned several properties in South Bend, informed all of its renters that "residing in South Bend subdivision presents a present and immediate danger to the health of those renters," according to an article in the South Belt - Ellington Leader. The FHSA immediately terminated the leases and ordered residents to vacate the premises by June 5, 1989. The FHSA admitted that while EPA reports did not indicate an immediate health threat, its own information indicated otherwise.

On August 23, 1990, an article by the same newspaper reported that a family which had lived in South Bend for nine years had their six-year-old child independently tested for toxic chemicals. N-hexane, Dichloromethane and 1,1,1 trichloroethane were found in the child's bloodstream. EPA tests performed in June 1988 indicated that the soil in the family's back yard was contaminated. When additional tests were performed, environmental specialists wore protective suits and respirators and told the family to stay indoors, according to the article. In contrast to the test on the child's bloodstream, the EPA stated that no immediate threat to the residents' health existed.

In January 1992, the trustees of the Clear Creek Independent School District voted to close Weber Elementary School, located in the South Bend subdivision about ¼ mile northwest of the Brio Site, after the conclusion of the school year in May. The 440 students were transferred to Brookwood Elementary School, which is seven to eight miles to the northeast.

By 1992, the U.S. Department of Housing and Urban Development (HUD) gained ownership of 15 to 20 houses in South Bend via foreclosure. HUD listed the houses for sale and received offers on many of these houses, but on June 19, 1992, HUD withdrew its offers to sell and ceased all sales and mortgage activities. Furthermore, no public entity would offer loan insurance on a house in South Bend. The Farm and Home Administration (FHA) is reportedly buying all houses in the subdivision and will demolish them. A March 1993 inspection of the subdivision by the authors revealed that some houses in South Bend were vacant and boarded up, and by July 1994, almost all of the houses in the subdivision were unoccupied with windows boarded. Large tents covered much of the affected site on either side of the road, and both sites have gates and secured entrances.

Brio Site disclosure forms were obtained from a sales associate for RE/MAX in Houston. These forms apply to house sales within the South Bend subdivision and include the newspaper articles described above and other statements meant to inform potential buyers about the Brio Site and protect brokers from liability. Buyers, sellers and brokers are required to sign each page prior to signing an earnest money contract.

Austin Valuation Consultants, Inc. (AVC) researched the effects of the contamination at the Brio Site and the disclosure of the contamination on sale prices of single family residences near the site. The research incorporated almost 400 sales of single family residences in six subdivisions between 1989 and 1992. The number of leased residences was insufficient for the analysis. The greatest number of sales occurred in 1991 and 1992. A table displaying pertinent data concerning the subdivisions and house sales follows:

	No. of	Price per SF		Size (000)		Year Built		Relative to Brio:	
Subdivision	Sales	Range	Avg.	Range	Avg.	Range	Avg.	Direction	Distance
South Bend	**65**	**$19-$51**	**$32**	**1.1-2.6**	**1.7**	**1980-1987**	**1983**	**W**	**0.00-0.75**
Sagemeadow	12	$35-$59	$46	0.8-2.5	1.3	1982-1991	1983	WNW	1.00-2.00
Sageglen	53	$30-$52	$39	1.6-3.3	2.4	1976-1984	1978	NW	1.00-2.00
Highland Meadow	38	$28-$45	$37	1.6-3.2	2.0	1976-1985	1980	NNW	1.00-1.75
Scarsdale	36	$30-$51	$37	1.0-1.6	1.3	1970-1978	1973	N	0.75-1.50
Heritage Park	**70**	**$38-$54**	**$47**	**1.4-2.4**	**1.8**	**1968-1991**	**1986**	**SE**	**1.50-3.50**

South Bend and Heritage Park are in bold print because these subdivisions are of primary importance. South Bend is the only subdivision directly adjacent to the Brio site, whereas Heritage Park is farthest away; it apparently is unaffected by the Brio Site. The other subdivisions are in the intermediate range of 0.75 to 2.00 miles. Furthermore, according to charts obtained from the U.S. National Oceanic and Atmospheric Administration, wind direction is from the south or east twice as often as from the north or west. Therefore, any potential airborne transportation of toxins and/or odors would most likely affect properties to the north and west. As noted in the chart above, Heritage Park is southeast of the Brio Site, while the other subdivisions are to its north or west.

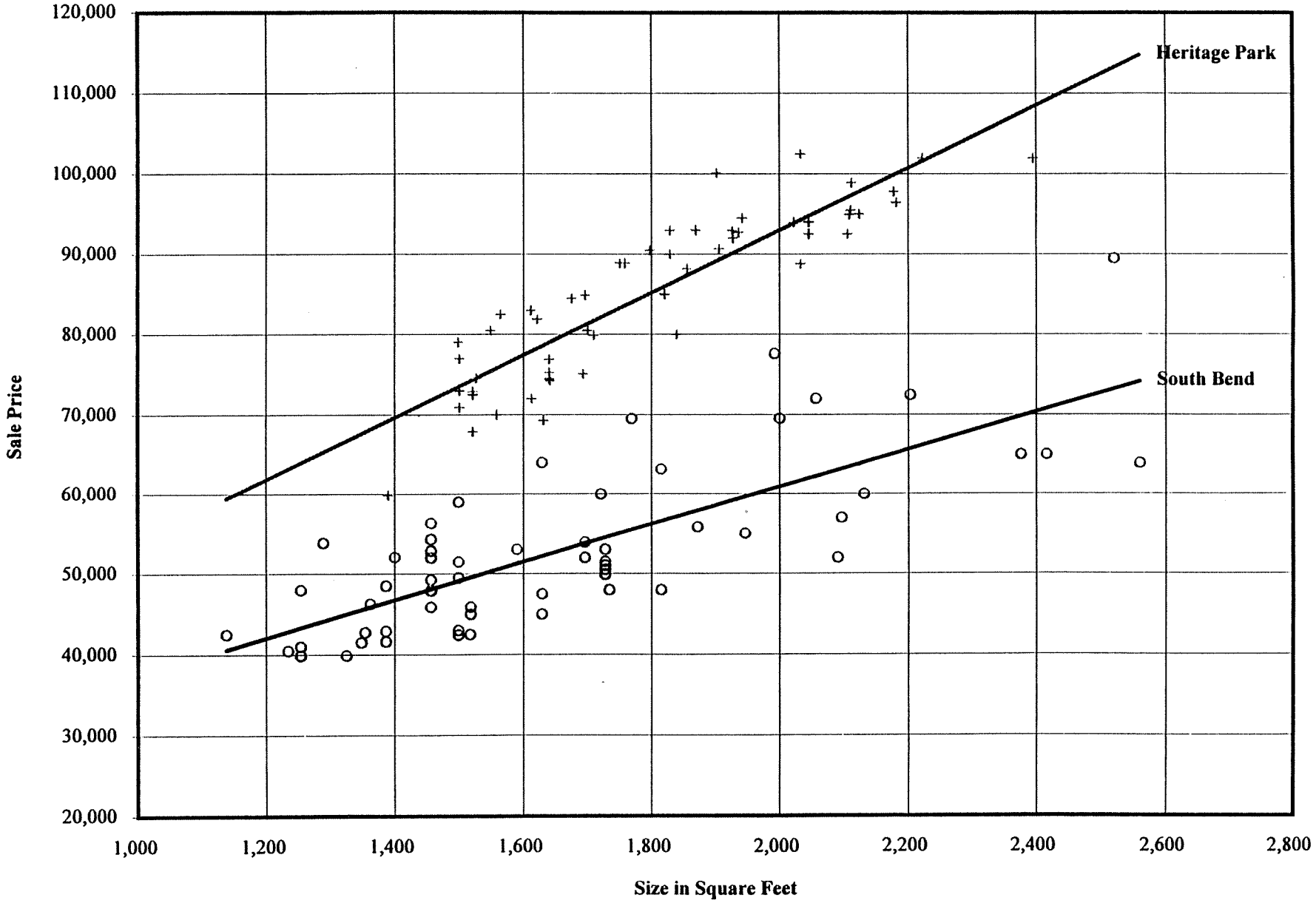
The house sales were placed into three groups: sales in South Bend, sales in Heritage Park and sales in Sageglen, Sage Meadow, Highland Meadow and Scarsdale. AVC researched various factors to determine which had the strongest influence on price: house size, lot size, age, number of bedrooms, etc. Although all of these attributes influence value, the strongest relationship was between total sales price and house size. Using the three groups noted above, the sales were plotted on a graph with house size as one variable and sales price as another. A straight line was then plotted that signified the

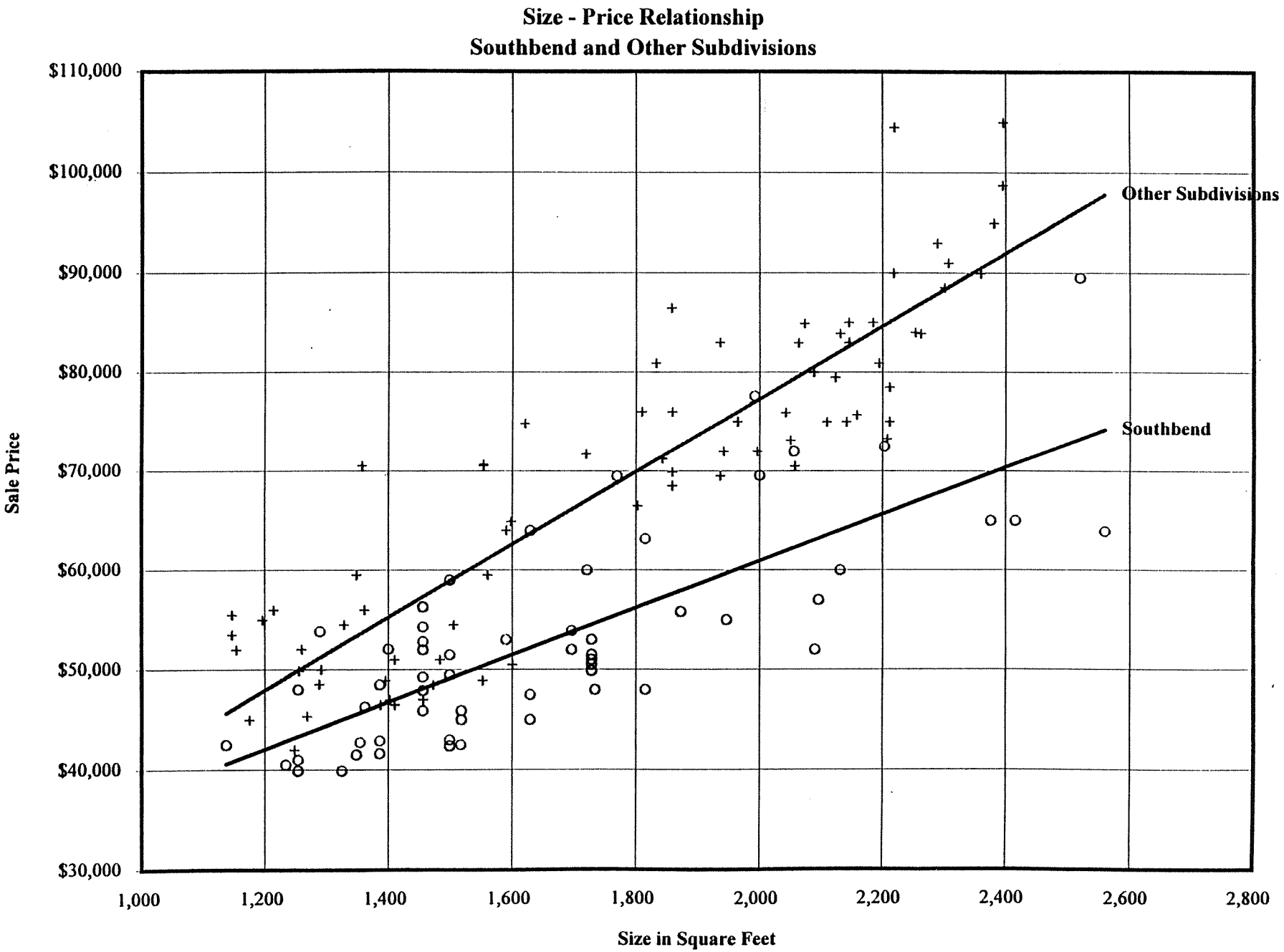
relationship or trend between price and size for each group. *The trend lines indicated that a house in South Bend would sell for 33%-35% less than a house of equal size in Heritage Park and 14%-25% less than a house of equal size in one of the other subdivisions.* Also, a house in one of the four intermediate subdivisions would sell for 15%-19% less than one in Heritage Park. Isolated cases can be found of houses in South Bend selling for slightly more than equally-sized homes in Sageglen, Sage Meadow, Highland Meadow or Scarsdale, but for the vast majority of houses, the opposite is true. This phenomena can be explained by creative and attractive seller financing which was available for properties in Southbend. *In no case did a house in Heritage Park sell for less than one of equivalent size in South Bend.*

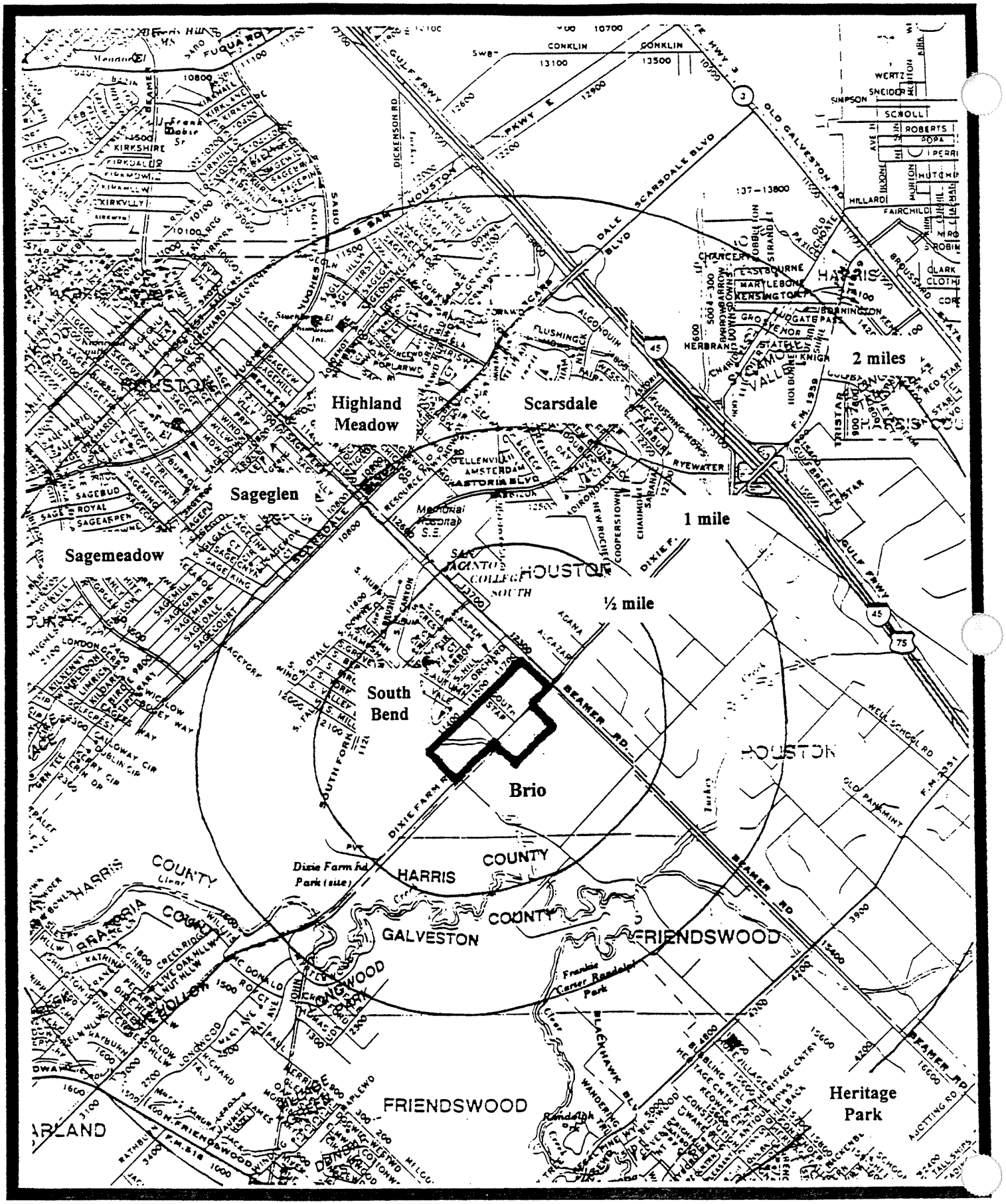
As a test of the validity of the trend lines, a grid was created which compared every sale in Heritage Park to every sale in South Bend. The difference in price between a sale in Heritage Park and one in South Bend was extracted whenever the difference in house sizes was less than 50 feet. 281 matches fit the criterion. The average difference in price was 34.6% (using the Heritage Park sale as the base), the minimum was 7.6% and the maximum was 48.5%. These findings are similar to the findings using the trend lines on Page Two. Also, the standard deviation from the average was 8.3%. Using a standard "bell curve," approximately two-thirds of the differences were between 26.3% and 42.9%.

