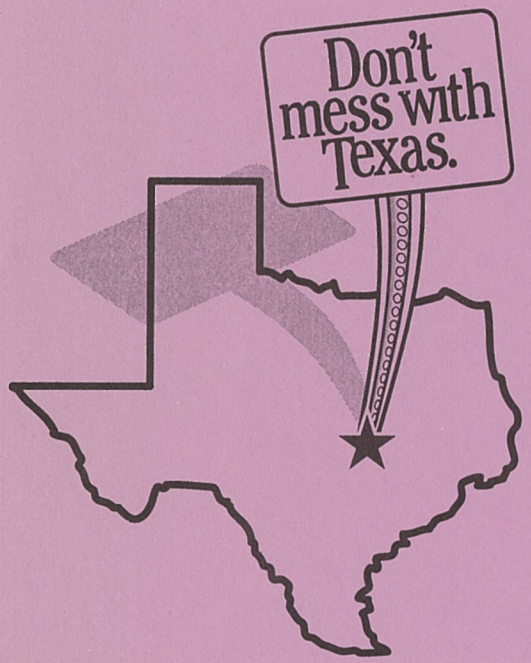
Ninth Annual Texas Environmental Superconference

July 31 & August 1, 1997

An Environmental "Ad" Venture



Four Seasons Hotel
98 San Jacinto Blvd.
Austin, Texas



Ninth Annual
Texas Environmental Superconference

NINTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

July 31 & August 1, 1997
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 1998 Tenth 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 1998 conference.

8. Suggested themes for the 1998 conference.

9. Other comments....

SPEAKER	ORAL PRESENTATION	COURSE MATERIALS	COMMENTS
Water Rights -- The Significance of Senate Bill 1			
Molly Cagle	5 4 3 2 1	5 4 3 2 1	
Stuart Henry	5 4 3 2 1	5 4 3 2 1	
James Kowis	5 4 3 2 1	5 4 3 2 1	
Superfund Update			
Steve Morton	5 4 3 2 1	5 4 3 2 1	
Clean Air Act ("CAA") Title V Interim Program			
Karen Olson	5 4 3 2 1	5 4 3 2 1	
CAA Title V Compliance			
Brad Raffle	5 4 3 2 1	5 4 3 2 1	
CAA New Source Review			
David Cabe	5 4 3 2 1	5 4 3 2 1	
New Legislation			
John Howard	5 4 3 2 1	N/A	
Toxicology, Epidemiology & Risk Asessment in Environmental Programs			
Thomas Musta-Dydek	5 4 3 2 1	5 4 3 2 1	
Voluntary Cleanup Update			
Chuck Epperson	5 4 3 2 1	5 4 3 2 1	
Risk Reduction Rules			
Ron Pedde	5 4 3 2 1	5 4 3 2 1	
Legal Issues Related to VCP/RRR			
Debra Baker	5 4 3 2 1	5 4 3 2 1	
TNRCC Decision-Making			
Geoffrey Connor	5 4 3 2 1	5 4 3 2 1	

SPEAKER	ORAL PRESENTATION	COURSE MATERIALS	COMMENTS
Groundwater Remediation			
John Loper	5 4 3 2 1	5 4 3 2 1	
Supercritical Oxidation			
Dick Lyon	5 4 3 2 1	5 4 3 2 1	
Forensic Residential Sampling			
Herndon Russell	5 4 3 2 1	5 4 3 2 1	
Strategic Environmental Management			
Bill Wilder	5 4 3 2 1	5 4 3 2 1	
Strategies for Toxic Tort Litigation			
Kay Gunderson-Reeves	5 4 3 2 1	5 4 3 2 1	
Wes Harris	5 4 3 2 1	5 4 3 2 1	
Technical Approaches to Resolving Toxic Tort Issues			
Devraj Sharma	5 4 3 2 1	5 4 3 2 1	
The Use of Demonstrative Evidence in Environmental Cases			
Mark Smith	5 4 3 2 1	5 4 3 2 1	
Federal Enforcement -- Issues of Federalism			
Lois Schiffer	5 4 3 2 1	N/A	
TNRCC's Implementation of Federal Programs			
Barry McBee	5 4 3 2 1	N/A	
Roundtable Discussion of Federalism			
Mary E. Kelly	5 4 3 2 1	N/A	
Barry McBee	5 4 3 2 1	N/A	
Hal Ray	5 4 3 2 1	N/A	
Lois Schiffer	5 4 3 2 1	N/A	
Bob Wilson	5 4 3 2 1	N/A	

SPEAKER	ORAL PRESENTATION	COURSE MATERIALS	COMMENTS
Criminal Enforcement -- Federal			
Gordon Young	5 4 3 2 1	5 4 3 2 1	
Criminal Enforcement -- State			
John Riley	5 4 3 2 1	5 4 3 2 1	
Expert Witness/Mock Examination			
Davis Ford Expert Witness	5 4 3 2 1	5 4 3 2 1	
The Honorable Margaret Cooper Judge	5 4 3 2 1	N/A	
Mike Gallagher Plaintiff	5 4 3 2 1	5 4 3 2 1	
Carrick Brooke-Davidson Defense	5 4 3 2 1	5 4 3 2 1	
Open Mike			
Ralph Marquez	5 4 3 2 1	N/A	
Ramon Dasch	5 4 3 2 1	N/A	
Beverly Hartsock	5 4 3 2 1	N/A	
Ann McGinley	5 4 3 2 1	N/A	
Ken Petersen	5 4 3 2 1	N/A	
Jeff Saitas	5 4 3 2 1	N/A	
Group	5 4 3 2 1	N/A	

Ninth Annual
Texas Environmental Superconference



MEMORANDUM

TO: Attendees

FROM: Planning Committee

DATE: July 31, 1997

On behalf of the Environmental and Natural Resources Law Section ("ENRLS") of the State Bar, the Air and Waste Management Association, Southwest Section, and the Water Environment Association of Texas, welcome to the Ninth 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. In addition, Thursday afternoon, at 5:15 p.m., the West Group is sponsoring a wine and cheese reception in honor of those ENRLS members who edited and wrote Volumes 45 and 46 of the West Texas Practice Series on Texas Environmental Law. Royalties from the sale of this treatise go to the ENRLS.

For Friday's open mike session, note cards are provided for you to write your questions. Please place your written questions in the designated box at the registration table. You also may ask questions in person, should you prefer.

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 tentatively scheduled for August 6-7, 1998. Please mark your calendars.

If you have any questions or comments, please do not hesitate to contact any of the Planning Committee at the conference, or, thereafter, Jeff Civins at (512) 495-6400.