AVC also studied the sales in South Bend for unusual sale conditions or financing and found that many of the sales in South Bend were 100% to 110% seller-financed. Conversations with local brokers indicated discounts of 33% to 50% because of proximity to the Brio Site.

Size - Price Relationship
South Bend and Heritage Park Subdivisions




Size - Price Relationship
Southbend and Other Subdivisions
$110,000
$100,000
$90,000
$80,000
$70,000
$60,000
$50,000
$40,000
$30,000
Sale Price
1,000
1,200
1,400
1,600
1,800
2,000
2,200
2,400
2,600
2,800
Size in Square Feet
Other Subdivisions
Southbend



Brio Site and Nearby Subdivisions

MULTIPLE REGRESSION ANALYSIS (MRA)

Multiple Regression Analysis is the second method which is quite popular in appraisal and academic literature and is recommended for obtaining market-derived adjustments utilized in the sales comparison approach to estimation of market value. *The Dictionary of Real Estate Appraisal*, Third Edition, defines Multiple Regression Analysis as "a type of analysis that measures the simultaneous influence of a number of independent variables on one dependent variable." It uses a hedonic price index to quantify the value of measurable, physical property attributes and intangible attributes such as an amenity or disamenity feature, design, reputation, etc. The advantage of MRA over the Linear Regression Analysis previously discussed is that it can measure the influence of multiple independent variables against a dependent variable.

The example chosen for discussion involves an analysis performed in 1994 and 1995 in which Mr. Robinson participated as a researcher and external auditor. This study involved the analysis of 16,990 residential real property transactions in 1992 which occurred in greater Cleveland, Ohio and were arms-length transactions recorded in the deed records. The hypothesis was whether sale prices of residential properties were affected by close proximity to underground petroleum storage tanks. The sales were analyzed with a logarithmic formula which accounts for all relevant economic, locational and physical attributes which influence sales price. Additionally, tank (dummy) variables were added to the chain of property variables to test for their significance in influencing value. The relevant proximity radius was established at 300', or the equivalent to one urban block. The findings of this study concluded that properties defined as close to an underground petroleum storage tank suffered an average diminution in property value of 17% or $15,152.

The Effect of Underground Storage Tanks on Residential Property Values in Cuyahoga County, Ohio

by

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The Effect of Underground Storage Tanks on Residential Property Values in Cuyahoga County, Ohio

ABSTRACT

This study considers the effect of underground storage tanks on residential sales price. These effects are tested with a hedonic pricing model for all 1992 residential sales in Cuyahoga County, Ohio. Three types of tanks were tested: non-leaking tanks registered with the State of Ohio, leaking tanks which are currently not registered, and registered leakers. Results show that close proximity (same block or within 300 feet) to registered, non-leaking tanks and to unregistered leakers did not significantly affect sales price. However, proximity to a leaking, registered tank demonstrated a reduction in price of over 17%.

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I. INTRODUCTION

This research investigates the relationship between both leaking and non-leaking underground storage tanks on residential sales values. We focus on one urban county and use registered tanks and known leaking tanks during the 1988-1993 period. The data source for the tank information is the State of Ohio's Bureau of Underground Storage Tank Regulations (BUSTR). We study 16,990 residential sales in Cuyahoga County, Ohio during 1992. A total of 83 residential sales were close enough to underground storage tanks to be featured in our analysis.

The rest of the paper provides a literature review, a discussion of the model and data sets used, and a map of most tank sites. We provide a hedonic model of residential sales, which includes three types of underground tanks. Where residential sales are close to tank sites, we find the expected negative effect on nearby residential sales among tanks that have **both** the nuisance effect of an ongoing business and a reported leak. Close proximity to either an unregistered leaking tank site or to a site with registered tanks that had not leaked had a small negative sign, not significantly different from 0. We believe our research is the first to address the relationship of UST (underground storage tanks) to residential property values.

II. LITERATURE REVIEW

There is a well documented relationship between the nuisance and hazard effects of the by-products of economic development and their negative effect on surrounding residential property. Studies have been conducted on Superfund toxic waste sites by Kohlhase (1991), on landfills by Thayer, Albers and Rahmatian (1992); Reichert, Small and Mohanty (1992); Nelson, Genereux and Genereux (1992); and Smolen, Moore and Conway (1992), existing hazardous waste sites by Michaels and Smith (1990), Kiel (1994) and Thayer Albers and Rahmatian (1992); and proposed radioactive waste sites Michaels and Smith (1990). Other studies on related negative externalities have been performed on high voltage and transmission power lines by Delaney and Timmons (1992), Colwell and Foley (1979), and Colwell (1990). Additional research on the relationship between groundwater contamination and residential values has been performed by Page and Rabinowitz (1993). We are not aware of any studies on underground storage tanks and their relationship to residential property values.

Results from available studies generally support the notion that there is a negative relationship between proximity to these sites and residential sales values. This relationship becomes less apparent with increasing distance from the site, tapering off to no effect at some distance, depending on how large the site is. The nature of the toxicity can also affect the reduction in values. Thayer, Albers and Rahmatian (1992) found a larger negative effect

for hazardous waste than for non-hazardous materials.

The mechanisms by which apparent negative effects of proximity to proposed hazardous land uses are capitalized into lower housing values include the markets' assimilation of publicly available information, especially the announced plans of government agencies (Kiel, 1994; Kohlhase 1991; Smolen, Moore and Conway 1992). Homeowners may also perceive separate diminution of value attributable to a nuisance associated with close proximity to a site, as well as more general negative effects related to potential health hazards as per Reichert, Small and Mohanty (1992). Proximity to visually obvious hazardous sites may also deter potential buyers from making offers on homes, thus affecting sales price by reducing demand.

Measurement of the proximity to environmentally objectionable land uses was typically measured from only one site, or the nearest site. Most of the studies have employed a concentric ring approach, with distance typically measured in quarter mile increments from the subject site. Colwell (1990) and Colwell and Foley (1979) used a non-linear decay function for distance from pre-identified power lines and time after sale.

Nearly all the studies cited have focused on a very small number of large, contaminated sites. We have a highly dispersed set of sites over 2,500 tank locations, with differing levels of actual or potential land-based toxic releases. All our sites were active or had leaks during the 1988-1993 period. We use the conventional definition of a tank leak, which excludes surface spills and includes leaks from below the plumbing union where the dispensing unit meets the underground storage tank. We measure relatively small distances, e.g., within several hundred feet.

III. THE MODEL

We employ a multiple regression model where the unit of observation is individual parcels. The hedonic platform features residential sales as the dependent variable to be explained. Proximity to a registered or leaking tank site is included as one of several independent variables, the others being property characteristics, location, and season of sale. This approach is similar to that employed in other studies concerned with the effect of proximity to environmentally objectionable sites to property value (Colwell 1990; Kohlhase 1991; Nelson, Genereux and Genereux 1992; Reichert, Small and Mohanty 1992; Smolen, Moore and Conway 1992; Thayer, Albers and Rahmatian 1992).

Our hedonic model is based upon an hypothesized relationship between residential sales price and a set of explanatory variables. As suggested by Rosen (1974), there are theoretical grounds to believe that relationships between these variables may be non-linear. To determine the appropriate functional form of the model, the general form employed is:

$$Y^{\lambda 1} = \beta_1 + \beta_2 X_2^{\lambda 2} + \ldots + \beta_N X_N^{\lambda N} + \epsilon \qquad (1)$$

where the parameters λ are estimated from the data using the power transformation introduced by Box and Cox (1964), and elaborated upon by Spitzer (1982).

For this research, separate λs were estimated for four key continuous variables: sales price, building square footage, age, and lot frontage. Therefore, the following model was employed:

$$PRICE^{\lambda 1} = \beta_1 + \beta_2 BLDSQFT^{\lambda 2} + \beta_3 AGE^{\lambda 3} + \beta_4 LEGFRONT^{\lambda 4} + \beta_5 UNIT + \beta_6 ZIP + \beta_7 SEASON + \beta_8 TANK + \epsilon \quad (2)$$

where the notation is:

PRICE = sales price of the residential unit

BLDSQFT = interior building square footage

AGE = age of the house

LEGFRONT = legal front footage of the lot

UNIT = a vector of other housing unit characteristics, including bedrooms, rooms, condition, bathrooms, fireplaces, garages, double (duplex unit) and style; and lot depth

ZIP = a dummy variable for zip code is used as a proxy for a vector of census tract and municipal characteristics, including distance to CBD, housing vacancy, income, race, and crime rates

SEASON = Proxies for the spring, summer, fall and winter sales seasons

TANK = a dummy variable if there are known leaking, non-leaking registered underground tank(s), or leaking and registered tanks present very near the property (e.g., same block or within 300 feet)

Because of the difficulty in interpreting the ß coefficients from a model which has undergone a Box-Cox transformation, a linear version of (2) is also presented to provide useful information on the effect of key variables on sales price.

IV. DATA SETS

This research utilizes several data sets, which are merged to produce a combined data base. These include property tax records, real estate sales, the TIGER/Line address files, and information on underground storage tanks.

The main data set is the Cuyahoga County Auditor tapes, which contain property characteristics and land use, property tax billing data such as market value, and deed and mortgage records for the approximately 650,000 parcels in the county. The computerized data provide property characteristics for the hedonic platform. This data base is keyed on a unique permanent parcel number (PPN). It can readily be merged with the Amerestate files, which contain real estate sales and mortgage financing data, some property characteristics, and PPN.

The TIGER/Line files are used for computer mapping with a GIS software package. In the process of address matching, TIGER provides latitude and longitude coordinates for all sites successfully plotted. We use these maps to determine trends and patterns in tank locations.[2]

Our main environmental data set contains information about the presence of underground storage tanks located in Cuyahoga County. Records date back to 1988. The State of Ohio Bureau of Underground Storage Tank Regulations (BUSTR) requires registration of all underground tanks currently in use that contain hazardous substances as defined in CERCLA section 101(14). This generally includes all petroleum products. Farm tanks, septic tanks, water tanks, small tanks (under 110 gallons) and tanks storing heating oil for personal use are excluded from regulation. The data set includes tank address and selected attributes such as number, type, content, and age of tanks on each site. The computer readable component of the leaking tanks data is much less complete, and only include year of release and a partial address. The data used in this research covers Cuyahoga County, and is derived from information provided by BUSTR. The data set contains 1,678 registered sites and reports of 1,362 leaking underground storage tank sites, as of mid-1993. Interestingly enough, only about 39% of the leaking tanks are on the current registered list, implying that some tank leaks were a "surprise", and that others that leaked had the tanks on site removed, and were deleted from the current registry list. To the best of our knowledge, this tank data set has not yet been used in research.

A recent study by Bowen, Salling, Haynes and Cyran (1995) developed a hierarchy of measuring toxicity for various types of noxious environmental releases, based in part on an ACGIH technical document (1991). According to this approach, leaking storage tanks could be classified as a land-based release, and are expected to have a small, localized effect. We interpret this local area to be within visual sight distance or a city block (about 300 feet). We therefore expect relatively small effects from the leaking tanks on surrounding residential property because it is a land-based toxic

release, and expect that the effect would be limited to the immediate vicinity, unless there is groundwater contamination. This notion is supported by Patchin (1994) who asserts that the market value stigma associated with environmentally suspect sites should be less severe if there is contained soil, as opposed to off-site groundwater contamination. Information about the extent of the leaks may vary also substantially. These data, however, are not currently available. We also expect that there is a nuisance factor of an ongoing business (e.g., gas station), the negative effect of which should be capitalized into residential sales price.

Exhibit 1 shows selected descriptive statistics and variable names for the housing variables and tank variables used in our model. Because housing hedonics are not the focus of the paper, we cover only the tanks variable in detail here. The mean residential sale in 1992 sat on a lot with 59 feet of frontage and an average depth of 164 feet. The units sold were a mean age of 51 years, averaged 1,608 square feet, with 3.3 bedrooms, 1.3 baths, and space for 1.6 cars in the garage. Average sales price was $86,500.

Exhibit 1 about here

Placing Underground Storage Tanks Sites in Real Space

We had substantial success in applying geocode addresses and PPNs to tank sites and residential sales. Out of a total of 2,513 tank sites, 835 were leaking unregistered tank sites (75% geocoded, 66% with PPNs), 1,151 were registered non-leaking tanks (82% geocoded, 77% with PPNs), and 527 were registered leaking tanks (90% geocoded, 85% with PPNs). We also report on over 16,900 residential sales from 1992 (89% geocoded, 100% with PPNs).[3]

In the hedonic model including tank data, we use a near-perfect match on PPNs as a measure of proximity for three categories of tank: CLOSLUST (close to a known leaking but currently unregistered tank), CLOSTANK (close to a registered, non-leaking tank site) and CLOSRGLK, (close to a registered tank site leak incident). This PPN matching technique is believed to capture over half of the sales located near tanks, and gives a measure of proximity between tanks and residential sales which is accurate within an average of five parcels, on either side.[4] We interpret this level of proximity to reflect residential sales "on the same block" as a tank. Further examination of property tax maps verified that all sales were in fact, on the same block or within 300 feet of the tank site. We also conducted field inspections on a sample of approximately 25 sales proximate to leaking tanks to rule out incompatible land uses (e.g., school athletic fields) and verify that the properties were still in residential use.[5]

Because our loss of information for tank data using PPNs was relatively low, we have a moderate level of confidence in our ability to generalize from our tank sample to the population. However, unregistered leaking tanks was the weakest group, and most likely to have incomplete addresses. Over 500 hours of work went into compiling acceptable PPN and geocoded address data.

Exhibit 2 is a map of the three types of tanks and residential sales. Squares denote registered tank sites that have not leaked during the 1998-1993 period (TANK), circles represent registered tank sites that have leaked (RGLK), and triangles show surprise leaks that were not registered prior to the event, and/or those whose registry status was deleted after the leak event had run its course (LUST).

Exhibit 2 here

One evident pattern is that most tank site locations (i.e., gas stations) occur along main arterial streets. For example, it appears that non-registered leakers may be more likely found in clusters and in outlying areas, rather than along the main thoroughfares.

V. STATISTICAL RESULTS

Prior to performing regression runs, we generated univariate plots, and deleted outliers for the housing related variables, where appropriate.[6] We also ran a correlation matrix, and did scatterplots of each variable against its own residuals and against the model residuals as a visual test for heteroscedasticity.[7]

The results of the Box-Cox hedonic model with housing characteristics, and zip codes, seasonal and tank dummy variables, are presented in Exhibit 3. The model had an adjusted R^2 of .78, and an F-statistic of 862, which is statistically significant at α=.0001. Consistent with the very large data set, the model had 16,875 degrees of freedom. The linear model was nearly as robust, with an adjusted R^2 of .77 and an F-statistic of 791 (see Exhibit 4). Other non-linear models were also run, but their performance was not as high as the Box-Cox or linear specifications. In general, unless otherwise noted, the statistical significance of variables in this study are cited from Exhibit 3, and the economic interpretations are derived from the linear ßs from Exhibit 4.

Exhibits 3 and 4 about here

Housing Variables: Results

The following housing-related variables were statistically significant at α=.01 or better: lot frontage, lot depth,[8] building square footage, rooms, age, baths, fireplaces, a quality index, forced air heat, garage, and a dummy variable for duplex unit. All variables except number of rooms and frontage had the expected signs. We interpret the negative sign on the rooms variable to reflect the functional obsolescence of older homes with many smaller rooms close to the city center. The seasonal dummies all had the expected negative sign, and winter and spring had a statistically significant price reduction compared with the reference category of the summer sales season.

Additionally, 35 out of the 50 zip code dummy variables were

also significant at α=.05 or better. Because zips are control variables for location and not generally interesting to readers outside Cleveland, we include them in the Appendix as Exhibit 4A. These results support the notion that certain zip codes (most likely those with homogeneous housing markets), acting as a proxy for location, school district and other services, are significantly related to sales price.

Results of Tank Variables

With respect to our tank dummy variables, we found 83 tanks located on the same block or within 300 feet as a residential sale in 1992.[9] These sales were scattered throughout the county. Because we considered the year of leak, we are certain that the sale (in 1992) occurred concurrent to or after a reported leak (1988-1992, midyear).

A total of 42 sales were close to registered non-leaking tanks, 24 were close to leaking unregistered tank sites, and 17 sales were proximate to leaking tanks currently registered.[10] Through comparing owner names and visual site inspections, we also deleted several cases where there was an obvious change in land use for the residential sale (e.g., property bought by a fast food chain, supermarket, City, or church for purposes other than residential use).

The sign for proximity to a registered tank site, CLOSTANK, was negative, but was not significantly different from zero. These are generally tanks in active use. Therefore, the nuisance value of the activity associated with tanks, in and of itself, does not appear to be important, holding other variables in the model constant (especially age of unit, quality, double), which could be associated with residences built on or near main thoroughfares.

The variable CLOSLUST (known leaking tank, not currently registered) had a negative sign, and was not significantly different from zero. This category most often included commercial and industrial sites, some presumably inactive, as well as former gas stations and automotive uses. It also contained a lower than expected proportion of government and non-profit uses.

The third category of tank, CLOSRGLK, is for tank sites which have had known leaking tanks **and** are registered with the state BUSTR. This list includes many ongoing gas stations, industrial and commercial properties, car dealerships and truck transport operations. We also have the best address matches for this group. The results show that for this variable, which combines the potential negative effects of both proximity to hazardous material and nuisance disutility, there is a negative sign which is statistically significant (in both the Box-Cox and linear models) at α=.05. The linear nature of the hedonic model allows the following interpretation of this variable: a residential sale located "on the same block or within 300 feet" of a registered tank site which is known to have leaked, could expect to sell for $15,152 less, holding all else constant.[11] This price reduction, or negative proximity influence, represents 17% of the average 1992 residential sales price.

VI. CONCLUSIONS AND POLICY IMPLICATIONS

This research has examined the relationship between three categories of underground storage tanks and their relationship to residential sales prices. Our hedonic model results provide evidence of a significant negative proximity influence on price when a residential sale is close to a registered tank site known to have leaked. In our sample, over three quarters of these leaking tanks involved soil contamination above mandated action limits and/or groundwater contamination. For non-leaking tanks and for leaking tanks no longer registered with the state, the impact of close proximity on sales price was not significantly different from zero.

However, our results do not include some known sites (i.e., those with poor quality addresses), and also ignores a potentially important fourth group of tanks: those historical tanks from prior land uses that have not yet leaked but are present, undetected and therefore unregistered, in the county.

The number of sales proximate to tanks (83) is smaller than expected. While this may be partly due to our technique of finding tanks, it may also be attributable to a lower level of market activity for tainted property. This issue deserves more research.

While this research did not specifically control for proximity to commercial zoning or other nearby activity which does not have tank registry status, our analysis shows that proximity to a registered tank site (almost certainly a commercial use) does not in itself have a negative impact on sales price.

Further analysis should seek to improve upon the simple dummy variable for close proximity to a tank, (e.g., next door property) and include more detail about the extent and type of leak, as well as date of leak relative to sales date.

The measure of proximity for tanks using match on permanent parcel numbers could be improved upon by utilizing a closer measure of proximity, or by employing geocoded latitude and longitude variables generated by an improved version of the TIGER/Line files. Tanks could also be examined to see if they affect non-residential sales and financing activity of commercial and industrial properties. Another approach could be to identify serious leak events, then search closely proximate areas for residential sales activity. Finally, other sale years (1991, 1990, etc.) could be considered.

Another challenge is overcoming the lack of theory regarding the mechanisms by which information on toxicity and mode of release is converted into market outcomes. Sellers, for example, should have a better knowledge of leak events than buyers. This may manifest itself in a lower original listing price. If buyers are aware of the leaking tank, the property may spend a longer time on the market before it is sold. Also, notification of the presence of nearby underground storage tank leaks is required to be reported to BUSTR, but they do not in turn publicize the results. Also, the state did not require realtors/sellers to notify potential buyers of leaks in the vicinity until 1993, and then only for residential

properties with on-site tanks.

The topic of underground storage tanks is an emerging field, and represents many interesting and important research opportunities. One useful application could be for property appraisers to employ this information to determine the negative proximity influence of contaminated property on nearby residential and commercial sales prices.

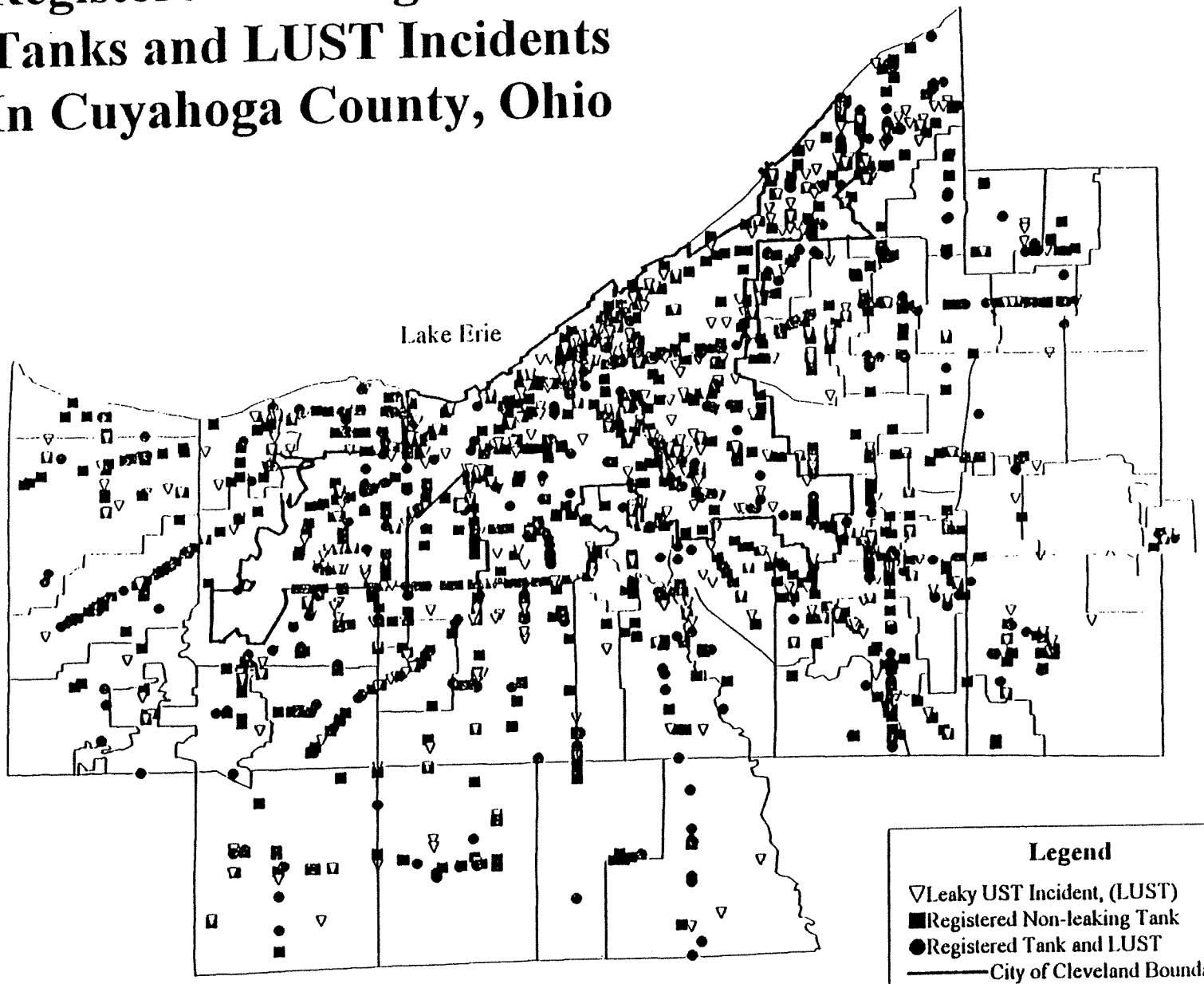
Exhibit 1: Descriptive Statistics on Housing and Tanks Variables used in the Model

VARIABLE NAME	MEAN	STANDARD DEVIATION	DETAILS ON MEASUREMENT
HOUSING VARIABLES			Number of observations=16,990
LEGFRONT	58.49	34.70	Legal lot frontage, in feet
AVEDEPTH	163.87	116.38	Average lot depth, in feet
BLDSQFT	1607.58	655.95	Building square footage
ROOMS	6.81	2.00	Number of rooms in 1992
BEDROOMS	3.26	0.92	Number of bedrooms, 1992
AGE92	50.91	24.15	Age of building in 1992
BATHS	1.34	0.57	Rooms that are bathrooms
FIREPLACE	0.37	0.55	Number of fireplaces, 1992
QUALITY	3.29	0.57	Quality index on 1-5 scale
GARAGE	1.62	0.97	Garage capacity (spaces), 1992
PRICE	86535.00	64481.00	Sales price in 1992
DOUBLE	--	--	Dummy variable for duplex (12%)
ZIP	--	--	Dummy variable for 50 Zip codes
STYLE	--	--	Dummy var. for 5 housing styles
SEASON	--	--	Dummy for one of 4 sales seasons
TANK VARIABLES			
CLOSLUST	554*	--	Dummy variable for proximity to leaking, unregistered tank
CLOSTANK	883*	--	Dummy variable for proximity to registered UST, not leaking
CLOSRGLK	446*	--	Dummy variable for proximity to leaking and registered tank

* Number of tank sites used in the statistical analysis for potential matching with residential sales. Of these, only 83 actually were proximate to a residential sale in 1992.

Source: Authors

Registered Underground Storage Tanks and LUST Incidents In Cuyahoga County, Ohio



Source: Ohio BUSTR & 1990 TIGER/Line Census Files

Exhibit 3 Results of the Hedonic Model Including Tank Variables, Box-Cox Specification

Variable	Parameter Estimate	Standard Error	T-Statistic
INTERCEPT	2542.93	64.81	39.23***
LEGFRONT	-1110.29	42.68	-26.01***
AVEDEPTH	00.006	0.007	0.40
BLDSQFT	00.00009	0.000002	44.10***
ROOMS	-2.71	0.80	-3.37***
BEDROOMS	-0.98	1.29	-0.76
AGE92	-1385.64	48.66	-28.48***
BATHS	26.53	1.97	13.44***
FIREPLACE	19.43	1.57	12.36***
QUALITY	60.93	1.94	31.47***
HEAT	-11.01	2.48	-4.46***
GARAGE	7.48	0.76	9.85***
DOUBLE	-75.47	3.19	-23.68***
STYLE1	3.27	6.88	-0.64
STYLE2	13.13	6.83	-1.92**
STYLE3	-0.29	6.87	-0.42
STYLE4	-5.67	7.18	-0.79
CLOSLUST	-16.40	17.56	-0.93
CLOSTANK	-4.87	13.83	-0.35
CLOSRGLK	-46.15	21.14	-2.18**
SPRING	-4.07	1.86	-2.19**
FALL	-2.48	1.86	-1.33
WINTER	-13.54	2.04	-6.64***

Adjusted R^2 = .78
F-Statistic = 862.46***
Deg. Freedom= 16,875

* significant at α=.1
** significant at α=.05
*** significant at α=.01

λ Values:

PRICE	0.550
LEGFRONT	-0.098
BLDSQFT	1.805
AGE	0.033

Source: Authors

Exhibit 4 Results of the Hedonic Model Including Tank Variabl
Linear Specification

Variable	Parameter Estimate	Standard Error	T-Statistic
INTERCEPT	-26376.00	4089.76	-6.45***
LEGFRONT	174.50	9.19	18.99***
AVEDEPTH	13.30	2.45	5.42***
BLDSQFT	46.41	0.76	60.92***
ROOMS	-2868.19	287.04	-9.99***
BEDROOMS	-3342.98	448.85	-7.45***
AGE92	-420.18	17.63	-22.83***
BATHS	14632.00	679.36	21.54***
FIREPLACE	5194.78	546.37	9.51***
QUALITY	19628.00	675.27	29.07***
HEAT	-3316.87	853.78	-3.89***
GARAGE	1509.80	262.99	5.74***
DOUBLE	-34485.00	1095.98	-31.47***
STYLE1	-2952.62	2382.00	-1.24
STYLE2	-64.89	2368.14	-0.03
STYLE3	-1056.35	2383.91	-0.44
STYLE4	-14479.00	2485.03	-5.83***
CLOSLUST	-1779.68	6335.29	-0.28
CLOSTANK	-3018.68	4909.64	-0.61
CLOSRGLK	-15152.00	7766.38	-1.95**
SPRING	-1522.56	643.23	-2.37**
FALL	-864.21	645.12	-1.34
WINTER	-4500.40	705.97	-6.38***

Adjusted R^2 = .77
F-Statistic = 791.05***
Deg. Freedom= 16,869

* significant at α=.1
** significant at α=.05
*** significant at α=.01

Source: Authors

APPENDIX

Exhibit 4A: Results of Zip Code Dummy Variables from Hedonic Model, Linear Specification

Variable	Parameter Estimate	Standard Error	T- Statistic
B44022	80904.00	3316.43	24.40***
B44040	189888.00	11380.22	16.69***
B44070	6151.53	2486.28	2.47*
B44102	-18397.00	2383.46	-7.72***
B44103	-27652.00	3202.47	-8.63***
B44104	-29573.00	3313.79	-8.92***
B44105	-19691.00	2373.31	-8.30***
B44106	-11516.00	3205.86	-3.59***
B44107	16795.00	2305.05	7.28***
B44108	-32713.00	2931.59	-11.16***
B44109	-6051.19	2317.66	-2.61***
B44110	-16395.00	2690.73	-6.09***
B44111	-1627.83	2225.63	-0.73
B44112	-32343.00	2741.56	-11.78***
B44113	-1595.35	3397.12	-0.47
B44114	10049.00	10029.42	1.00
B44115	-81274.00	18068.79	-4.50***
B44116	33433.00	2657.12	12.58***
B44117	-4274.56	3239.02	-1.32
B44118	-14796.00	2273.52	-6.51***
B44119	-5284.03	2906.05	-1.82*
B44120	-12231.00	2476.77	-4.94***
B44121	-7082.36	2271.97	-3.12***
B44122	15399.00	2457.67	6.27***
B44123	-1603.51	2739.46	-0.59
B44124	23384.00	2298.66	10.17***
B44125	-1220.82	2408.23	-0.51
B44126	19568.00	2579.77	7.59***
B44127	-16003.00	3422.55	-4.68***
B44128	-19527.00	2717.12	-7.19***
B44129	14748.00	2493.56	5.91***
B44130	8425.16	2324.59	3.63***
B44131	2637.92	2800.89	0.94
B44132	-4057.60	2851.13	-1.43
B44133	-487.89	2856.56	-0.17
B44134	13542.00	2271.85	5.96***
B44135	-7365.32	2309.99	-3.19***
B44136	-13155.00	2329.69	-5.65***
B44137	-2974.96	2419.27	-1.23
B44138	1429.55	3182.14	0.45
B44139	11399.00	2664.13	4.28***
B44140	20455.00	2507.44	8.16***
B44141	5111.53	3185.12	1.61
B44142	10006.00	2753.05	3.63***
B44143	1164.50	2820.95	0.41
B44144	7439.08	2606.74	2.85***
B44145	8049.23	2576.24	3.12***
B44146	-6066.83	2603.55	-2.33**
B44147	8238.60	3602.04	2.29**

* significant at α=.1
** significant at α=.05
*** significant at α=.01

Source: Authors

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ENDNOTES

1. Theoretically, for reasons noted by Colwell (1990), non-linearities in a proximity variable may be expected when the measurements reflect effects involving distance decay over time or space. Moreover, the non-linear proximity variable specification used by Colwell is sensible given his research design. In this case, however, the non-linear specifications are justifiable only for certain housing attribute variables. Our measurement of proximity is fundamentally different than Colwell's.