NINTH ANNUAL
TEXAS ENVIRONMENTAL SUPERCONFERENCE
Thursday and Friday, July 31 & August 1, 1997

"DON'T MESS WITH TEXAS"
AN ENVIRONMENTAL "AD" VENTURE

THURSDAY, July 31, 1997

7:30 - 8:45 Registration - *"When You Care Enough To Send The Very Best"*

Continental Breakfast - *"Leggo My Eggo"*

8:45 - 9:00 Welcoming Remarks - *"Enjoy The Ride"*

Jeff Civins - Kelly, Hart & Hallman, Austin
Mehron Azarmehr - State Bar, Environmental & Natural Resources Law Section
Al Axe - Air & Waste Management Association
Martha Martin - Water Environment Association of Texas

Moderator: Art Bedrosian - Zephyr Environmental Corporation, Austin

9:00 - 9:45 Water Rights - The Significance of SB 1 - *"You're Soaking In It"*

Moderator: John Baker, Commissioner - TNRCC

Speakers: Molly Cagle - Vinson & Elkins, Austin
Stuart Henry - Henry, Lowerre, Hess & Frederick, Austin
James Kowis - TNRCC

9:45 - 10:15 Superfund Update - *"It's Stronger Than Dirt"*

Speaker: Steve Morton - Jenkens & Gilchrist, Austin

10:15 -10:30 Coffee Break - *"Good To The Last Drop"*

10:30 - 11:00 Clean Air Act ("CAA") Title V Interim Program - *"It Just Keeps Going And Going And Going...."*

Speaker: Karen Olson - TNRCC

11:00 - 11:30 CAA Title V Compliance Strategies - *"Just Do It"*

Speaker: Brad Raffle - Hutcheson & Grundy, Houston

11:30 - 12:00 CAA New Source Review - *"Something Special In The Air"*

Speaker: David Cabe - Zephyr Environmental Corporation, Austin

12:00 - 1:15 Lunch - *"Finger Lickin Good"*

Moderator: Walt Shelton - Shelton & Dewan, Austin

1:15 - 1:45 **New Legislation** - ***"It's Shake And Bake, And I Helped"***

Speaker: John Howard
Director - Environment & Natural Resources, Governor's Office

1:45 - 2:05 **Toxicology, Epidemiology & Risk Assessment in Environmental Programs** ***"Doctors Recommend It Three to One"***

Speaker: Thomas Musta-Dydek - Musta-Dydek Enterprises, Austin

2:05 - 2:25 **Voluntary Cleanup Update** - ***"The Quicker Picker Upper"***

Speaker: Chuck Epperson - TNRCC

2:25 - 2:45 **Risk Reduction Rules** - ♪***"You're Not Really Clean Until You're Zestfully Clean"***♪

Speaker: Ron Pedde - TNRCC

2:45 - 3:05 **Legal Issues Related to VCP/RRR** - ***"Take It Off, Take It All Off"***

Speaker: Debra Baker - Mayor, Day, Caldwell & Keeton, Houston

3:05 - 3:20 **Cookie Break** - ***"Got Milk?"***

3:20 - 3:45 **TNRCC Decision Making - An Inside Look** - ***"The Loneliest Job In The World"***

Speaker: Geoff Connor, General Counsel - TNRCC

3:45 - 4:50 **Emerging Environmental Technologies** -***"Better Living Through Chemistry"***

Groundwater Remediation - ***"Lifts and Separates"***

Speaker: John Loper - Roux Assoc., Inc., Houston

Supercritical Oxidation - ***"Kills Germs On Contact"***

Speaker: Dick Lyon - Eco Waste Technologies, Austin

Forensic·Residential Sampling - ***"A Little Dab'll Do Ya"***

Speaker: Herndon Williams - Radian Corporation, Austin

4:50 - 5:15 **Strategic Environmental Management** - ***"It's Not Nice To Fool Mother Nature"***

Speaker: Bill Wilder - Spring, Texas

5:15 - 6:00 **Cash Bar Reception** - ***"It's Miller Time"***

Complimentary soft drinks, wine and cheese are being provided by the West Group.

FRIDAY, AUGUST 1, 1997

8:00 - 8:45 **Continental Breakfast** - *"Breakfast Of Champions"*

Moderator: Jeff Gordon - Mayor, Day, Caldwell & Keeton, Austin

8:45 - 9:35 **Strategies for Toxic Tort Litigation** - *"You Can Pay Me Now, Or You Can Pay Me Later"*

Plaintiff Speaker: Kay Gunderson Reeves - Baron & Budd, Dallas

Defendant Speaker: Wes Harris - Kelly, Hart & Hallman, Fort Worth

9:35 - 10:00 **Technical Approaches to Resolving Toxic Tort Issues** - *"We Do The Work So You Don't Have To"*

Speaker: Devraj Sharma - Principia Mathematica, Denver, Colorado

10:00 - 10:20 **The Use of Demonstrative Evidence in Environmental Cases** - *"The Next Best Thing To Being There"*

Speaker: Marty W. Jones - Peterson, Farris, Doores & Jones, Amarillo
Mark Smith - GradyAlan, Inc., Austin

10:20 - 10:35 **Coffee Break** - ♪*"You Deserve A Break Today"*♪

10:35 - 11:00 **Federal Enforcement - Issues of Federalism** - *"You're In Good Hands"*

Speaker: Lois Schiffer, Assistant U.S. Attorney General - D.C.

11:00 - 11:25 **TNRCC's Implementation of Federal Programs** - *"Mother, PLEASE...I'd Rather Do It Myself"*

Speaker: Barry McBee, Chairman - TNRCC

11:25 - 12:00 **Roundtable Discussion of Federalism** - ♪*"I'd Like To Teach The World To Sing In Perfect Harmony"*♪

Speakers: Mary E. Kelly, Texas Center for Policy Studies, Austin
Barry McBee, Chairman - TNRCC
Hal Ray, Assistant Texas Attorney General
Lois Schiffer, Assistant Attorney General - Environment and Natural Resources Division, Dept. of Justice, D.C.
Bob Wilson, McGinnis, Lochridge & Kilgore, Austin

12:00 - 1:15 **Lunch** - *"Make A Run For The Border"*

Moderator: Carol Batterton - TNRCC

1:15 - 2:00 **Criminal Environmental Enforcement** - *"Get A Rope"*

Speakers: Federal - Gordon Young, Assistant U.S. Attorney, Houston
State - John Riley - TNRCC

2:00 - 3:00 **Expert Witness/Mock Examination** - *"Home of the Whopper"*

Speakers: Expert Witness - Davis Ford - Austin
Judge - The Honorable Margaret Cooper, Judge - Travis County District Court, Austin
Plaintiff - Mike Gallagher - Gallagher, Lewis & Downey, Houston
Defense - Carrick Brooke-Davidson - Austin (former Senior Attorney, Enviromental Enforcement Section Dept. of Justice, D.C.)

3:00 - 4:00 **Open Mike** - *"Inquiring Minds Want To Know"*

Moderator: Ralph Marquez, Commissioner - TNRCC

Speakers: Ramon Dasch - TNRCC
Beverly Hartsock - TNRCC
Ann McGinley - TNRCC
Ken Petersen - TNRCC
Jeff Saitas - TNRCC

4:00 **Adjourn** - ♪*"Plop, Plop, Fizz, Fizz, Oh What A Relief It Is"*♪

Ice Cream Reception - *"Hefty, Hefty, Hefty"*

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 program has been approved by the State Bar of Texas for 12.25 Hours in Continuing Legal Education Credits, including 1 hour of Ethics, and for credit towards requirements for certification by the Texas Board of Legal Specialization in Real Estate Law, Litigation, and Administrative Law.

1997 Planning Committee

Jeff Civins
Kelly, Hart & Hallman, P.C.
Austin, Texas

Jack Kramer
TNRCC
Austin, Texas

Gregg Cooke
Haynes & Boone
Austin, Texas

Brad Raffle
Hutcheson & Grundy
Austin, Texas

Jeff Gordon
Mayor, Day, Caldwell & Keeton, L.L.P.
Austin, Texas

Carol Batterton
TNRCC
Austin, Texas

Margaret Menicucci
Kelly, Hart & Hallman
Austin, Texas

Al Axe
Jenkens & Gilchrist
Austin, Texas

Art Bedrosian
Zephyr Environmental Corporation
Austin, Texas

Rhonda Harris
Professional Operations, Inc.
Plano, Texas

Four Seasons Hotel
98 San Jacinto Blvd.
Austin, Texas

(512) 478-4500

Parking

The Four Seasons provides validated, free parking in its garage, but space is limited. Paid parking is available at the Convention Center garage, or at nearby lots.

NINTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

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   James Kowis

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   Robert L. Soza

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   Karen Olson

6. Clean Air Act Title V Compliance Strategies
   Brad Raffle

7. Minor New Source Review
   David Cabe

D. LEGISLATIVE UPDATE

8. New Legislation
   John Howard

E. CLEANUP AND RISK ASSESSMENT

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   Thomas Musta-Dydek

10. Voluntary Cleanup Update
    Chuck Epperson

11. Texas Risk Reduction Program
    Ron Pedde

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    Geoffrey S. Connor

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    John Loper

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    Dick Lyon

    Operation of the First Supercritical Water Oxidation Industrial Waste Facility
    R. N. McBrayer
    J. W. Griffith

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    C. Herndon Williams

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    Stephen G. Jones

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    Lois Schiffer

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    Barry McBee

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    Mary E. Kelly
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    Bob Wilson

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    Carrick Brooke-Davidson

M. OPEN MIKE

30. **Notes**

Ralph Marquez
Ramon Dasch
Beverly Hartsock
Ann McGinley
Ken Petersen
Jeff Saitas

N. MODERATORS' BIOGRAPHICAL INFORMATION

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 brings to the TNRCC an extensive background in farming, agricultural science, and environmental issues in agriculture. He is committed to fulfilling the TNRCC's mission statement: to protect the human and natural resources of Texas in a manner consistent with sustainable economic development.

During his first year at the agency, Commissioner Baker helped formulate a set of guiding principles that calls for using common sense and good science as a basis for all Commission decisions and regulations. As sponsoring Commissioner for agricultural and water issues at the TNRCC, he has worked closely with other state and federal agencies in responding to the water supply issues resulting from the drought of 1996. Commissioner Baker currently is leading the TNRCC's efforts to help develop new options for more efficiently and effectively managing water resources in Texas.

From 1991 to 1993 in the Bush Presidency, Commissioner Baker served as Agricultural Advisor to EPA Administrator William K. Reilly, providing guidance on the development of regulations affecting agricultural producers. He has more than 20 years of experience serving on the Boards of Directors for several agricultural producer groups, including the Texas Farm Bureau, where he served as Vice-President for three years.

Commissioner Baker is a former tenured professor of Soil Science and Agronomy at Oklahoma State University, where he earned a doctoral degree in Soil Science in 1970. He earned M.S. and B.S. degrees in Agronomy from Oklahoma State University and Texas A&I University, respectively. Since 1974, he and his wife Bobbie have operated a 2,500-acre row crop and beef cattle operation that uses state-of-the-art water and soil conservation measures and integrated pest management.

The Bakers have two daughters and four grandchildren.

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Ninth Annual Texas Environmental Superconference

Water Rights



WATER RIGHTS -
The Significance of SB 1

"You're Soaking In It"

MOLLY CAGLE
JAMES KOWIS

AN OVERVIEW OF S.B. 1

By
Molly Cagle
Vinson & Elkins L.L.P.
&
James Kowis
Texas Natural Resource Conservation Commission

S. B. 1

By Molly Cagle
Vinson & Elkins L.L.P.
&
James Kowis
Texas Natural Resource Conservation Commission

ARTICLE 1. STATE WATER PLAN: DROUGHT RESPONSE, CONSERVATION, DEVELOPMENT, AND MANAGEMENT

- State Water Plan - Texas Water Development Board

- State Drought Planning Framework - Division of Emergency Management (Governor's Office)

  1. Water Conservation Plan -
     > 1,000 AF/year, Indust./Municipal
     > 10,000 AF/year, Irrigation

  2. Drought Contingency Plans -
     Wholesale & Retail Public Water Suppliers; Irrigation Districts

- Research, Development and Planning - Political Subdivisions for Non-Texas Water

ARTICLE 2. WATER MANAGEMENT, MARKETING & TRANSFERS

- Reuse Criteria

    1. Conservation of Water as a "Beneficial Use"

    2. Bed and Banks Permit

    3. Water Quality Permit

    4. In Granting a Water Right, TNRCC May Require Return of Surplus Water

        a. to Protect Downstream Water Rights

        b. to Provide Flows for Instream Uses

        c. to Provide Flows for Freshwater Inflows

- Temporary Water Sales

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- Interbasin Transfer Guidelines
    1. Administrative Aspects
    2. Junior Rights
    3. Exceptions
- Cancellation of Water Rights
- Enhances Texas Water Bank

ARTICLE 3. EMERGENCY AUTHORIZATIONS: ENFORCEMENT

- Maximum Administrative Penalty
- Strengthens Watermaster Program
- Emergency Water Transfers

ARTICLE 4. SURFACE WATER AND GROUNDWATER SUPPLIES

- Confirms Groundwater Conservation Districts
- Surface/Groundwater Connections
- Alternative Water Supplies
- Priority Groundwater Management Areas
    1. By September 1, 1998, Water Development Board & TNRCC Must Complete all Pending Studies
    2. County Commissioners Courts May Prevent Development for Inadequate Water Supply
- Groundwater Management
    1. Loan Assistance
    2. Collect Fees
    3. Regulate the Export of Groundwater From the District

ARTICLE 5. FINANCIAL ASSISTANCE TO LOCAL GOVERNMENTS

ARTICLE 6. SMALL COMMUNITIES ASSISTANCE

ARTICLE 7. WATER DATA COLLECTION AND DISSEMINATION STUDIES, INVESTIGATIONS AND SURVEYS

- By December 31, 1999, TNRCC Must Obtain or Develop an Updated Water Availability Model

  1. Project water rights at 75% and 50% of normal flow

  2. Project regional water supply if cancellation procedures were instigated

  3. Determine the maximum amount of municipal effluent that may be reused

ARTICLE 8. INTERIM COMMITTEE ON WATER RESOURCES DEVELOPMENT AND MANAGEMENT

ARTICLE 9. REPEALER

- Wagstaff Act

BENEFITS
OF
SB1

Bill Provision	Benefits
Article 1 **State Water Plan, Regional Water Plans, Drought Response** · TWDB, in coordination with TNRCC and Texas Parks and Wildlife Department, to adopt guidance principles for the state water plan. · Requires the TWDB to designate regional water planning areas, by September 1, 1998 and designate initial members of the regional planning group · Regional water plans completed by September 1, 2000, considering local plans · TWDB to resolve any disputes between regions. · TWDB to adopt a state water plan by September 1, 2001 which incorporates approved regional water plans · Identification of streams with unique ecological value and sites with unique value for reservoir construction · TWDB may provide financial assistance only if the project is consistent with an approved regional water plan. (§§1.01, 1.02)	· Regional plans will improve opportunities for coordination between local water service providers, provide better acceptance of water plans in the regions, result in additional information being available on water supplies and drought response plans, and better identify potential local/regional problems and solutions · Promotes regional plans as the foundation and substance of the State Water Plan · Provides that the State Water Plan will incorporate approved regional water plans · The TWDB provides guidance and serves as a financial and technical partner to the regional planning groups · Legislature may protect streams with unique ecological value and sites with unique value for reservoir construction identified through the planning process
Out-of State Planning, Research, and Project Financing: Provides for expanded use of TWDB finance program for activities outside Texas by Texas political subdivisions, if the activity would benefit Texas. (§§ 1.04-1.05, 5.04)	· Because Texas shares some water resources with its neighbors, Texas could benefit from water supply and water quality enhancement projects outside the boundaries of Texas. · For example, El Paso is working with its neighbors on water issues. Also the Canadian River Municipal Water Authority is working in New Mexico.