Colwell's research design pre-selects study areas in which he assumes the potential impacts are likely to occur, based upon proximity to power lines. The potential impacts are then operationalized as functions of distance from each parcel to the nearest point on the line, ignoring other points. This is a point-to-line analysis and the design is subject, in theory, to the criticism that the parameter estimates are biased with respect to the population, because of the non-randomness of the study areas.

In contrast, our research design starts out with an entire County and operationalizes the potential impacts as functions of distances between pairs of points within the County. However, rather than basing our analysis upon measurements between all possible combinations of points within the study region, we employed a dummy variable for proximity to tanks, based on a perceived behavioral "zone of influence" (a city block, or within visual sight distance of about 300') for a multitude of (about 2,500) scattered site "hot spots." This approach is in theory, subject to the criticism that the distance measurements fail to capture the non-linearities associated with distance decay.

To examine whether this theoretical criticism pertains to our study, we correlated each of the tank proximity variables with the model residuals. If there is a distance decay effect that our variables do not capture, we would expect the correlation coefficients to be significantly related to the error term. Each of the three correlations was found to be statistically insignificant, thereby indicating that our dummy variables for close proximity contain no error of measurement.

2. We considered using the latitude and longitude to calculate distance and provide a measure of close proximity. However, we believe the accuracy of the GIS-generated geocoded coordinates to be accurate within 150 feet. This is not sufficiently precise for the task at hand.

3. We attribute our inability to attain 100% accuracy in geocoding and PPN matches to two factors: random human error by others in recording site addresses, and incompleteness of the TIGER/Line files. This partially explains why we were unable to

get all sites geocoded.

4. Our matching technique is about 80% accurate. However, lots on the parcel maps do not always run consecutively, so we are likely to miss some sales that are near tanks, reducing our overall proportion to about 50-60%. However, because we verified proximity using tax maps, we are certain that these remaining sales are in fact proximate to tank sites.

5. The lead author Robert Simons, Rudy Robinson and graduate student Stephen Crowther conducted these site visits during November and December 1994.

6. The deletion of outliers increased the R^2 of the hedonic platform from .68 to over .76. We deleted cases in the top 0.1% which appeared to be largely attributable to human error. For example, this includes homes of over 9,000 square feet, lots with more than 800 feet of street frontage, and deeper than 2,000 feet. In general, deletion of these error outliers does not materially affect the results of our analysis of tank sites.

7. The rooms and bedrooms variables were very highly correlated, indicating possible multicollinearity. We ran the model shown later in Exhibit 4 without number of rooms. The model had a slightly lower R^2, and results for the other variables were not significantly different. Scatterplots on all independent variables were acceptable, and did not exhibit any fanning which would require adjustment. We also examined the correlation matrix between rooms, bedrooms and building square footage and found no significant relationship between these variables and our three UST dummies. Thus, we find no reason for concern about the issue of multicollinearity in the model with respect to the statistical significance of our tank variables. TOL results also showed that the tank variables had almost no multicolinearity.

8. The lot depth variable was significant in the linear model. However, in the Box-Cox transformation version its λ did not converge.

9. The subgroup of sales near tank sites was similar to the overall population, but generally had about 10% more frontage, and an older, smaller house. Sales price was also slightly lower, at $80,400. Only 5% were duplexes.

10. Although these numbers are small relative to the total number of sales, we are confident that all these sales were in fact proximate to the tank sites. Further, the nature of the toxic release for the RGLK group was more serious, with nearly half of those events having documented groundwater contamination or off-site effects, and additional one third having soil contamination in excess of state mandated action limits. In contrast, among the LUST group, most of the releases were small or moderate, resulting in soil contamination contained on-site: very few releases impacted the water table.

11. We also ran an earlier model combining the CLOSRGLK and 24 CLOSLUST sales because we wanted to see if results were robust with a larger N related solely to proximity to leaky tank. The parameter estimate for this variable was reported to be -$8,032, and was statistically significant at α=.10.

PAIRED SALES ANALYSIS

Paired Sales Analysis is the valuation method preferred by most appraisers and other consultants in measuring the diminution in property value from contamination. A paired sales analysis is defined in appraisal literature as a quantitative technique used to identify and measure adjustments to the sales prices of comparable properties. In this analysis, sales of similar or nearby identical properties are analyzed to isolate the effect of a single property characteristic on value. The analyst must take care in selecting unimpaired or control properties from which to make comparisons. If the control properties vary from the subject property in terms of location, school district, or other factors, they must be accounted for *before* considering damages due to contamination.

As an example, the authors used Paired Sales Analysis in the Brio Superfund site case described previously. From the list of several hundred sales, properties within the Southbend subdivision, which is directly adjacent to the contaminated site, were compared to sales in similar subdivisions at a greater distance from the site. The groups of sales were identical or nearly identical in terms of year of construction, number of bedrooms and bathrooms, lot and residence size, and quality. A range of diminution in value from 29% up to 50% was found. The average pairing indicated diminution of approximately 40%.

Paired Sales: South Bend (SB) and Heritage Park (HP) Subdivisions

SBD	ADDRESS	YOC	BD	BA	LOT SIZE	HOUSE SIZE	SALE PRICE	PRICE /BLDG	
HP	16747 COLONY BEND	84	3.0	2.0	6,360	1,641	$74,285	$45.27	
HP	2426 LEADING EDGE	83	3.0	2.0	6,300	1,640	$74,500	$45.43	
HP	16739 SELDER	83	3.0	2.0	6,522	1,640	$75,300	$45.91	Avg: $45.88
HP	16706 NINA	83	3.0	2.0	7,000	1,640	$76,939	$46.91	
SB	**12118 S OAK**	**83**	**3.0**	**2.5**	**6,900**	**1,629**	**$45,000**	**$27.62**	**Avg: $27.62**
									-40%
HP	2422 TALL SHIPS	83	3.0	2.0	6,710	1,500	$73,000	$48.67	
HP	2406 TALL SHIPS	83	3.0	2.0	6,710	1,500	$76,973	$51.32	Avg: $49.09
HP	2318 TALL SHIPS	83	2.0	2.0	6,600	1,500	$70,900	$47.27	
SB	**11635 S CANYON**	**83**	**3.0**	**2.0**	**6,900**	**1,517**	**$42,500**	**$28.02**	
SB	**11602 S CANYON**	**83**	**3.0**	**2.0**	**6,600**	**1,499**	**$43,000**	**$28.69**	**Avg: $28.33**
SB	**12007 S DOWNE**	**83**	**3.0**	**2.0**	**7,150**	**1,499**	**$42,400**	**$28.29**	
									-42%

Note: Sales occurred between January 1991 and December 1992

Paired Sales: South Bend (SB) and Sageglen (SG), Sagemeadow (SM), Scarsdale (SC) and Heritage Meadow (HM)

SBD	ADDRESS	YOC	BD	BA	LOT SIZE	HOUSE SIZE	SALE PRICE	PRICE /BLDG	
SG	9918 SAGEMILL	83	4.0	2.5	7,705	2,455	$116,500	$47.45	
SG	9911 SAGEMARK	83	na	na	7,475	2,832	$125,000	$44.14	Avg: $44.13
SG	9903 SAGEMILL	81	na	na	9,672	2,696	$110,000	$40.80	
SB	**12014 S BERRY**	**84**	**4.0**	**2.5**	**6,050**	**2,560**	**$63,900**	**$24.96**	
SB	**11438 S ARBOR**	**83**	**4.0**	**2.5**	**9,984**	**2,423**	**$47,000**	**$19.40**	**Avg: $22.18**
									-50%
SG	10311 SAGELINK CT	77	na	na	8,008	1,916	$99,500	$51.93	
HM	11502 SAGECREEK	na	4.0	2.5	7,510	1,857	$86,450	$46.55	
HM	11506 GANDERWOOD	82	4.0	2.0	6,000	1,842	$71,235	$38.67	Avg: $41.99
HM	10950 PIGEONWOOD	82	4.0	2.0	5,750	1,802	$66,500	$36.90	
SM	10203 SAGEROYAL	na	4.0	2.0	8,166	1,936	$69,500	$35.90	
SB	**11623 S OAK**	**83**	**4.0**	**2.5**	**6,325**	**1,920**	**$46,750**	**$24.35**	**Avg: $24.35**
									-42%
SG	11635 SAGECANYON	77	na	na	7,475	1,620	$74,800	$46.17	
SM	9823 SAGEROYAL	na	3.0	2.0	7,980	1,702	$76,000	$44.65	Avg: $44.18
HM	10911 PIGEONWOOD	83	3.0	2.0	6,166	1,719	$71,733	$41.73	
SB	**11706 S CANYON**	**83**	**3.0**	**2.0**	**6,600**	**1,728**	**$53,000**	**$30.67**	
SB	**11610 S ORCHARD**	**83**	**3.0**	**2.0**	**6,670**	**1,728**	**$51,500**	**$29.80**	
SB	**11606 S CANYON**	**83**	**3.0**	**2.0**	**6,600**	**1,728**	**$50,500**	**$29.22**	**Avg: $29.24**
SB	**11531 S ORCHARD**	**83**	**3.0**	**2.0**	**6,380**	**1,728**	**$49,900**	**$28.88**	
SB	**12118 S OAK**	**83**	**3.0**	**2.5**	**6,900**	**1,629**	**$45,000**	**$27.62**	
									-34%
HM	11546 EAGLEWOOD	83	3.0	2.0	4,946	1,357	$70,516	$51.96	
SC	12502 ELLENVILLE	77	3.0	2.0	9,504	1,348	$59,500	$44.14	Avg: $45.75
HM	11503 HIGHLAND MDW	83	3.0	2.0	5,290	1,361	$56,000	$41.15	
SB	**11610 S ARBOR**	**83**	**3.0**	**2.0**	**6,325**	**1,386**	**$48,500**	**$34.99**	
SB	**11531 S HILL**	**84**	**3.0**	**2.0**	**6,050**	**1,362**	**$46,269**	**$33.97**	
SB	**12150 S OAK**	**80**	**3.0**	**2.0**	**7,452**	**1,354**	**$42,750**	**$31.57**	**Avg: $32.30**
SB	**12123 S OAK**	**83**	**3.0**	**2.0**	**6,325**	**1,386**	**$42,900**	**$30.95**	
SB	**11443 S ARBOR**	**83**	**3.0**	**2.0**	**9,130**	**1,386**	**$41,625**	**$30.03**	
									-29%

Note: Sales occurred between January 1991 and December 1992

CASE STUDIES APPROACH

The Case Studies Approach has evolved as part of the Sales Comparison Approach in estimating diminution in property value involving real estate which has been affected by contamination. As real estate professionals have gained more information and experience with environmentally impaired transactions, some of purchasers' biases in favor of absolute rejection of a property have gradually changed. Sellers of contaminated properties are developing mitigation solutions including indemnification agreements, separation of surface and subsurface rights, future remediation/liability escrow, and ground leasing. As a result of these measures, a small but increasing number of data are emerging in the form of sales, financing and leasing of contaminated real estate.

Most of the data researched involves slightly-to-moderately contaminated properties. The sales of more severely contaminated communities, such as Superfund sites and adjacent properties, are scarce, and the research on them can be expensive and time-consuming to develop (see Brio linear regression example). Severely contaminated properties are the rarest breeds; these sites usually have such a high risk of regulatory or third party liability that the current owners cannot or will not relinquish control. These properties may never sell on an arms-length basis to an informed, knowledgeable buyer because of pending litigation or enforcement proceedings.

When appraising a contaminated property, many appraisers dismiss the Sales Comparison Approach by stating that the property is not marketable; thus, no sales are comparable to the subject property. While environmentally impaired properties are infrequent, the authors are convinced by observations over the last ten years that sales are occurring more frequently. Reasons for this include market familiarity, the quantification of environmental risks, and regulatory bodies offering the responsible parties more relief from future prosecution and remedial action through Risk-Based Corrective Action (RBCA) and Voluntary Cleanup Programs (VCP).

Some real estate appraisers and scholars favor the Income Approach. While income techniques are valid and provide an easy-to-follow, mathematical quantification of environmental risk, the analysts' conclusions are infrequently substantiated by market data. The income approach is therefore often criticized as being strictly theoretical and lacking real world contact with the market, especially with losses from intangible factors such as stigma. Often, these models are driven by a lender or investor survey of market participants, the majority of whom have never invested in such properties.

The Case Studies Approach is a process of comparing sales which are similar to the subject property. From these comparisons, the appraiser attempts to develop an understanding of how actual buyers and sellers have reacted to the following factors:

(1) discounts in selling price;

(2) risk of regulatory enforcement and third party litigation;

(3) on-going and future monitoring, sampling, testing, and other remediation liabilities;

(4) structural controls such as deed recordation requirements;

(5) medical monitoring costs and health claims or concerns; and,

(6) seller and purchaser indemnification requirements related to future conveyances of the property and subsequent recontamination discoveries.

In order to apply the results of case study research to the property being appraised, the analyst must understand the nature and extent of the contaminants present. Many questions must be answered by the appraiser and the team of consultants which may include geologists, hydrologists, professional engineers, toxicologists, industrial hygienists, and medical and veterinary doctors. The following are questions in the valuation assignment:

(A) What type of contaminants are involved? How are the contaminants characterized (hazardous or toxic waste, petroleum substances, non-hazardous waste, debris, etc.)?

(B) What are the principal sources of contamination?

(C) What are the contamination pathways (air, soil, groundwater)?

(D) Is the subject property currently contaminated, or will it be invaded by contaminants in the foreseeable future?

(E) What are the public health risks?

(F) What has been the history of the complaints and problems generated against the PRP including all the discharges, violations, fines, etc.? What is the likelihood of subsequent discharges at the point source based on the history of operations and on-going environmental controls?

(G) What is the potential for state or federal action? Who will be the target of the enforcement by the governmental agency?

(H) Is the client potentially a *de minimus* responsible party, operator, transporter or an innocent landowner?

(I) What type of testing, monitoring or surveillance work will be necessary to quantify the nature and extent of the contaminants present on-site? How large is the plume of contaminants, and in what direction and speed is it moving?

(J) Based on the premise that no government action will be taken and the responsible party will not remediate the site, what mitigation measures and structural controls will be implemented by the responsible party to increase or decrease the marketability of the property?

(K) If no action is taken by the PRP or regulatory agencies, how many years will it take for the contaminants to reach a concentration below background or maximum contaminant level (MCL) assuming biodegradation is possible?

(L) What actions, if any, can the adjacent, innocent landowners take toward remediation of their site and at what cost of money and time?

(M) In how many years will the subject site be remediated to background levels, or will deed recordation be required because remediation goals will not achieve background levels?

(N) If background levels of contamination are not the goal of the remediation, then what is the extent of remediation being sought and how will the eventual amount of contamination compare to background for properties in the area?

(O) Assuming no remediation work is required of the innocent landowner but contamination liability remains, how should the owner disclose this liability to third parties?

After an appraiser has assembled a group of contaminated case studies, he can develop some basic opinions. First, sites purchased with little-to-no concern of future reprisals by regulatory bodies or with a nominal, manageable remediation liability often command the smallest discounts. Purchasers of this type of property are unlikely to require a large stigma discount. This may be especially true when the contaminants have not moved off-site and the remediation effort will result in an effective, permanent cure such as a closure letter from the applicable enforcement agency upon completion of the remediation project. Second, purchasers who manage similarly contaminated sites on a daily business are less likely to negotiate large discounts on sites which will be continuously operated and exposed to future releases. A notable exception is major oil companies which are reluctant to purchase gasoline station sites which have been previously contaminated by on-site or off-site contaminants until they have been remediated to below regulatory limits. The dilemma for many purchasers of formerly contaminated real estate is that while a site may have been successfully remediated to the acceptance of state and federal regulations, it still may not satisfy mortgage lenders. The result is that the property may never regain its mortgageability. Third, sites sold without regulatory closure or with off-site migration problems sell for substantial discounts or are not marketable at any price because the environmental and third party liabilities cannot be quantified. Fourth, some properties in demand because of a lack of substitutes often sell for lesser discounts. One such property is a large, heavy industrial plant. In these cases, purchasers are compelled to work with the site owners in spite of the contamination problems.

The sales of properties summarized in Exhibit A establish a range of diminution in value. The case studies suggest an appropriate discount in value for the subject property proportionate to the risks associated with the nature and extent of contaminants. The comparability of each case study is based on its similarity to the subject property's contamination problem. The contamination case studies may be drawn from diverse property types or land uses but can still be applicable to a subject property for the purpose of estimating stigma loss or total diminution in value. Typically, case studies with less severe situations than the subject property will normally indicate a smaller percentage of losses. Conversely, case study examples with the most severe problems will indicate the highest losses in value.

An argument against the Case Studies Approach is that market data has not yet developed to the extent that it can be used as the primary means of defending a property loss adjustment; however, appraisers have long utilized only a few data points for estimating market value. The industry standard for appraising single family homes is only three comparable sales. When enough case studies have been developed which are analogous to the subject property, this approach can be the primary approach to quantify diminution in market value associated with owning contaminated real estate.

EXHIBIT A

Location	Property Type	Property Size	Date	Waste Type	Amt. of Discount	Type of Discount / Cost to Control
A. Austin, TX	Commercial	9.3 acre and 0.8 acre lot	1989-1993	Petroleum hydrocarbons from four USTs on adjacent property	13.5% and 16%-21%, respectively	13.5% loss in market value for one property; 16%-21% loss from 3.5 year marketing period for other property; seller indemnification
B. San Antonio, TX	Industrial	3.035 acres	1992	Gasoline, waste oils	45.6%	$38,000 to treat and remove ±1,000 cubic yards of contaminated dirt; additional $156,000 or 36.7% deducted from original sales price of $425,000 for stigma/risk; no indemnification.
C. El Paso, TX	Manufacturing Plant	16 acres	1994	Nickel and chromium	32.4%	Removal of 240 cubic yards of contaminated soils to a depth of 32 feet below slab; total remediation cost of $375,000 plus $100,000 for hazardous and non-hazardous disposal; $750,000 total cost of remediation and reconstruction plus $1,200,000 loss in market value; no indemnification.
D. Ennis, TX	Industrial	2.94 acres	1994	1,1-Dichloroethane, Tetrachloroethane, Benzene	89.4%-93.3%	Worst case scenario estimated at $25,500 - $7,500 for a recovery well and five years of monitoring at $3,600 per year; no indemnification.
E. Kingsland, TX	Service Station	0.12 acres	1994-1995	BTEX, TPH	34.2%, 49.4%	$49,495 in remediation costs by prior owner (bank) through 1993. The comparison of the 1984 sale of the property to the most recent ground lease wit indemnification from the bank indicated a 34.2% diminution. The comparison of the 1984 sale to the 1994 sale with indemnification indicated a 49.2$ diminution.

CONCLUSION

In a perfect world, the analyst would be able to use all four techniques in the valuation of a contaminated property and choose which techniques were most relevant and accurate. Unfortunately, the location of and type of property usually dictate which approaches can be used. Regression analyses are most useful with urban and suburban single family residences because sales data are plentiful and readily available, and these properties are relatively homogeneous. With fewer transactions and increased heterogeneity, commercial properties are better suited to Paired Sales and Case Studies approaches. The same limitations apply to most rural properties.

Another constraint is the large amount of time and money required to produce these analyses. Few clients have the resources to fund detailed linear and multiple regression studies and in-depth research of numerous sales of contaminated sales. The authors' experience is that extensive studies are researched over several years with several clients. As the database of contaminated property sales grows, it can be used repeatedly and more efficiently to satisfy each client's needs.

Employment Issues in Environmental Law

"9 to 5"

A Simple Roadmap of the Intersections of Employment and Environmental Regulations

Henry Robinson
and Elizabeth J. Kohn

HENRY H. ROBINSON

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A SIMPLE ROADMAP OF THE INTERSECTIONS OF EMPLOYMENT AND ENVIRONMENTAL REGULATIONS

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INTRODUCTION

Employment law, which addresses the relationship between the worker and the employer, intersects with environmental laws and regulations in several contexts. Environmental laws are designed to protect health and the environment. Employment laws serve a multiplicity of purposes: to maintain industrial peace, to provide rights to the worker and the employer while protecting them from each other, to pursue societal goals such as anti-discrimination and child labor prohibitions, and to provide benefits to workers in the event of accidents or other workplace injuries. Regulation of the workplace to assure worker health and safety is difficult to classify strictly as either an environmental or employment regulation; it addresses goals common to both.

Outside of the health and safety area, some laws and regulations that address the employment relationship specifically support environmental law goals, such as reporting of violations to assist in enforcement, or using the workplace as a venue for reducing the release of pollutants. Environmental laws raise other employer-employee concerns. Employees often must respond to regulators investigating environmental compliance. Employee efforts consistent with employer direction may assure either compliance or non-compliance with environmental laws. Further, the existence of environmental laws can affect informal or formal contractual arrangements between employers and workers as well as ongoing working relationships. Finally, unions are capable of significant effects on environmental regulation.

Understanding aspects of environmental law that affect the workplace and aspects of employment law that affect environmental regulation can assist in achieving compliance with regulations in both areas while avoiding regulatory and civil liability. This paper will provide a roadmap of various intersections of environmental and employment law, beginning with a brief overview of workplace health and safety regulation, moving to environmental laws with potential workplace impacts, and describing areas of employment law where environmental and health and safety affect the outcome. This section will include a brief discussion of issues associated with employee liabilities and indemnities. The paper will conclude with some practical tips to avoid negative impacts and encourage compliance with both employment and environmental regulations.

I. First Intersections on The Road: Worker Health and Safety and the Right to Know

Both federal and state regulations provide significant employee rights to know and understand how to handle hazardous materials in the workplace. These regulations place obligations on employers to protect employees and are the first step on the road toward understanding how employment law and environmental law intersect. The following discusses some of these regulations.

A. OSHA Standards: The Paving Stones

The road to worker health and safety is first paved with a relatively mature statute, the Occupational Health & Safety Act of 1970[1] (the "OSH Act"), administered by the Occupational

[1] 29 U.S.C.A. §§ 651 *et seq.*

Health & Safety Administration ("OSHA"). The stated purpose of the OSH Act is to "assure safe and healthful working conditions for working men and women." In order to accomplish the goals of OSHA, Congress wrote the statute to require mandatory "standards" that require:

> conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.[2]

While a full discussion of the OSH Act and its standards is beyond the scope of this paper, the following is a brief description of some representative standards illustrating the relationship between worker protection and regulation of the use of hazardous substances.

1. OSHA Standards Controlling Workplace Use of Hazardous Substances

A starting point for illustration of steps an employer must take to inform and protect employees concerning hazardous materials in the workplace is the Hazard Communication Standard (the "HAZCOM"). Under the HAZCOM, employers are required to develop a written hazard communication program designed to educate workers to observe use instructions on labels, and to provide information and training on "handling" hazardous chemicals known to be present in the workplace.[3] Key elements of the HAZCOM are its use of Material Safety Data Sheets ("MSDSs") and labels, which must be developed by chemical manufacturers, processors, and importers for each hazardous chemical produced or imported;[4] these are designed to provide information on health hazards, safe handling and disposal for any user.

Another standard specifically addressing hazardous materials in the workplace is the "HAZWOPER" standard on hazardous waste operations and emergency response.[5] This standard addresses the potential for an occurrence that can result in an uncontrolled release of a hazardous substance or hazardous substances, and requires written planning in advance and employee training.

Related to both the HAZCOM and the HAZWOPER standards is the OSHA Process Safety Management ("PSM") standard, which applies stringent preparedness rules to the use of certain listed toxic and reactive chemicals present above threshold quantities in the workplace.[6] It establishes an approach to managing hazards related to use and production of highly hazardous

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[2] 29 U.S.C.A. § 652(8).

[3] 29 C.F.R. § 1910.1200(e) and (b).

[4] 29 C.F.R. § 1910.1200(d).

[5] 29 C.F.R. § 1910.120.

[6] 29 C.F.R. § 1910.119

chemicals. The Environmental Protection Agency ("EPA") has issued companion regulations governing chemical accidental release prevention programs.[7]

Several other OSHA standards address the potential for exposure to various specific chemicals in the workplace, including asbestos, lead, cadmium, benzene, and formaldehyde.[8] These standards can require extensive employer participation, site evaluation, written programs, training and retraining, and notification. All of these standards impose employer obligations to educate and train employees who are exposed to or use hazardous substances in the workplace and to prepare for emergencies involving hazardous substances.

2. OSHA Enforcement

OSHA sanctions can include civil and criminal penalties.[9] Characterization of violations can vary depending on whether they are willful and repeated, serious or not serious.[10] Willful violations causing death to an employee are treated separately and most seriously.[11] In the Omnibus Budget Reconciliation Act of 1990, Congress provided for a seven-fold increase in the system of civil monetary penalties for violations of occupational safety and health laws and regulations.

B. Texas Workers' ROADMAP of Right-To-Know Protections

Texas enacted a "Hazard Communication Act" (THAZCOM") effective September 1, 1989, as part of the Health and Safety Code.[12] The intent of the Act was to assure that all employers, not just those employers covered by the OSHA standards, provide information regarding hazardous chemicals in the workplace. It requires, in common with the HAZCOM, the compilation of a list of hazardous chemicals in the workplace, labeling, and an employee education program. In 1993, the THAZCOM was amended, changing a single law to four separate laws, and expanding the coverage over both public employers and certain private sector employers.

Texas also has an Agricultural Hazard Communication Act to provide persons living and working in agricultural areas access to information on hazardous chemicals in the agricultural workplace, in emergency situations, or as a result of proximity to the use of hazardous chemicals

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[7] 40 C.F.R. § 68.

[8] 29 C.F.R. Subpart Z.

[9] 15 U.S.C.A. § 666.

[10] Id.

[11] Id. § 666(e).

[12] TEX. HEALTH & SAFETY CODE ANN. § 502.001-502.019 (West 1992 & Supp. 1996).

in an agricultural setting.[13] It also guarantees certain rights to agricultural laborers, such as access to the required workplace chemical list and associated MSDSs, as well as training on the hazards of workplace chemicals and on measures employees can take to protect themselves. Personal protective equipment and clothing, as appropriate, must be provided to agricultural laborers. The legislation expressly provides that an agricultural laborer may not be discharged for complaining about an employer's compliance with the Act. The Department of Agriculture has enforcement jurisdiction.

C. Miscellaneous Signs along the Road

1. Texas

Texas also has miscellaneous provisions about the use of chemicals in the workplace, again designed to protect the worker. These include extensive regulation of substances such as asbestos [14] and lead.[15]

2. NIOSH

NIOSH, the National Institute of Occupational Health & Safety,[16] is established under the OSH Act as part of the Department of Health and Human Services. It is the scientific or technical advisor to OSHA, authorized to develop standards, conduct research and experimental programs, and make recommendations for new standards. NIOSH can also, upon the written request of an employer or the authorized representative of employees, investigate whether any substance in a workplace has potentially toxic effects.[17] A determination must be provided to OSHA and the requesting employer or employee representative.

D. Effects of Health & Safety Regulation in the Workplace

Even a short examination of health and safety regulation in the workplace illustrates that it is extensive and pervasive. The possibility of fines and penalties combined with worker rights compels an employer to address regulations for use of hazardous substances. Each workplace will have unique compliance issues. However, almost every workplace is required to have a written HAZCOM plan, which will require an assessment of the hazardous substances in the workplace and how they are handled. Once that plan is prepared, other regulations addressing hazardous materials should be considered in light of the workplace practices.

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[13] TEX. AGRIC. CODE ANN. § 125.001.

[14] 25TAC § 295.

[15] Id.

[16] 29 U.S.C.A. § 671.

[17] 29 U.S.C.A. § 669(a)(6).

II. Further Down the Environmental Road: Employee Protections and Reporting Duties

Many environmental statutes contain provisions that further environmental goals by providing new rights to employees under environmental statutes or otherwise affecting the employment relationship. Some of these allow employees to protect their jobs while reporting employer violations to regulators.

A. Whistleblower Provisions: Employees as Traffic Cops

1. Whistleblower Provisions in Environmental Statutes

Several environmental statutes contain provisions that protect employees who report environmental violations. In employment law, the "at-will" rule is the general rule governing when an employer may discharge employees; absent any restriction such as a contract for a term and so long as prohibited factors (e.g., race, sex, age or disability) are not considered, employment continues or ends at the "will" of the employer or employee. The so-called "whistleblower" provisions modify the "at-will" rule and serve to make it unlawful for an employer to discharge or take other workplace retaliatory action against employees who contact agencies about perceived employer misconduct relating to environmental laws. In certain circumstances, a "whistleblowing" employee can obtain back pay and compensatory damages caused by the employer's retaliation. Exemplary or punitive damages may also be available in some instances.

Some of the federal environmental statutes that provide anti-retaliation protections are: the Toxic Substances Control Act ("TSCA"),[18] the Clean Air Act ("CAA"),[19] the Solid Waste Disposal Act ("SWDA"),[20] the Comprehensive Environmental Response Compensation & Liability Act of 1980 ("CERCLA"),[21] the Federal Water Pollution Control Act ("FWPCA"),[22] and the Surface Mining Control and Reclamation Act of 1977 ("SMCRA").[23] In addition, OSHA also provides employee protection for "whistleblowers."[24] Texas has a whistleblower statute protecting public sector employees.[25]

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[18] 15 U.S.C.A. § 2622.

[19] 42 U.S.C.A. § 7622.

[20] 42 U.S.C.A. § 6971.

[21] 42 U.S.C.A. § 9610.

[22] 33 U.S.C.A. § 1376.

[23] 30 U.S.C.A. § 1293.

[24] 29 U.S.C.A. § 660(c).

[25] TEX. GOV'T. CODE ANN. § 554.

A typical "whistleblower" statute will be entitled "Employee protection" and will prohibit the discharge of or other discriminatory act against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) (1) commences or causes to be commenced a proceeding to enforce requirements of the particular statute, (2) testifies, or (3) assists in a proceeding or "any other actions" to carry out the purposes of the statute.[26] Statutes may vary in the relief available. Some environmental statutes, such as CERCLA, have "bounty hunter" provisions as well, rewarding informers for providing information leading to the arrest and conviction of any person for criminal activity under the statute.[27]

Under the Clean Air Act "whistleblower" provision, a complaint must be submitted to the Secretary of Labor, who has an opportunity to investigate and then issue or deny an order providing relief; if relief is denied, the aggrieved worker can obtain review in the United States Court of Appeals. Relief can include an injunction to abate the violation, reinstatement with back pay, reinstatement of all other privileges of employment, and compensatory damages.[28] If any employer refuses to comply with an order by the Secretary, the Secretary or the employee is authorized to file a civil action in the United States District Court to enforce the order. The district court has jurisdiction to grant "all appropriate relief, including exemplary damages" in an action by the Secretary.[29] Attorney's fees can be awarded "to any party whenever the court determines such award is appropriate."[30] Similar relief exists under TSCA.[31] Note, however, that there is a "safe harbor" provision, under which the employer specifically is authorized to take action against an employee deliberately violating an environmental law acting without direction from the employer.[32]

Numerous cases have been filed under these employee protection provisions of environmental and health and safety statutes. A recent federal court of appeals opinion construing a claim under the OSHA whistleblower statute illustrates some of the federal and state issues that can arise. In *Neville v. U.S. Fidelity and Guaranty Co.*,[33] the employee was an insurance loss control consultant who alleged he had been fired for insisting on reporting OSHA violations of a customer in his reports to his employer. Rejecting his federal claim, the Tenth Circuit noted that the record did not establish that the employee had specified OSHA violations

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[26] *See, e.g.*, 42 U.S.C.A. § 7622.