Reuse: Provides clear statutory guidance for the authorization to reuse water (§§2.02, 2.05-2.07).	Clear guidance is necessary to avoid unnecessary litigation. This balanced approach promotes reuse while also providing protection to downstream water rights. The existing provision in the bill has been worked out among the affected stakeholders.
Interbasin Transfers: Provides clear statutory guidance for TNRCC review and action on an application for the interbasin transfer of water Certain transfers are exempted: · Emergency transfers · Transfers totaling less than 3,000 acre-feet · Transfers to counties, cities, city retail water service area partially in a basin · Transfers to adjacent coastal basins Interbasin transfers shall be junior in priority to existing water rights in the basin (§§2.01 & 2.08).	· Clear guidance is necessary to avoid unnecessary litigation. Specific criteria is needed to adequately weigh the impacts of the proposed transfer on the basin-of-origin against the benefits to the receiving basin. · Additional notice and hearing requirements will provide for enhanced public input. · Provisions for the mitigation or compensation to the basin-of-origin for the transfer may help offset any impacts from the transfer. · Limiting the term of a transfer to the term of the underlying water supply contract will also help avoid unnecessary litigation.
Water Right Cancellation: Protects water rights being held for demonstrated long-term water supply needs from cancellation for non-use. Removes the evidentiary burden requiring the TNRCC to disprove the future intentions of a holder of an unused water right. Avoids an unnecessary hearing if the right to the cancellation hearing has been waived by the water right holder (§2.12).	· Removes a difficult and unnecessary evidentiary burden that has had the practical effect of eliminating the justified cancellation of unused water rights so that they may be re-allocated to those who need the water. · Retains the cancellation exemption for a water right held to meet a demonstrated long-term need and adds that the right should be maintained if it is consistent with an approved regional water plan.
State Water Bank: · Directs TWDB to facilitate the voluntary marketing and transfer of unused water rights · Allows deposit of an entire water right in the bank where it is protected from cancellation · Allows a water right to be deposited into the State Water Trust for environmental flow maintenance purposes (§§2.13-2.17).	· Encourages the deposit of unused water rights into the State's Water Bank where willing sellers may sell water rights to willing buyers to meet alternative and future water needs. · Provides a voluntary mechanism for the donation of unused water rights to help maintain environmental water needs.

Article 4 **Commission Consideration of State/Regional Water Plans and Effects on Groundwater:** In considering a surface water right application the TNRCC shall: · Consider the state water plan and any approved regional water plan(§4.01); and · Consider effects, if any, on groundwater or groundwater recharge · After September 1, 2001, no municipal water right may be issued for an area without an approved regional water plan (§4.02).	· Provides statutory guidance to the TNRCC in relation to water right permitting actions. · Protects groundwater resources from being depleted by proposed upstream surface water diversions. · Promotes true conjunctive management of water resources in the state. · Promotes completion of regional water plan
Aquifer Storage and Retrieval Projects: Allows the Commission to grant a final order for aquifer storage and retrieval pilot or historical projects shown to be feasible (§§4.03-4.05).	· Removes the arbritary date of June 1, 1999 from existing language. · Allows feasible projects to begin operation sooner than originally anticipated under statute approved in 1995.
TWDB Agricultural Water Conservation Loans, Brush Control, Precipitation enhancement, Unsafe Dam Repair, Out-of-State Projects: Authorizes the TWDB to make loans for precipitation enhancement, brush control, repairs of unsafe dams, water projects outside Texas when such use would benefit Texas, the cost of buying and installing irrigation water-flow meters on public or private property, and planning and activities to obtain local, state, and federal regulatory approvals. (§ 4.07 - 4.09)	Makes activities to enhance water supply eligible for funding. Allows districts to borrow funds for meters located on private property to measure diversion or withdrawal of irrigation water.
Designation of Priority Groundwater Areas (PGMA): Streamlines the designation of PGMAs and creation of groundwater districts in PGMAs (§§4.11-4.18, 4.20 & 4.22-4.26).	· Avoids unnecessary or duplicative hearings and procedures. This will reduce the time to create a district in a PGMA, if needed, from 4 years to 1.5 years. · Allows local county officials the opportunity to appoint temporary board of directors for districts created for a PGMA. · Establishes an educational effort to inform residents in the proposed district of the status of groundwater resources in the area and their management options.

Transfers Out of Groundwater Districts Allows groundwater district to require permits for transfer out of a district. District may limit transfers if warranted by the following: · availability of water in district and receiving area · availability of alternatives to applicant · projected effect of the transfer in the district · approved regional water plan and certified district management plan Does not apply to groundwater purchased on or before June 1, 1997 or to transfers begun or increased prior to September 1, 1997. (§4.33).	Provides districts with the ability to limit transfers out of the district if necessary for proper management of the resource.
Funds Available to Groundwater Districts: Allows the TWDB to allocate funds to groundwater districts for data collection and development of management plans and regional plans. (§4.34).	Provides the groundwater districts with a source of funds to pursue the needed data collection and planning functions necessary to manage the groundwater resources within their district.
Groundwater District Performance Review and Commission Actions: · Provides that the State Auditor shall determine whether a district is actively engaged in implementing its management plan · Establishes procedures and actions the TNRCC may take in ensuring district compliance with requirements established in Chapter 36. · Requires newly created districts to hold a confirmation election within two years of the effective date of its creation (§4.36).	· Provides for a review process for determining whether a district is achieving the objectives of its management plan. · Provides the TNRCC guidance in determining which actions the agency could take if a district does not comply with provisions established by the Legislature. · Statutorily dissolves districts created by the Legislature which do not hold a confirmation election within the time period specified by the Legislature.
Groundwater District Loan Assistance Fund Provides for TWDB to provide loans to assist districts to pay initial operation and creation expenses (§4.39).	Provides a State source for needed start-up loans.
Sales Tax Exemption: Amends Section 151.318, Tax Code, to expand the current sales tax exemption for the purchase of pollution control equipment to include water conservation and reuse equipment. (§ 4.40)	Promotes water conservation by providing a tax incentive to those persons investing in technology for conserving the limited water supplies in the state.
Rules Regarding Drinking Water Standards Provides for public meetings, if requested, at TNRCC regional offices on statewide drinking water standards. (§4.41).	Provides for additional opportunities for public input into the program

Consolidation of TWDB Bond Authorization and Funds Flexibility: Creates the Texas Water Development Fund II as a separate fund from the existing Development Fund to accomplish two main objectives: · **Consolidation of existing TWDB bond authorizations.** Pursuant to the passage of a constitutional amendment (SJR 17), provides for the consolidation of existing voter-approved TWDB bond authorizations, including water quality, water supply, flood control, and state participation, to fully maximize funds available to local governments in developing water resource projects. Authorizes the TWDB to issue Development Fund II bonds for any of the existing constitutional purposes in amounts not to exceed the existing outstanding constitutional authorizations for Development Fund Bonds. · **Funds Flexibility.** Changes the requirement that the TWDB maintain a debt service reserve fund for outstanding TWDB general obligation bonds, and revises the method for requesting general revenues if needed to pay bond debt service. Authorizes the TWDB to enter into bond enhancement agreements in administration of its general revenue pledge programs. (§ 5.03- 5.08)	· Removes existing restrictions so that TWDB can loan local governments more than $1.1 billion in existing, outstanding general obligation bond authorization for water supply, wastewater, and flood control projects without limitations on bond amounts allocated to specific purposes, if related constitutional amendment is approved by voters · Delays the need for seeking new voter-authorized general obligation bonds which would raise state debt authorization. · Changes inefficient and antiquated bond fund operating requirements which do not enhance the rating of these general obligation bonds and unnecessarily encumbers money. · The proposed language clarifies TWDB's authority to enter into interest rate swaps and other bond enhancement agreements for its general obligation bonds, as are available to the TWDB in its revenue bond programs, the Veterans Land Program and other Texas issuers.