[27] 42 U.S.C.A. § 9609(d).

[28] Id.

[29] 31 U.S.C.A. §§ 3729-33

[30] Id.

[31] 15. U.S.C.A. § 2622.

[32] Id.

[33] 83 F.3d 432 (10th Cir. 1996) (unpublished).

in the report or that the conduct in the report would be an actual violation. The Court was influenced by the employee's failure to report any alleged violations to OSHA. In rejecting the employee's state claim alleging a public policy exception to the "at-will" rule, the Court concluded Oklahoma did not recognize a public policy exception for internal whistleblowing.[34]

The crucial point in any whistleblower case is causality, i.e., whether the termination resulted from the employee's report of an alleged violation of environmental or health and safety regulations. Factors relevant to this inquiry include, among other things, whether a good faith report to an agency was made, whether a violation actually occurred, and whether the employer had notice of the employee's report at the time the discharge decision was made. Although courts may consider whether a violation actually occurred, an actual violation is not required to invoke the anti-retaliation provisions of the whistleblowing laws.

2. A Non-environmental Statute that Protects Environmental Whistleblowers

Another federal statutory protection for "whistleblowers" has been used in, but is not limited to, the environmental arena. The federal "False Claims Act"[35] provides for not only attorney's fees and costs, but has also a *qui tam* or "bounty" provision [36] allowing a person reporting a false claim for money or property to the government to recover a substantial percentage of proceeds of an action or settlement. This statute can be used, for example, by an employee of a contractor doing environmental work for a U.S. agency.

There are three elements to a claim under the False Claims Act: (1) a claim by the defendant for U.S. money or property; (2) the claim is false or fraudulent; and (3) the claim is knowingly presented.[37] This type of action is particularly risky because a government contractor could face debarment as well as liability for treble damages and costs. The intent provisions of the statute define "knowingly" broadly as a person (1) with actual knowledge; (2) acting in deliberate ignorance of truth or falsity; or (3) acting in reckless disregard of the truth or falsity of information submitted to the government. No proof of specific intent to defraud is required.[38]

In a recent case, *United States ex rel. Fallon v. Accudyne Corp.*[39], the plaintiffs (whistleblowers and a public interest group) alleged that Accudyne, a federal contractor, falsely

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[34] Id. at 433.

[35] 31 U.S.C.A. §§ 3729-33.

[36] Interestingly, the *qui tam* provision in this Civil War era statute was inserted at the instigation of President Abraham Lincoln.

[37] 31 U.S.C.A. § 3129.

[38] 31 U.S.C.A. § 3729(b).

[39] 880 F. Supp. 636 (W.D. Wis. 1995).

certified compliance with environmental laws to obtain payment from the U.S. government. The company argued that the claims should be dismissed because they were claims for failure to comply with environmental laws instead of false claims to the government and/or because they were preempted. In rejecting the company's argument, the court determined that the essence of the complaint was the false certification of compliance. Ultimately, the whistleblowers and public interest group received 22 percent of the $12 million dollar settlement, with the remaining 78 percent going to the government.

Employees are often among the persons reporting alleged employer misdeeds and are most likely to be in a position to report false claims. Disgruntled employees pose a particular risk to employers. Employers can, however, take steps to avoid whistleblower and *qui tam* claims. Compliance policies communicated to employees and records of compliance efforts, including training, can assist in defending "whistleblower" claims of alleged violations. A careful review of claims prior to submission to government agencies can assist in avoiding *qui tam* claims. In addition, an employer can institute ombudsman or other employee reporting systems with incentives to report violations or accounting errors to the employer, as an employer "feedback" mechanism for self-auditing. These systems can enable the employer to consider self-reporting and correction of any violations or erroneous claims before a *qui tam* action is initiated. Finally, good employee relations, even on termination, can assist in avoiding actions.

3. First Amendment Protection for Public Sector Employees Who Act as Whistleblowers.

The First Amendment may protect public employees who have reported perceived environmental violations. For example, in *Ricker v. Fulton County Soil and Water Conservation District*,[40] the court recognized the plaintiff's claims that her exercise of free speech may have contributed to her discharge. Governmental agencies at risk for these claims can include cities, counties, and states, as well as federal agencies.

B. Employee Reporting Obligations

In another effort to support environmental goals, at least one environmental statute, the Toxic Substances Control Act ("TSCA"), imposes obligations on employees to report risks to health and safety that may not be already known to the EPA. TSCA, one of the older environmental statutes, is drafted to require persons producing chemicals to develop data concerning the effect of those chemicals and any mixtures on health and the environment. The statute also regulates chemicals that pose an unreasonable risk of injury to health or the environment.[41] The statute, however, contains numerous balancing provisions, stating that its purpose is not to impede unduly or create economic barriers to technological innovation.[42] EPA has authority under the statute to require testing and notification prior to manufacture of the

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[40] 800 F. Supp. 636 (C.D. Ill. 1992).

[41] 15 U.S.C.A. § 2601.

[42] Id.

regulated material, to regulate the material, and to require reporting and retention of information.

Under Section 8(e) of TSCA, "any person" who manufactures, processes, or distributes a chemical substance and has information reasonably supporting the conclusion that it presents a substantial risk of injury to health or the environment has the obligation to inform EPA. This provision applies to employees as well as the company, and imposes a significant obligation on employees or managers with technical or scientific knowledge about the substances manufactured or processed in the workplace. This obligation is particularly significant in that TSCA allows for significant civil penalties as well as criminal sanctions,[43] and in the past, EPA has been willing to use TSCA for criminal enforcement to convict employees.[44]

EPA has published a statement of interpretation and enforcement policy,[45] clarifying employee obligations under Section 8(e), describing information which must be reported, and discussing reporting requirements. In the interpretation, EPA stipulates that individual officers and employees can discharge Section 8 reporting obligations by providing pertinent information to the company official designated to comply with Section 8(e), so long as the company establishes, publicizes internally, and affirmatively implements certain procedures for notification.[46] EPA states, however, that regardless of such procedures, *all* company officials responsible for Section 8(e) retain *personal liability* for ensuring that information on any substantial risk is reported to EPA.[47]

EPA has also published a Section 8(e) reporting guide.[48] The guide contains examples of situations concerning reporting and toxicological information. Employee reporting obligations under TSCA demonstrate that EPA, implementing congressional direction, is prepared to seek sanctions against employees working with hazardous substances for failure to comply with environmental laws, regardless of employer policy otherwise. As noted above, however, TSCA also contains protective provisions for employees if the employer is engaging in violations.

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[43] 15 U.S.C.A. § 2615.

[44] In *United States v. Ward*, the Chair of the board of directors was convicted of a criminal violation of TSCA for directing a subordinate to dispose of waste as cheaply as possible, with the knowledge it would probably be disposed of illegally. 676 F.2d 94 (4th Cir. 1982), *cert. denied*, 459 U.S. 835 (1982).

[45] 43 Fed. Reg. 11110 (March 16, 1978).

[46] Id.

[47] Id.

[48] TSCA Section 8(e) Reporting Guide, June 1991.

III. Switchback: The Repealed Mandatory Employer Trip Reduction Program

Some environmental statutes were drafted to use the workplace as a venue to change behavior. The Employer Trip Reduction Program, part of the 1990 Clean Air Act Amendments, concerning metropolitan air quality,[49] was such an experiment. Designed to require higher vehicle occupancy rates, and presumably less vehicles and accordingly less air pollution, it called for states to require large employers in cities with severe and extreme ozone pollution to impose programs to reduce work-related vehicle trips and miles traveled by employees. The focus was on commutes to work between 6 a.m. and 10 a.m. on Monday through Friday. An EPA Draft Guidance interpreted the statute to require that employers develop trip reduction compliance plans to be submitted to the state for approval, and provide periodic reports showing progress toward compliance plan targets.[50] Penalties for failure to submit or implement a plan were contemplated. Nearly all medium to large employers in the relevant ozone non-attainment areas were likely to be covered. It would have had significant impact on employment and union-management relationships.

This provision raised some interesting issues about the employment relationship. To create a successful trip reduction plan, employers would have had to impact employee driving habits. Incentives and disincentives to affect commuting could have been offered, along with subsidies for use of public transportation or carpooling. Changes to work schedules may have been necessary. Certainly, an employer would have been required to collect information about driving and commuting from employees. Many drivers may have considered the intrusion into driving habits by the employer as an infringement on personal decisions and personal time (i.e., an invasion of privacy). Some resistance was expected, and in fact occurred, due to the potentially intrusive effects of the regulation.

Significant negative comment on the program ultimately resulted in congressional modification of the trip reduction program. In mid-December, 1995, Congress approved legislation that was signed into law making the Clean Air Act employer trip reduction program voluntary.[51]

The Texas Natural Resource Conservation Commission ("TNRCC"), the agency with authority to implement and oversee compliance with many Texas environmental statutes, had included an employer trip reduction program in its State Implementation Plan.[52] In Texas, the only area affected was Houston/Galveston. The program had required large employers with work sites that had 100 or more employees to increase the average passengers in vehicles arriving at the workplace at the peak commuting hours by 25 percent above the average for the area. Companies were prepared to use some imaginative procedures to comply, such as

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[49] 42 U.S.C.A. §§ 7401-7515.

[50] EPA Guidance Memorandum (April 23, 1996).

[51] Pub. L. 104-79, § 1, 109 Stat. 773, codified at 42 U.S.C.A. § 7511a(d)(1)(b).

[52] 17 Tex. Reg. 8297 (1992); 19 Tex. Reg. 1830 (Mar, 15, 1994)(amending program).

requiring employees to pay for the privilege of parking at the worksite. TNRCC repealed its rule after the congressional amendment that made the program optional for states.[53]

The Houston/Galveston area will still implement a voluntary regional initiative to reduce vehicle trips. The Houston-Galveston Area Council (H-GAC) alternative voluntary program, the Regional Commute Alternatives Program, includes regional ride sharing, van-pooling, startup funding for Congestion Mitigation/Air Quality, and public outreach and education programs.[54] At this time, the employer trip reduction program is entirely voluntary.

The employer trip reduction provision and the voluntary programs are innovative concepts to support environmental goals. Instead of imposing obligations on employers in the workplace itself, the programs sought to modify non-workplace employee behavior that contributed to pollution. The route to modification, however, was a new employer obligation that would have required the employer to intrude in the employees' offsite, off-hours habits. Not surprisingly, the mandatory provision was not successful; too much opposition resulted in repeal. The voluntary program in Texas, however, has been adopted by some employers, using compressed work weeks, car-pooling, van-pooling, public transportation, bicycling or telecommuting programs which reportedly are quite popular with employees.[55] Like many environmental regulations, the trip reduction initiatives may result in benefits for the employer as well as the employee.

IV. Union Influences: Backseat Drivers

Environmental issues often spark union attention. This attention is often addressed to OSHA regulation, in that unions frequently propose, comment on, or litigate over health and safety regulation of the workplace on behalf of members. For example, recently the Bakery Confections and Tobacco Worker's International Union issued a statement asking OSHA to reopen hearings on a proposed rule to protect workers from second-hand tobacco smoke.[56] The union, in an interesting twist, was opposing greater regulation of smoking in the workplace. The position is unusual because union action on health and safety is usually to make regulation more stringent. The position on smoking is not surprising, since workers' right to smoke has been a traditional labor bargaining point. Two unions also participated in a challenge of OSHA's new asbestos rule, resulting in corrections.[57]

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[53] 21 Tex. Reg. 3147 (April 12, 1996). More information can be obtained by calling Thomas Ortiz at TNRCC, at (512) 239-1054.

[54] June 5, 1996 TNRCC Employer Trip Reduction Update. Interestingly, telecommuting may also be required as a reasonable accommodation under the Americans with Disabilities Act and/or the Rehabilitation Act.

[55] 26 Env't Rep. (BNA) 1801 (Jan. 26, 1996).

[56] 27 O.S.H. Rep. (BNA) 92 (Dec. 6, 1995).

[57] 38 O.H.S. Rep. (BNA) 1206 (Feb. 7, 1996).

Issues such as the legal characterization of a walkout in the face of perceived environmental hazards also have been addressed by the courts. In *Oil, Chem. and Atomic Workers Int'l Union v. NLRB*[58], after unsuccessful negotiations between the union and the company for a new contract, workers walked off the job, citing unsafe working conditions. The health concern was high levels of radioactive dust. A federal inspection of the plant found levels higher than industry norms but under the required employee exposure limits. The company, which had hired replacement workers, argued that the work stoppage was not covered by section 501 of the Taft-Hartley Act. That section states that a work stoppage over abnormally dangerous working conditions will not be deemed to be a strike. The Circuit Court disagreed with the National Labor Relations Board decision that had allowed the company to hire replacements for the striking workers, and remanded the decision to the NLRB.

V. Map of Employment Roads Where Environmental and Health and Safety Issues Arise

As set out above, environmental and health and safety issues are appearing with increasing frequency in employment litigation. As the following subsections explain, environmental and health and safety issues appear in cases alleging discrimination theories based on statute and common law theories based on tort and contract. Moreover, company procedures adopted to control and resolve conflict are increasingly addressing environmental and health and safety issues.

A. Statutory Discrimination Causes of Action

On the federal level, an applicant, employee or ex-employee may elect to pursue several major causes of action: sex, race, color, national origin or religious discrimination claims;[59] pregnancy discrimination;[60] age discrimination;[61] and disability and/or handicap discrimination.[62] Most of these require, as an administrative prerequisite to the filing of a lawsuit, the filing of an administrative charge with the Equal Employment Opportunity Commission. Also, government contractors with a contract or subcontract of $10,000.00 or more may be audited or investigated by the Office of Federal Contract Compliance Programs, which administers Executive Order 11246. The Order prohibits discrimination on the basis of sex, race, color, national origin, or religion and requires affirmative action in many instances.[63]

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[58] 46 F.3rd 82 (D.C. Cir. 1995); *cert. denied*, 116 S.Ct. (1995).

[59] Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e, *et seq.*

[60] The Pregnancy Discrimination Act of 1978, 42 U.S.C.A. § 2000e (k).

[61] Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621, *et seq.*

[62] Americans with Disabilities Act, 42 U.S.C.A. §§ 12101, *et seq.*; and Rehabilitation Act of 1973, 29 U.S.C.A. §§ 701, *et seq.*

[63] 3 C.F.R. § 339.

On the state level, most states have enacted fair employment practice laws that prohibit discrimination. For example, Texas has enacted the Texas Commission on Human Rights Act which prohibits employment discrimination on the basis of race, color, disability, religion, sex (including pregnancy), national origin or age.[64] Also on the state level, plaintiffs can bring lawsuits based on common law.

On the local level, many cities around the country have adopted ordinances prohibiting various types of discrimination. Some of these cities have created local government offices that receive administrative discrimination complaints and investigate them. For example, in Texas, the City of Fort Worth has adopted an ordinance prohibiting race, sex, color, national origin, religious, and disability discrimination and created a government entity, the Fort Worth Human Relations Commission, that receives, investigates and adjudicates administrative discrimination complaints.