Improvements in Service for Customers of Inadequate or Inferior systems: Clarifies TNRCC authority: · to order improvements in service, especially in EDAP areas; · to require noncompliant systems to do business planning to promote more consistent, quality service; · to require financial assurance and the ability to access that financial assurance to make improvements; · to require systems with inadequate sources of water to obtain an acceptable wholesale supply from a neighboring utility service provider; And by: · clarifying the conditions under which TNRCC can seek a receiver to take over a system; · requiring prompt notice and enforcement action by TNRCC in cases of imminent health threats; and, · establishing a Water Utility Improvement Account for fines against investor owned utilities which would be available in certain instances to fund system improvements or offset receivership expenses. (§§ 6.09, 6.13, 6.14, 6.21-23, 6.28, 6.29 & 6.30)	· Promotes improved service for customers currently receiving inferior or unreliable service. · Ensures State statutes will meet minimum federal requirements for penalty authority in enforcement case, thereby not jeopardizing delegation of the SDWA program.

Geographical Information Council: · Creates the Texas Geographical Information Council (TGIC) to provide strategic planning and coordination in the acquisition and use of geographical data and related technologies. The TGIC is made up of designees of the TWDB and Department of Information Resources. · Requires the TGIC to make recommendations to the Department of Information Resources on standards for data sharing. (§ 7.02)	· Modernizes TNRIS' role to bring electronic data sharing into state government. · Enhances data availability and minimizes duplication of effort by requiring interagency coordination and data sharing.
Statewide Computer Mapping System: Directs the TWDB to develop, maintain, and make available statewide digital base maps commonly needed by multiple state and local agencies. Maps will depict water and transportation systems, land surface elevations, soils types, and political boundaries.	· Provides vital information for water and environmental planning and management · Cost-share will leverage at least 2 federal matching dollars for each state dollar spent · Will reduce duplication of effort and promote private business activities · Centrally managed program will provide high efficiencies and provide product standardization.

Molly Cagle
Vinson & Elkins L.L.P.

Molly Cagle is a partner in the firm's Austin office. Her principal area of practice is administrative law, specializing in environmental law.

Molly counsels various clients on virtually every kind of environmental matter before all kinds of agencies. In the enforcement area, she has represented clients before state and federal agencies and has litigated and negotiated settlements under the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, and their state analogs. Molly was lead counsel in negotiating a settlement with the Texas Water Commission in a case involving the first administrative penalty sought under the Water Code and later in a case involving the largest fine ever sought by that regulatory agency. The latter case concerned alleged water code, solid waste act, and emission violations and required coordination with multiple state and federal agencies. Molly also was retained as special settlement counsel to pursue a multi-agency settlement in a nationally known enforcement case in Louisiana.

Permitting work before the Texas Natural Resource Conservation Commission (and its predecessor agencies, the Water Commission and Air Control Board) and the U.S. Environmental Protection Agency is Molly's other major administrative practice area. She has successfully obtained environmental permits in a number of controversial wastewater cases for municipal and private sector clients. Molly recently negotiated a multi agency agreement relating to the inapplicability of certain pretreatment requirements, thereby allowing a client to implement process modifications without regulatory interference. These negotiations specifically involved the integration of the Electrical and Electronic Components Category pretreatment requirements with those for other industry categories. Molly is actively involved in the State's efforts to review and revise metal limits under the Texas Water Quality Standards. She also handles clean water cases, including those dealing with raw water supply. She is examining reuse issues related to the electronics industry on behalf of both supply and demand side clients.

With regard to air and solid waste, Molly has handled a variety of contested cases, including incinerator and BIF air and hazardous waste permitting. She presently is handling the State's first NSR/PSD contested permit proceeding.

In addition to these contested cases, Molly counsels clients on a variety of rulemaking and regulatory compliance issues. She has participated in work groups responsible for drafting the State's spill reporting and audit privilege rules, as well as rules regarding the hearing process. She has assisted clients with lobbying and in preparing comments on a variety of water, air, and multimedia legislative and rulemaking packages. Molly also advises clients on day-to-day environmental problems ranging from notice requirements to implementation of the State's risk reduction rules.

Molly is a member of the ABA Sections of Natural Resources, Energy, and Environmental Law, and the State Bar of Texas Sections of Administrative & Public Law and Environmental and Natural Resources. At the request of the Texas Natural Resource Conservation Commission, Molly served on Task Force 21, a regulatory negotiation committee for developing environmental rules and policies in Texas. She has authored numerous environmental articles and frequently lectures at environmental courses. Additionally, Molly has testified before the United States and Texas Senate and has served as a testifying expert in a number of cases.
Molly attended the University of Southwestern Louisiana and graduated from Texas Tech, B.S. *magna cum laude* in engineering technology and textile chemistry in 1978. Molly graduated from The University of Texas School of Law, J.D. with honors in 1981. She was admitted to practice in Texas in 1981.

WATER RIGHTS -
The Significance of SB 1

"You're Soaking In It"

STUART HENRY

NOTES

Biographical Sketch- Stuart N. Henry

Stuart N. Henry is senior partner of Henry, Lowerre, Johnson, Hess and Frederick in Austin, Texas, where he has most recently been involved in extensive federal court litigation over groundwater/springflow issues and the Endangered Species Act. In addition to environmental litigation, he also practices administrative law on behalf of cities, counties, citizen groups, landowners, and individuals before state environmental agencies and state and federal district and appellate courts.

Mr. Henry has written and lectured on legal topics relating to administrative law, regulatory takings, groundwater regulation and the Endangered Species Act.

He earned his J.D. with emphasis on urban and environmental law from South Texas College of Law in 1970, graduated from the University of Southern California Air Pollution Control Institute in 1968, and received his B.A. from the University of Texas in 1967. He is admitted to the bars of the State of Texas, the Western, Northern and Southern Districts of Texas, the United States Fifth Circuit and the United States Supreme Court.

WATER RIGHTS -
The Significance of SB 1
"You're Soaking In It"

JAMES KOWIS

NOTES

JAMES KOWIS

James is presently a Senior Technical Specialist in the Water Policy and Regulations Division of the Office of Policy and Regulatory Development at the Texas Natural Resource Conservation Commission.

Born and raised on a dairy farm in northern Harris County near Tomball, Texas. After graduation from high school, James attended Texas A&M University and received a BS degree in Agricultural Engineering in December, 1970. After college, he worked as a Research Assistant for the Agricultural Engineering Dept. at A&M from Feb-Dec of 1971 on the design and operation of the first cotton module builder.