What relevance does discrimination law have to environmental and health and safety matters? The relevance arises when an employee has been disciplined for having violated an environmental rule or policy or a health and safety rule or policy. The employee may allege that he/she was treated differently because of his/her protected classification status. Several examples demonstrate the point.

- A manager may have been disciplined because he failed to repair a known gas leak in a building in which hundreds of employees work. The manager may allege age discrimination, claiming that younger managers at similar facilities who failed to repair "known gas leaks" were not discharged, but older managers who failed to repair known gas leaks were discharged.

- A manager may have been discharged because ducks kept dying after they tried to land on a pond of sludge; the manager may have failed to take appropriate action to protect the wildlife. The female manager may allege sex discrimination, claiming that male managers were not discharged when ducks kept dying after trying to land on other ponds of sludge for which the male managers were responsible.

- An employee may have been discharged after having reported a suspected violation to the EPA. The employee may allege not just retaliation but also race discrimination, claiming that white employees who report suspected violations are not discharged, whereas black employees who report suspected violations are discharged.

- An employee may have been discharged for having violated lock out/tag out rules. The employee may allege national origin discrimination, claiming that U.S. born employees are not discharged for lock out/tag out violations, but foreign born employees are discharged for lock out/tag out violations.

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[64] TEX. LAB. CODE ANN. §§ 21.001, *et seq.*

- An employee may have been discharged because he/she dumped some chemicals into a creek. The employee may allege religious discrimination, claiming that Muslims who dumped chemicals into the creek were discharged, but non-Muslims who dumped chemicals into the creek were not discharged.

- An employee may have been discharged after he/she released contaminants into the atmosphere. The employee may allege disability discrimination, claiming that his/her act was the product of manic depression, which is now controlled by medication.

B. Common Law Causes of Action

Environmental and health and safety matters may trigger employment suits based on common law causes of action. The following subsections discuss the more commonly used ones.

1. Public Policy Exceptions to the "At-Will" Rule

Although employment is presumed to be for an indefinite term and hence "at-will", courts in most states have recognized one or more "public policy" exceptions to the "at-will" rule. The scope and number of the public policy exceptions vary from state to state. Public policy exceptions may exist for, among others, discharge due to retaliation against an employee who has acted as a "whistleblower," discharge due to an employee's refusal to comply with an order to commit a crime, discharge due to an employee's refusal to comply with an order to violate a civil law, and discharge due to an employee's having reported another employee's misconduct to the employer.[65]

In Texas, the Supreme Court has recognized only one public policy exception to the "at-will" rule. In *Sabine Pilot Service, Inc. v. Hauck*,[66] an employee on a shipping vessel was ordered to discharge a pollutant into the Houston shipping channel. The act would have violated criminal law. When the employee refused to comply with the order, he was discharged. The Supreme Court created a public policy exception for the circumstance when the sole reason for an employee's discharge was his/her refusal to comply with an order to commit a criminal act. In Texas, this public policy exception does not extend to the circumstance where the reason for an employee's discharge was his/her refusal to comply with an order to violate civil law. The Supreme Court has also ruled that the public policy exception does not create a new cause of action for private sector employees who have been discharged for whistle-blowing or having informed the employer of an unlawful act.[67]

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[65] Generally, see Larson & Borowsky, Unjust Dismissal, Chapter 7 (Matthew Bender).

[66] 687 S.W.2d 733 (Tex. 1985).

[67] *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723 (Tex. 1990).

The *Sabine Pilot* exception continues to be used in cases arising from environmental and safety and health matters. For example, in *Ebasco Constructors v. Rex*,[68] an employee worked for a company that installed heating, ventilating and air conditioning systems at a nuclear power facility. The employee was ordered to report work as complete before it had actually been performed, to perform work without following safety inspection procedures, and to falsify reports in violation of NRC regulations. These acts would arguably have violated criminal statutes. After he refused to perform these acts, the employee was discharged. He sued based on the *Sabine* public policy exception. The court of appeals sustained a jury verdict in favor of the employee. According to the court of appeals, there was some evidence of a criminal conspiracy.

2. Intentional Infliction of Emotional Distress

The Texas Supreme Court has defined intentional infliction of emotional distress as consisting of the following elements: (1) the defendant must have engaged in conduct that was extreme and outrageous; (2) the defendant's conduct must have proximately caused the plaintiff's emotional distress; (3) the plaintiff's emotional distress must have been severe; and (4) the defendant must have acted intentionally or recklessly, i.e., the defendant must have intended to injure the plaintiff, as distinguished from having intended to commit the act that in turn caused the injury.[69]

Several examples demonstrate how intentional infliction of emotional distress may be used to pursue employment claims arising from environmental and health and safety matters. In *Harris v. Proctor & Gamble Cellulose*,[70] an employee reported toxic chemical exposure at the plant where he worked. Afterwards, he was harassed, threatened with discharge, and eventually discharged. The Eleventh Circuit held that this conduct -- essentially retaliation -- qualified as intentional infliction of emotional distress.

In *Birklid v. The Boeing Co.*,[71] the company manufactured airplanes. In the process of making the interiors for airplanes, the company used a type of fiberglass cloth. It was known that the particular type of fiberglass cloth would cause illness in humans. Nonetheless, the company used the fiberglass cloth. The plaintiff, a Boeing employee, became ill due to exposure to the fiberglass cloth. He sued. The Washington Supreme Court held that Boeing's conduct qualified as intentional infliction of emotional distress.

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[68] 11 IER Cases [BNA] 1030 (Tex. App. -- Corpus Christi 1996, *no writ*).

[69] *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993).

[70] 11 IER Cases [BNA] 605 (11th Cir. 1996).

[71] 11 IER Cases [BNA] 97 (Wa. Sup. Ct. 1995).

In *Carroll v. TVA*,[72] a manager failed to implement agency guidelines assigned to provide a smoke-free environment. The plaintiff complained. The manager retaliated by verbally harassing the plaintiff and giving her a low performance rating. She sued. The federal district court held that the conduct constituted intentional infliction of emotional distress.

3. Negligence

An employer and/or manager may be sued based on negligence theories. Examples of negligence theories include, but are not limited to, negligent hiring, negligent retention, failure to train, failure to supervise adequately, and failure to provide a safe workplace.[73] Although some states have adopted a tort called negligent infliction of emotional distress,[74] the Texas Supreme Court has declined to do so.[75]

Negligence litigation against companies and managers cannot be fully understood unless consideration is given to the worker's compensation statute. In each state, the worker's compensation law provides that it is the exclusive remedy for any injury incurred by the employee in the course of employment.[76] However, this exclusivity is not absolute in that the employee may sue his/her employer if the injury was due to the employer's intentional act. This is referred to as the intentional tort exception to worker's compensation exclusivity. The courts in the various states have rendered inconsistent opinions on the scope of the intentional tort exception. In Texas, an employee may pursue an independent action for an intentional tort against his/her employer only when the employee can demonstrate that the employer had the specific intent to cause actual injury, as distinguished from the intent to engage in conduct that in turn caused the injury.[77]

Because of worker's compensation exclusivity, most negligence claims are brought by third parties, not by employees. However, by alleging an intentional tort theory rather than a negligence theory, an employee may attempt to sidestep the effect of worker's compensation

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[72] 3 IER Cases [BNA] 149 (D.C. 1988).

[73] *See* Green and Reibstein, Negligent Hiring (BNA 1988); and Shepard, Heylman and Duston, Without Just Cause (BNA 1989). *Also see Roberts v. Benoit*, 605 So.2d 1032 (La. 1991); *Degenhart v. Knights of Columbus*, 420 S.E.2d 495 (S.C. 1992); and *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419 (Minn. Ct. App. 1993).

[74] For example, see *Buckley v. Metro-North Commuter R.R.*, 11 IER Cases [BNA] 897 (2nd Cir. 1996).

[75] *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993).

[76] In Texas, *see* TEX. LAB. CODE ANN. § 408.001.

[77] *Reed Tool Co. v Copelin*, 689 S.W.2d 404 (Tex. 1985); and *Rodriguez v. Naylor Industries, Inc.*, 763 S.W.2d 411 (Tex. 1989).

exclusivity.[78] Also, in Texas, an employee may pursue a negligence claim against an employer who does not subscribe to worker's compensation.

4. Contract

In employment cases, including ones arising from environmental and health and safety matters, plaintiffs may use contract theories. For example, in *Mobil Coal Producing Inc. v. Parks*,[79] a truck driver was discharged because of repeated safety violations. The truck driver sued, claiming that the discharge was invalid because, in implementing the discharge, the employer failed to follow the disciplinary procedure set forth in the employee handbook. The driver argued that the handbook constituted a contract. The court agreed and held that the employer was liable.[80]

C. Intra-company Efforts to Control and Resolve Conflict

When the workers of a company are unionized, conflict is typically controlled and resolved through discussions between union and management representatives and via negotiated grievance and arbitration procedures. Generally, a labor relations staff -- not well versed in environmental and safety and health matters -- represents the company in its dealings with the union. Likewise, union business agents who represent the union and bargaining unit employees have traditionally not been well versed in environmental and safety and health matters. Recently, unions have increased their efforts to engage the services of business agents who are trained in environmental and safety and health issues. In the future, these issues will be given increased attention in dealings between union and management.[81]

In companies with workers who are not unionized, a variety of efforts have been made to control and resolve conflict. Some companies have created "open door" policies whereby, at any time, any employee is free to visit any manager and raise any issue of concern. Some open door policies are used extensively and others not at all. Other companies have created internal grievance procedures that culminate in a decision by a high level manager; rarely has a company unilaterally implemented grievance procedures that culminate in a binding decision by a neutral arbitrator. Still other companies have personnel and/or human resources

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[78] *Gulden v. Crown Zellerbach Corp.*, 4 IER Cases [BNA] 1761 (9th Cir. 1989).

[79] 1 IER Cases [BNA] 1341 (Wyo. 1985).

[80] In Texas, employee handbooks do not constitute contracts unless accompanied by express agreement or written representation regarding discharge procedures. *Hicks v. Baylor University Medical Center*, 789 S.W.2d 299, 301 (Tex. App. -- Dallas 1990, *writ denied*).

[81] A hue and cry has already arisen over the tactic whereby a union, when in a dispute with a company, files dozens and dozens of sometimes frivolous charges with the EPA and OHSA. Some commentators have accused the agencies of complicity and acting in league with unions. *See* "Are the NLRB, OSHA and the EPA in League with the Unions?", *Termination of Employment*, Volume 12, No. 4, ¶ 4.5 (April 1, 1996).

departments charged with the duty of receiving and resolving employee complaints. A common thread among these various efforts to control and resolve conflict is the fact that the persons representing the company are seldom well versed in environmental and safety and health matters.

What is the relevance of this? The relevance is that environmental and health and safety issues are increasingly being raised in grievance/arbitration procedures, open door procedures, and other problem-solving procedures. As employees have become more sophisticated and informed, they are raising HAZCOM, HAZWOPER, and other issues. As these issues arise, personnel and human resources specialists must resist any inclination to "guard their turf", and instead, must handle the matters in conjunction with specialists in environmental and health and safety matters.

VI. Driver's Ed: Employee Interaction with Regulators and Citations to and Indemnification of Employees

Employees are quite often the first to have contact with regulators. When inspections occur, it may be the employee who is first faced with the search warrant or request for entry. Further, an employee in his/her individual capacity may be the recipient of a citation that is issued. When an employee is liable or potentially liable, the employer typically must consider whether to defend and/or indemnify the employee. This section will discuss how an employer can prepare employees for contact with regulators, citations to employees, and employee liabilities and indemnities.

A. Employee Interaction with Inspectors

Employees are the first line of defense with inspectors with a search warrant or a request for entry onto a workplace. Training of employees in how to respond to an inspection is a key element to a successful result. Employees of all levels should be trained to contact management immediately, to avoid small talk or answering questions until a management representative can be present, and to behave courteously.

Management should be prepared with a plan to address an inspection; the plan should include the designation of a representative with authority to interact with an inspector. The designated representative must be trained to conduct the inspection. This training should include such direction as whether to contact counsel, careful reading of the warrant, if the inspection is under a search warrant, confining the inspection to areas or subjects covered by the warrant, asking to be present for all portions of the inspection and interviews, and taking careful notes of the areas inspected. Employees should avoid interfering with the inspection, failure to follow the inspector's direction could lead to a charge of obstruction of justice. The representative should also request a copy of the inspector's findings and notes, if available, and inquire about the results of the inspection.

B. Citations to Employees

An issue which frequently arises in environmental law is citations to employees. Municipal ordinances and some environmental laws provide for citations for minor offenses, which nonetheless can be misdemeanors. If the employee has been involved in the offense, for example, of placing leaking paint cans in a dumpster in violation of city or county ordinances, it is sometimes the employee who is the personal subject of the citation. Employees are understandably reluctant to be convicted of a misdemeanor for conduct which may have been consistent with employer practices.

Avoiding practices that would lead to citations is the first step in dealing with this issue. Employees should be trained in good environmental practices to avoid the opportunity for citations. If, despite training and employer vigilance, an employee receives a citation personally, generally, counsel should be engaged to represent the employee. Often a *nolo contendere* plea is entered, and, when available, probation should be requested. Generally, any fines should be paid by the employer and after the fact training provided to avoid further violations.

C. Officer or Employee Liabilities and Indemnities

Several environmental statutes define a liable party as "any person" conducting the activity.[82] "Any person" can include an officer or key employee who has personally participated in the conduct giving rise to the environmental violation. Violations can lead to civil liability (e.g., *Sidney S. Arst Co. v. Pipefitters Welfare Educational Fund*[83] (reinstating contribution claims against two corporate officers alleged to be personally responsible for cleanup of hazardous waste spill)) and criminal liability (e.g., *U.S. v. Wilson*[84] (chairman of the board and CEO of a publicly traded real estate development company was convicted of filling wetlands in violation of the Clean Water Act)).

An employer faced with a liable or potentially liable employee, whether a manager or officer, has several issues to decide. Primary among those are whether discipline is appropriate and whether to provide a defense and indemnity.

Some statutes in the state of incorporation,[85] articles of incorporation, and corporate bylaws will address indemnity for directors, officers, and certain managers. The Texas statute,

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[82] 24 U.S.C.A. § 9603 (CERCLA notification provision); 42 U.S.C.A. § 7413 (Clean Air Act enforcement provision); 42 U.S.C.A. § 6928 (RCRA enforcement provision).

[83] 25 F.3d 417 (7th Cir. 1994).

[84] No. AW-95-0390 (D.Md. June 17, 1996); *see also U.S. v. Hart.* 41 Env't Rep. Cas. (BNA) 1741 (10th Cir. 1995) (affirming Clean Water Act violations agencies and superintendent of waste water (treatment facility).

[85] *See, e.g.,* Texas Bus. Corp. Act Art. 2.02-1.

for example, allows a corporation to indemnify and defend a "person" who may have liability due to employee, officer or director status so long as actions were taken in good faith and in a manner reasonably believed to be in or not opposed to the best interests of the corporation. In any criminal action, the employee must not have had reasonable cause to believe the conduct was unlawful. Note that even in the absence of statutes or mandatory bylaws or articles of incorporation, employment contracts may bind the company to indemnify the employee.

If there is no mandatory obligation to defend and indemnify, the employer should consider providing counsel to the employee and advancing counsel's fees and expenses. If the decision is to pay counsel's fees, authorization from management may be sufficient, but an employer can also consider a corporate resolution authorizing the expenditure. Cases considering the obligation to indemnify employees have, for the most part, required indemnification of officers and directors. The Fifth Circuit considered indemnification obligations and reversed a decision denying indemnity to an officer or director personally sued under CERCLA.[86]

In *U.S. v. Lowe,*[87] the company and Lowe, an officer of the company, had been sued under CERCLA for cost recovery. After both settled, Lowe sued for indemnity under a corporate bylaw which provided for officer or director indemnities for costs incurred "by reason of his being [an] officer." The company disputed the liability because Lowe had been personally sued and CERCLA provides for personal liability. The Fifth Circuit held that regardless of Lowe's personal liability, the bylaws entitled him to indemnity.[88] The opinion noted that the Seventh Circuit had recently concluded[89], in interpreting the Delaware statute, that the "by reason of being a director" language is broad enough to require indemnity not only for a director's official capacity, but also for suits arising "more tangentially from his role, position, or status of a director."