James began his career with the water agencies in Jan. 1972 as a Engineering Assistant in the Water Rights Division of the Texas Water Rights Commission. He has held a number of management positions through the years with the water agencies. His experience at the Commission has centered around the statewide adjudication of surface water rights, dam and levee safety, flood management, water rights and water quality permitting, protection and management of ground water resources, watermaster operations and the overall enforcement of the above functions. He has been a Registered Professional Engineer since August, 1975.

Ninth Annual Texas Environmental Superconference

Superfund



SUPERFUND UPDATE

"It's Stronger Than Dirt"

STEVE MORTON
AND
ROBERT L. SOZA

1997 UPDATE ON

FEDERAL AND STATE SUPERFUND LAW

Presented at

The Ninth Annual Texas Environmental Superconference

July 31, 1997

by

Steve Morton
Robert L. Soza

Jenkens & Gilchrist, P.C.

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Appendix I House Bill 2776

I. Introduction

This paper discusses recent developments in Federal and Texas Superfund Law. The first part of this paper deals with recent decisions in the Federal Courts regarding the private cost recovery provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, ("CERCLA"). The second half of this paper discusses recent legislative changes to the Texas Superfund program. This paper is merely a guide to practitioners and is not intended to express any view, opinion or prediction as to how the law applies in particular situations. It is recommended that each attorney analyze the particular facts of his or her client's situation to determine how these developments may impact a particular client.[1]

II. Case Law Update

A. Presentation of Issue. The following fact situation will be used to illustrate the various positions that can be taken by litigants and Courts in CERCLA cost recovery actions under recent case law developments:

> Super-Brite Cleaners, a dry cleaning business, seeks advice with regards to a contaminated piece of property that it purchased many years ago and on which it has begun remedial measures to address contamination in the subsurface. Super-Brite's environmental engineers have detected volatile organic compounds consistent with tetrachloroethylene ("TCE") contamination. One of the three prior occupiers of the property, Mega-Steel Fabricators, is a large, solvent (no pun intended) entity that manufactured heavy machinery on the property. The remediation activities have been underway for the past four years. Super-Brite now wants to file a lawsuit against all prior owners/operators of the property to recover costs associated with past and future remediation activities.[2]

B. Joint and Several Claims vs. Contribution Claim

1. Super-Brite. Super-Brite files an action in federal court against Mega-Steel and three other companies alleging that these defendants are liable to it under 42 U.S.C. §§ 9607(a) and 9613(f) (hereinafter §§ 107(a) and 113(f)) for all cleanup costs it has expended to date, and all cleanup costs that it will expend in the future. Super-Brite would prefer to have its cause of action classified as a 107(a) ("direct") action because, if successful, it would make Mega-Steel jointly and severally liable for the whole amount of clean-up, thus shifting the burden to Mega-Steel to seek contribution from other PRPs or to absorb any "orphan share" of liability. Furthermore, the statute of limitations under a 107(a) claim is six years from initiation of physical

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[1] This paper was prepared by Steve Morton and Robert Soza. Steve is a shareholder with the Austin office of Jenkens & Gilchrist and a member of the firm's Environmental Practice Group. Steve has extensive experience representing clients in environmental matters. Robert is a senior associate in the Jenkens & Gilchrist San Antonio Office. Robert represents clients in Superfund related cost recovery actions under Federal and State environmental laws.

[2] We were just hired, so we have no idea why they waited this long.

on site construction of the remedial action and thus would allow Super-Brite to ensure that all of its cleanup costs are included in the cost recovery action.[3]

Super-Brite relies on a number of Circuit decisions which cite to *dicta* in the *Key Tronic* Supreme Court case in holding that potentially responsible parties may assert both § 107(a) and § 113(f) claims against other potentially responsible parties. *See Key Tronic v. United States* 114 S.Ct. 1960, 128 L.Ed.2d at 805 ("[CERCLA] now expressly authorizes a cause of action for contribution in §113 and impliedly authorizes a similar and somewhat overlapping remedy in §107"); *see also Velsicol Chemical Corp. v. Enenco, Inc.*, 9 F.3d 524, 526-527 (6th Cir. 1993) *reh'g denied en banc* (6th Cir. 1994), (Court allowed a party that agreed to perform a remediation plan with the EPA to bring both § 107 and § 113 claims against other responsible parties without a discussion of the overlapping coverage under § 107 and § 113), and *In re Dant & Russell, Inc.*, 951 F.2d 246, 247-249 (9th Cir. 1991) (The Ninth Circuit implicitly allowed a party that had incurred response costs for remediation under an agreement with the EPA to bring action for past costs against other responsible parties under both § 107 and § 113 without any discussion of the overlapping coverage of both provisions.)[4]

2. Mega-Steel. In its defense, Mega-Steel files a Motion To Dismiss asserting that because Super-Brite has liability as a current "owner and operator," it lacks any standing to file direct § 107(a) claims against any defendants, and is limited to a §113(f) contribution claim. Mega-Steel would like to classify Super-Brite's causes of action as contribution actions and thereby eliminate the possibility that Mega-Steel will be found jointly and severally liable. It is well established that liability under § 113(f) is not joint, but is several. Under § 113(f) courts are authorized to apportion liability based on equitable factors. *See* CERCLA § 113(f)(1) and *Saco Steel Company v. Saco Defense, Inc.*, 910 F.Supp. 803, 809 (D.C. Maine 1996). Furthermore, the statute of limitations for a contribution cause of action is three years after a judgment for cleanup costs or the date a court approves settlement with respect to cleanup costs. *See* CERCLA § 113(g)(3).

The First, Third, Seventh, Tenth and Eleventh Circuits have expressly determined that potentially responsible parties ("PRPs") do not have joint and several claims under § 9607 against other PRPs and may only recover costs in CERCLA litigation pursuant to § 113. *United*

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[3] 42 U.S.C. § 9613(g)(2).

[4] Some parties have argued that 107 claims may be asserted against parties that have obtained contribution protection from the government. This position has been soundly rejected. *Adhesives Research Inc. v. American Inks & Coatings Corp.*, 931 F.Supp. 1231, 1242 n.8 (M.D.Pa. 1996) ("If a nonsettlor were permitted to pursue a cost recovery claim against a settlor, the contribution protection provided by §113 would effectively be nullified. In such a case, the nonsettlor would theoretically be permitted to recover all response costs (not just the amount expended beyond its equitable share). Such an outcome would abrogate the protections afforded to parties who promptly settle their liability."); *Pinal Creek Group v. Newmont Mining Corp.*, 926 F.Supp. 1400, 1409 (D.Ariz. 1996) ("Where a plaintiff brings a Section 107 claim merely to circumvent contribution protection granted by the government to another party pursuant to section 113(f)(2), or to avoid the shorter statute of limitations for contribution actions, CERCLA policy militates against allowing Section 107 standing.").

Technologies Corp. v. Browning Ferris Industries, Inc., 33 F.3d 96, 97 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 1176 (1995); *In the Matter of Reading Company*, ____ F.3d ___, 1997 WL 318065 (3d Cir. 1997); *Akzo Coating, Inc v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994); *United States v. Colorado Eastern R.R. Co.*, 1994 W.L. 647329 (10th Cir. 1994) *aff'd on rehearing*, 50 F.3d 1530 (10th Cir. 1995); and *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996) ("[a]s a matter of law . . . [Redwing's] CERCLA claims . . . are claims for contribution governed by § 113(f). . . [, and] to bring a cost recovery action based solely on § 107(a), Redwing would have to be an innocent party . . .")

Despite the fact that the Fifth Circuit Court of Appeals has not been presented with arguments regarding whether a potentially responsible party is precluded from asserting a § 107 claim, numerous Courts cite *Amoco Oil Co. v. Borden, Inc.* for the proposition that potentially responsible parties are limited to contribution claims. *Amoco Oil Co. Borden, Inc.* 889 F.2d 664, 672 (5th Cir. 1990) ("When one liable party sues another to recover its equitable share of the response cost, the action is one for contribution. . . .") In *Amoco Oil*, Amoco, the Plaintiff, was the owner of the land containing the gypsum piles, and thus could not argue that it was an "innocent party" that could assert § 107 claims. In a recent Texas Federal District Court summary judgment opinion that has not been appealed,[5] Judge Kent held that the plaintiff, a former lessee of contaminated property, was limited to contribution claims and could not assert a § 107 claim. This is the only case in the Fifth Circuit discussing this issue.

C. Who Is An Innocent Party?

1. Super-Brite. Super-Brite argues that even if the Court believes a distinction is to be made between persons that may assert § 107(a) and § 113(f) claims, Super-Brite is an "innocent party," not a PRP, and thus it is exempted from the limitation of a § 113 action. Super-Brite argues that it completely relied upon the representations of the now-defunct seller of the property in purchasing the property, and that it was not aware of the contamination prior to its purchase of the property. Super-Brite learned of the problem after a lender required an environmental assessment as a pre-condition to re-financing[6]. Super-Brite claims that because its' CERCLA liability stems only from the fact that it is an "owner" of contaminated property it should be able to bring a § 107(a) action. *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994)(providing that if a landowner faces liability solely because a third party spilled or allowed hazardous waste to migrate onto its property, the landowner may directly sue for its response costs); *see also AM Intern., Inc, v. Datacare Corp* 106 F.3d 1342, 1347 (7th Cir. 1997) (allowing a landowner to sue under § 107(a) even though it knew before it purchased the property that it was

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[5] March 19, 1997 Order, *Clear Lake Properties v. Rockwell International Corp. et al* (Civil Action No. G-95-288), Galveston Division of the Southern District of Texas.

[6] Because it did not perform an environmental assessment of the property prior to purchase, it cannot, however, argue that it is an "innocent purchaser" under CERCLA § 107(b)(3).

contaminated); *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.* 107 F.3d 1235 (7th Cir. 1977).[7]

Super-Brite asserts that the mere fact that Mega-Steel has claimed that Super-Brite is not an innocent party does not establish what kind of CERCLA claim Super-Brite may bring. *Saco Steel Company v. Saco Defense, Inc.*, 910 F.Supp. 803, 809-810, n8 (D.C. Maine, 1996) (holding a party to be an innocent party for purposes of allowing the party to pursue § 107 claims, because "...[no] other party produced any evidence to show that [Plaintiff] actually bears joint and several liability...). So long as Super-Brite asserts that it did not contribute to the contamination on the property, it asserts it can bring a § 107 claim. *Akzo Coatings, Inc. v. Ainger Corp.*, 30 F.3d 761, 764 (7th Cir. 1994), *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996).

2. Mega-Steel. Mega-Steel argues that "[a] PRP may not proceed with an action under § 107(a) unless it can demonstrate that it is an innocent party." *Sterns & Foster Bedding Company v. Franklin Holding Corp., et. al.*, 947 F.Supp 790 (D.N.J. 1996)(emphasis added). The Sterns & Foster court based its decision on the rationale that, ". . . it seems fundamentally unfair to allow one PRP to burden all . . . named defendants . . . with joint and several liability for the entire harm . . . simply because [it] won the race to the courthouse." *Id.* at p.7. *Sun Co., Inc. v. Browning Ferris, Inc.*, 919 F.Supp. 1523, 1528 (Plaintiff held to be potentially responsible party and thus limited to a contribution claim despite Plaintiff's denial that it was a potentially responsible party). In Judge Kent's Order, the defendant was not required to prove that the plaintiff was in fact a liable party; the mere allegation that the Plaintiff was a former lessee of the contaminated property appeared to be sufficient to limit the plaintiff to a § 113(f) contribution action.[8]

D. Statute of Limitation/Ripeness

1. Mega-Steel. CERCLA does not make it clear when a cause of action for contribution arises. As a result, Mega-Steel can argue that Super-Brite's claims are not ripe because a cause of action for contribution under § 113(f) is not ripe until the party seeking contribution has paid more than its fair share of its response costs. *Sun Company v. Browning-Ferris*, 919 F.Supp. 1523, 1530 (N.D. Okla. 1996) ("[a]bsent a judgment, a cause of action for contribution [under CERCLA] does not arise until the party seeking contribution has paid more than her fair share of a common liability."); *see also Colorado & Eastern Railroad Company*, 50 F.3d at 1535 ("[a] principal objective of § 113(f) . . . was to 'clarify and confirm [ ]the right of a person held jointly and severally liable under CERCLA to seek contribution from other

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[7] Mega-Steel could also argue that Super-Brite is liable as an operator and an arranger if it can reasonably allege that Super-Brite released contaminants as a result of its operations, but Mega-Steel may have to develop proof of this fact before a Court would limit Super-Brite to a § 113(f) action.

[8] Note 5, *supra* at p. 5.

potentially liable parties, when the person believes it has assumed a share of the cleanup costs that may be greater than its equitable share'. . . ." (emphasis added) (citing the legislative History of the Superfund Amendments and Reauthorization Act of 1986.). Mega-Steel can argue that because Super-Brite uses VOCs (TCE) in its processes, it may be responsible for some of the contamination, and it has not alleged that it has paid more than its fair share of liability.[9]

2. Super-Brite. Super-Brite argues that, as § 113(g)(3) is written, if Super-Brite is limited to a contribution claim, its cause of action against Mega-Steel would never ripen until a judgment against it was rendered or it cleaned up the property pursuant to an administrative order. Mega-Steel's interpretation would leave Super-Brite without any remedy. This could not be the result intended by Congress. Super-Brite argues that the moment it spent any monies to address this issue, its cause of action became ripe against Mega-Steel because that expenditure of money, Super-Brite contends, is already more than its fair share of any common liability. Because there is a statute of limitations of three years for contribution claims, Super-Brite argues that waiting to bring a lawsuit would put into peril its hope of recovering any monies from Mega-Steel.

E. Orphan Share

1. Mega-Steel. Mega-Steel argues that because Super-Brite is limited to a contribution claim, Mega-Steel should be liable only for the allocable portions of liability attributable to it, and not any "orphan shares" which cannot be collected from insolvent PRPs. *Allied Corp. v. Acme Solvents Reclaiming Inc.* 691 F.Supp. 1100, 1118 (N.D. Ill. 1988).

2. Super-Brite. Super-Brite argues that the Court has broad equitable powers under § 113 to distribute liability and may distribute "orphan shares" to Mega-Steel under either § 107(a) or § 113(f). *United States v. Kramer* 953 F.Supp. 592, 598,601 (D.N.J. 1997); *Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F.Supp. 790, 800-801 (D.N.J. 1996), *TH Agriculture & Nutrition Co., Inc. v. Aceto Chem Co.* 884 F.Supp. 347, 362 (E.D. Cal. 1995), *Chesapeake & Potomac Telephone Co. of Virginia v. Peck Iron Co. of Virginia*, 814 F.Supp. 1269, 1277-78 (E.D. Va. 1992).