The Third Circuit recently considered a similar indemnity claim. In *Witco Corp. v. Beekhuis,*[90] the Court affirmed the district court's finding that indemnity was owed to the estate of a former officer and director, despite the company's argument that the liability was personal under CERCLA. The Court reasoned that Delaware Courts and the legislature had chosen to provide broad protection to an officer or director successfully defending against claims of personal responsibility with a nexus to the director or officer's corporate position.[91]

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[86] *United States v. Lowe,* 29 F.3d 1005 (5th Cir. Aug. 15, 1994).

[87] Id.

[88] Id., at 1010. The Court noted its agreement with *Bowen Engineering v. Estate of Reeve,* 799 F. Supp. 467 (D.N.J. 1967), *aff'd* 993 F.2d 223 (1993) reaching a similar conclusion.

[89] *Heffernan v. Pacific Dunlop GNB Corp.,* 965 F.2d 369, 375 (7th Cir. 1992).

[90] 38 F.3d 682 (3rd Cir. 1994).

[91] Id. at 692.

Another potential scenario in this area would be an employee directed to perform an illegal act. For example, in *U.S. v. Rudd,*[92] the president of a road striping business pleaded guilty to violation of the Clean Water Act. He had been charged with directing employees to dispose of paint wastes into pits dug into ground water which contaminated a nearby creek. Conceivably, the employee also could have been charged. There are no laws requiring a defense in this circumstance; however, an employee would likely expect a defense. This situation will require careful consideration of employer choices, including (1) whether to provide a defense; if so, (2) whether to engage separate counsel for the employee; if so, (3) how to interact with separate counsel to avoid obstruction of justice charges; and (4) how to handle continuing supervision of the employee during the proceeding to avoid any claims the employee was rewarded, on the one hand, for favorable testimony for the company or retaliated against, on the other hand, for testimony against the employer. Conceivably, an employee personally charged and undefended by the company could even sue for a defense and indemnity of civil claims. An employee at risk for criminal charges is more likely to be willing to testify against the employer's interests for a reduced charge or dismissal of charges.

Where employment and environmental laws intersect, employee responses to regulators cannot be ignored. A strong and supported compliance policy and training, recorded in employer files, will go a long way to reduce the risks.

VII. Safe Passage or Collision: Suggestions to Minimize Potential Liability

A. Keep Your Car in Tip-Top Shape: Dealing with the Employee Who May Have Violated an Environmental and/or Health and Safety Rule or Policy

Companies can and should take steps to minimize potential liability. These steps should commence upon realization that there has been a violation of an environmental and/or health and safety rule or policy. These steps should continue through the discharge and exit interview process.

Once a possible violation has been detected, an investigation should be conducted. Once the investigation is complete, a decision must be made. It is axiomatic that, if litigation ensues, the plaintiff will attack the investigation and/or decision-making process. Consequently, a prudent employer will conduct the investigation and decision-making process in a manner that will later enable the company to defend against the common forms of plaintiff attacks.

1. Determine Whether a Formal Investigation is Required

The first step is to determine whether a formal investigation is required. Quickly and informally settling minor disputes keeps hard feelings to a minimum, restricts knowledge of the events, and minimizes administrative costs. However, oftentimes an informal investigation is not appropriate. This is especially true when the potential violation is significant, the employee has a history of violations, and/or there is a need to talk to witnesses.

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[92] No. CA-6-96-CR28 (E.D. Tex. June 13, 1996), 85 F.3d 630 (unpublished).

2. Determine Who Should Conduct the Investigation

The investigation should be conducted by someone knowledgeable of the subject matter.

If in-house personnel will conduct the investigation, the investigator should not be a person who might have reason to be biased. For example, an investigation of an employee should not be conducted by a manager against whom the employee has just made a complaint.

Whoever conducts the investigation should have been properly trained. Even a meritorious case can be lost if an inexperienced investigator conducts an incomplete investigation and mischaracterizes facts.

3. Plan the Investigation

The investigation must be planned. The investigator should initially gather all policies and rules, training records, personnel files and information from any prior investigations.

Determine whether the employee under investigation or witnesses should be interviewed first.

At the planning stage, do **not** develop preconceived ideas.

4. Consider Whether Interim Action is Appropriate

When the allegation is serious -- such as alleged criminal wrongdoing -- immediate action may be required, such as suspending the employee under investigation, with or without pay.

5. Conduct Interviews

Conduct interviews in private areas. Obtain facts, not conclusions. Ask open ended questions. Avoid leading questions. Do not ask intrusive personal questions. Ask interviewees to keep the matter as confidential as possible. Do not promise total confidentiality because such is usually impossible.

It is wise to take notes. If an employee complaint sparked the investigation, encourage that employee to write down his/her version of the facts and to provide supporting documentation. Do not hint at a conclusion or credibility judgment.

In talking to the accused, the first step is to set out the issues so that he/she understands the nature of the allegations and/or investigation. Do not accuse the employee of wrongdoing, but rather, explain that facts are being gathered and that, upon completion of the investigation, a decision will be made. Be sure that the accused is afforded full opportunity to tell his/her side of the story. Do not physically force a witness to remain in the interview room. If the accused will not cooperate, explain that failure to cooperate in an investigation may be grounds for discipline, up to and including discharge.

6. Analyze the Facts to Reach a Conclusion

If the accused denied key facts and/or made no admissions, it may become necessary for the investigator to analyze the facts, documents and other information so as to assess credibility.

The investigator must try to reach a conclusion as to what happened, including whether policies or rules were violated. Occasionally, an investigation may be inconclusive; when this occurs, then at a minimum the accused should be carefully reminded of the relevant rules and policies.

7. Determine Who Should Receive What Discipline

The discipline should fit the offense. A court is more likely to uphold the discipline when the potential hazard or harm is great rather than when it is small.[93] If the potential hazard or harm is small, then courts are likely to expect the company to have adhered to the principle of progressive discipline, i.e., an oral warning for the first offense, a written warning or suspension for the second offense, and discharge for the third offense.[94]

Did the employee receive "fair warning"? Did the employee receive sufficient training to know what not to do or to know how to accomplish his/her duties? Inadequate training can be a defense to discharge.

How have similarly situated employees been treated? If prior offenders have received only a verbal reprimand, then a discharge may (1) be viewed as harsh and unfair, and (2) provide grounds to allege disparate treatment under the discrimination laws.

Are two employees responsible for the conduct in question? If yes, then it may be risky to discipline one and not the other or to impose unequal discipline. If discipline is to be unequal, then there must be a sound basis for the inequality.

It is absolutely critical that the company be able to articulate legitimate, nondiscriminatory and nonretaliatory reasons for imposing discipline.

8. Follow Company Procedure

In administering discipline, it is essential that a company follow its procedures. A favorite plaintiff tactic is to attack the discipline because the company failed to follow its procedures.

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[93] *See Brandenburger v. Hilti, Inc.*, 5 IER Cases [BNA] 1681 (Ct. App. -- Ohio 1989).

[94] *See DePluzer v. Village of Winnetka*, 9 IER Cases [BNA] 1310 (Ct. App. -- Ill. 1994).

B. The Fork in the Road: The Dilemma Between Retaliation and the Blocking Charge

An employee may make a report or complaint about an environmental or health and safety matter. The same employee may also engage in misconduct or his/her performance may deteriorate. What is the employer to do? The employer actually faces a dilemma. On the one hand, if the employer disciplines the employee or gives him/her a low performance rating, then the employer is likely to be confronted with a retaliation (whistle-blowing) complaint. On the other hand, if fear of the retaliation (whistle-blowing) complaint causes the employer to refrain from taking action, then such inaction tacitly approves the misconduct and/or unacceptable performance. Such inaction will probably cause negative effects on the morale of co-workers and create a precedent likely to haunt the employer. Specifically, in the future, when other employees engage in similar misconduct or exhibit similar unacceptable performance, what will the employer do? If the employer disciplines or gives a low performance rating to the other employees, then they may file discrimination lawsuits, claiming that they were treated differently from the first employee. It will not be a viable defense for the employer to argue that the first employee was not disciplined or given a low performance rating because he/she had made a report or complaint about an environmental or health and safety matter.

The aforegoing dilemma is by no means academic. To the contrary, it is common. In fact, it occurs so frequently that attorneys and courts have coined the term "blocking charge". This term originated in Title VII cases; an employee about to be disciplined or given a low performance rating would file a discrimination charge; if the employer dared follow through on the discipline or low performance rating, then the employee would file a retaliation claim. The threat of a retaliation claim is calculated to deter the employer from implementing discipline or giving a low performance rating. The term "blocking charge" is now used to refer to any report, charge or complaint -- whether internal to the company or to a governmental agency -- which causes a company to consider the threat of a potential retaliation suit in making an employment-related decision about a worker.

The question of how to handle employment decisions involving employees who have filed blocking charges turns on the weighing and balancing of risks. Obviously, risks can be minimized by closely following the recommendations in section A (immediately above) for conducting investigations. However, when a blocking charge is in the picture, additional factors need to be weighed and balanced.

1. Did the Poor Performance and/or Misconduct Occur Before or After the Employee Made a Report or Complaint About an Environmental or Health and Safety Matter?

When did the poor performance and/or misconduct first occur? A fact finder is more likely to give credence to a claim of poor performance and/or misconduct if the employer was criticizing the employee's performance and/or investigating his/her conduct before the employee made or filed the blocking charge. Fact finders are less likely to give credence to an employer's claim of poor performance and/or misconduct that never occurred until after the employee had made or filed the blocking charge.

2. If the Unacceptable Performance and/or Misconduct Occurred Before and After the Employee Made or Filed the Blocking Charge, When Did the Employer First Raise an Objection?

When did the employer first respond to the unacceptable performance or misconduct? In many cases, the unacceptable performance and/or misconduct may have occurred both before and after the employee made or filed the blocking charge. The employer who counseled the employee about his/her unacceptable performance and/or misconduct before the employee made or filed the blocking charge is in a much stronger position than is the employer who did not start counseling the employee until after he/she made or filed the blocking charge. Fact finders generally deem it retaliatory when an employer suddenly starts enforcing rules or expectations that were not enforced before the employee made or filed the blocking charge.

3. How Did the Employer Treat Other Employees Who Had Similar Unacceptable Performance or Who Engaged in Similar Misconduct?

How has the employer treated similarly situated employees? Fact finders tend to infer retaliation when within the past several years the employer has not disciplined employees whose performance was unacceptable and/or who engaged in misconduct but had not made or filed a blocking charge, while disciplining the employee (with similar unacceptable performance and/or who engaged in the similar misconduct) who had made or filed a blocking charge. In a retaliation case, an employer can improve its prospect of prevailing by proving that similarly situated employees who had not made or filed a blocking charge were treated the same as the employee who made or filed a blocking charge.

4. Weigh and Balance the Strength of the Evidence of the Unacceptable Performance or Misconduct.

How strong is the evidence? When there is an issue of retaliation, fact finders tend to closely scrutinize the strength of the evidence of unacceptable performance or misconduct more so than when there is not a question of retaliation. Stronger evidence means that the employer has a stronger case. When the timing of events suggests retaliation, fact finders may require especially strong evidence to overcome an inference of retaliation.

5. Weigh and Balance the Severity of the Unacceptable Performance or Misconduct.

How severe is the unacceptable performance and/or misconduct? When there is an issue of retaliation, fact finders tend to closely examine the severity of the unacceptable performance or misconduct. An employer has a stronger case when the unacceptable performance or misconduct is severe rather than mild. When the timing of events suggests retaliation, fact finders may require severe levels of unacceptable performance or misconduct to overcome the inference of retaliation.

6. What Happened to Other Employees Who, Within the Past Several Years, Made or Filed Blocking Charges?

When other employees have made or filed complaints about environmental or health and safety problems and have not been disciplined, then this fact significantly helps the company's case. The employer's case is significantly damaged if the company has discharged every employee who has ever made or filed a complaint about environmental or health and safety problems.

C. Trip Planning to Avoid Pot Holes and Pitfalls

An effective, well implemented environmental policy provides persuasive evidence that a company does not retaliate against whistleblowers, but rather, strongly favors compliance. Employers should develop environmental policies and train employees to abide by the policy. A typical policy would be preceded by an evaluation of environmental issues particular to the workplace in question, and would include a statement of the employer's commitment to comply with environmental and health and safety regulations, a designation of the environmental manager, and a description of environmental issues in that workplace and how those should be addressed. Training in the policy is essential, if a policy is developed, and many environmental and health and safety laws and regulations will require specific employee training. Recordkeeping is also essential, since it is the concrete communication to regulators confirming the employer's actions.

There are some pitfalls associated with the development of an environmental policy. A policy must be supported by management; without specific management support, the policy will not be implemented, and its existence on paper, setting a standard which is not met, can be more damaging as evidence than no policy at all. Policies can become outdated as businesses change. However, if a policy is written and implemented, and updated as appropriate, the presence of an environmental policy has significant benefits. It communicates the company's philosophy about the environment and compliance with environmental regulation to workers and regulators, as well as providing a roadmap for compliance, reporting and management of environmental issues.

VIII. Conclusion: Road's End

Many policies and procedures that are "right" for environmental law will leave the employer and the employee better situated to cope with employment law issues. Preplanning can avoid many wrong turns, pitfalls, and potholes. At the end of the road, employment and environmental laws have many intersections, and the wise employer will take each path with the other in mind.

Open Mike

"The Wild Bunch"

Moderator: John Baker

Jeff Saitas
Jim Phillips
Minor Hibbs
Bob Sweeney
Philip Holder

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

FOR YOUR INFORMATION

COMMISSIONER JOHN M. BAKER, JR.

John Baker, a native of Temple, was appointed by Governor George W. Bush to the Texas Natural Resource Conservation Commission (TNRCC) on September 8, 1995. His appointment is scheduled to expire on August 31, 2001.

Commissioner Baker served as Agricultural Advisor to EPA Administrator William K. Reilly, from 1991 to 1993 during the Bush Presidency. He has more than 20 years experience with environmental and agricultural issues, and previously served on the Board of Directors of the Texas Corn Producers Board, the Lone Star Corn Growers Association, the Texas Beef Council and the Texas Farm Bureau. He also served on an advisory committee to the Texas Water Commission (a predecessor agency to the TNRCC) addressing the implementation of underground fuel storage tank regulations.

Commissioner Baker is a former tenured professor of Soil Science and Agronomy at Oklahoma State University where he was awarded a doctoral degree in Soil Science in 1970. He also was awarded an M.S. and B.S. degrees in Agronomy from Oklahoma State University and Texas A&I University, respectively. Commissioner Baker is married and the father of two daughters, with three grandchildren.

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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. In September 1985 he became Manager of the Permits Section of the Commission's Industrial and Hazardous Waste Division. He has been in his current position as Director of the Industrial and Hazardous Waste Division since October 1994. Mr. Hibbs is a registered professional engineer in the State of Texas.

Robert D. Sweeney, Jr. ("Bob") is the Senior Attorney for water quality in the Legal Division of TNRCC. Bob is a 1985 graduate of Case Western Reserve University Law School in Cleveland, Ohio, magna cum laude and Order of the Coif, and was Research Editor of the Law Review. He is a 1981 graduate of Wesleyan University in Middletown, Connecticut.

From 1985 to 1990, Bob practiced in Washington, D.C., first with Jones, Day, Reavis & Pogue and later with McKenna & Cuneo, and focused on federal court litigation, products liability, government contracts, and environmental law. For family reasons, Bob relocated to San Antonio in 1990, and was general counsel to a manufacturing company there from 1990-1992. Bob joined the Legal Division of TNRCC in 1993. He is a member of the bars of the U.S. Supreme Court, the U.S. Fourth Circuit Court of Appeals, Texas, Ohio, and the District of Columbia. He has published articles on environmental law, criminal law, and tax law.