F. Response Costs

1. Super-Brite. CERCLA makes it clear that a CERCLA Plaintiff may seek "necessary costs of response incurred . . . consistent with the National Contingency Plan." CERCLA § 107(a)(4)(B). Because Super-Brite has been the only party to begin cleaning up the property, it moves for summary judgment against Mega-Steel's CERCLA claims on the grounds that Mega-Steel has not incurred any response costs. Super-Brite's summary judgment evidence includes affidavits from the project manager of "Enviro-Tech" stating that Super-Brite is the only entity that has substantially complied with the National Contingency Plan ("NCP") prior to incurring costs on the

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[9] Judge Kent's Order rejected this logic finding that ". . .a party does not even have to wait to be sued in a direct action before bringing a contribution action under § 113(f). Note 5, *supra* at p. 6.

property. Super-Brite argues that Mega-Steel has failed to submit evidence that it has incurred response costs consistent with the NCP and therefore has not established a *prima facie* case against Super-Brite Cleaners under either § 113 or § 107. *See Marriott Corp. v. Simkins Industries, Inc.* 825 F.Supp at 1583 (denying request for declaratory judgment assessing liability for future response costs because plaintiff could not prove that these future costs would be consistent with the NCP); *Amland Properties Cop. v. Aluminum Co. of America* 711 F.Supp 711 at 801 (2nd Cir. 1993); *Artesian Water Co. v. New Castle County* 659 F.Supp 1294 at 1299 (D.Del. 1987). Should a Court follow this line of cases, the Court would not apportion future liability until the completion of a fully approved and NCP-consistent remediation plan.

2. **Mega-Steel.** Mega-Steel argues that not all costs must be consistent with the NCP, and that preliminary costs in investigating a site and searching for responsible parties are sufficient to meet the "response costs" requirement under CERCLA. The Fifth Circuit does not require a plaintiff to make a showing that it has incurred response costs consistent with the NCP before it is entitled to summary judgment on the issue of liability. *See Liciardi, et. al. v. Murphy Oil Co. USA, Inc.*, 111 F.3d 390 (5th Cir. 1997), *Redwing Carrier, Inc. v. Saraland Apartment* 94 F.3d 1489, 1496-1497, n. 8 (11th Cir. 1996), *citing Amoco Oil* 889 F.2d 664.

II. Texas State Superfund Legislative Developments

The 75th Regular Texas Legislative Session marks an important turning point for the State's scheme of Superfund liability. Since its adoption, the State scheme for imposing liability on potentially responsible parties has paralleled the federal program. However, important differences existed between the two programs. With the passage of House Bill 2776, the State's Superfund liability scheme has now been updated to provide important protections to businesses and financial institutions, similar to those that have recently been added to the federal program. More importantly, the State program now provides a significant new weapon in the environmental practitioner's arsenal: a statutory right to pursue private cost recovery in state district court for cleanup expenses incurred in private cleanups.

A. Summary of Differences Between Texas and Federal Superfund Programs

Set out below is a brief description[10] of the important differences currently existing between the Texas and Federal Superfund statutory schemes. Sections that have been significantly modified by House Bill 2776 are marked with an asterisk (*) and are discussed in greater detail below.

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[10] Mehron Azarmehr, Assistant Attorney General, Natural Resources Division, State of Texas, presents an excellent analysis of the differences between the federal and state programs in his 1996 Texas Superconference paper entitled "State Superfund -- Key Issues".

1. **Jurisdiction: "Hazardous Substance" vs. "Solid Wastes".** The "jurisdictional" substance that triggers liability under the Texas program is not limited to "hazardous substances" as provided in the federal program; it extends to all "solid wastes"[11].

2. **Jurisdiction: Release "into the environment" vs. "imminent and substantial endangerment".** While the federal scheme provides liability for any release of hazardous substances "into the environment"[12] for which response costs substantially consistent with the National Contingency Plan are incurred, under the state scheme only releases or threatened releases that pose an "imminent and substantial endangerment" to public health safety and the environment trigger liability[13].

3. **Liability of Past Owner/Operators: "Disposal" vs. "Storage, Processing or Disposal".** The State scheme differs from the federal by imposing liability on prior facility owners and operators who not only "dispose" of substances on the land (as in the federal scheme[14]), but also on those who merely "processed" or "stored" such substances at the facility[15].

4. **Lender Liability*.** No specific lender liability exemptions are granted under the Texas statute. On the federal level, under recent federal legislation, lenders are afforded substantial protections[16]

5. **Joint and Several Liability: "Divisibility".** Under the Federal scheme, no statutory mechanism is prescribed for determining whether a party's liability is divisible instead of joint and several. The Texas statute provides that a party's liability is not joint and several if the party can show by a preponderance of the evidence that the waste is capable of being managed separately under the remedial action plan[17].

6. **Contribution Bar*.** Under CERCLA, the settlement of a claim with the government entitles the settling parties to a bar against later contribution suits by non-settling

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[11] Texas Health & Safety Code § 361.272. *See also* § 361.003 (34) (Definition of "Solid Waste").

[12] 42 U.S.C. § 9607 (a) and 42 U.S.C. § 9601 (22) (definition of "Release").

[13] Texas Health & Safety Code §§ 361.181 and 361.272.

[14] 42 U.S.C. § 9607 (a)(2).

[15] Texas Health & Safety Code § 361.271 (a) (2).

[16] Section 101 of the Comprehensive Environmental Response, Compensation and Liability Act was amended in October of 1996 by the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 to add exclusions to the definition of "owner" and "operator"for typical activities carried out by lenders.

[17] Texas Health & Safety Code § 361.276.

parties who may have also expended funds at the site[18]. Under the current Texas statute, no bars exist and parties settling with the State are subject to later contribution claims.

7. Innocent Adjacent Landowner*. To assist with Brownfields development, EPA announced a policy several years ago that owners or operators of facilities contaminated by migration of hazardous substances from adjacent facilities will generally not be liable for cleanup costs if they were not responsible for the contaminants migrating onto their property[19]. Neither the Texas Health and Safety Code nor the Texas Water Code specifically provided for this defense (although the innocent purchaser defense came close[20]), and the TNRCC has not adopted this as a policy under its "enforcement discretion".

B. Legislative Changes

House Bill 2776[21], effective September 1, 1997, significantly amends the Texas Health and Safety Code and the Texas Water Code. A copy of the bill is attached as Appendix I. The following discussion outlines the significant changes to the statute.

1. Prerequisite to State Superfund Listing: Consideration of Voluntary Cleanup Program. Section 3 of the House Bill amends Texas Health and Safety Code ("Code") § 361.183 (a) to require the Executive Director of the Texas Natural Resource Conservation Commission ("TNRCC") to expend reasonable efforts to determine whether the potential endangerment to public health and safety presented by a site can be resolved through the Voluntary Cleanup Program ("VCP"). Only after such consideration can the site be listed as a State Superfund Site.

2. Cleanup Standards: Non-Residential Assumptions Allowed. Section 4 of the House Bill adds § 361.1855 to the Code to clarify that the TNRCC may utilize non-residential land use assumptions in determining cleanup standards if proposed by the Executive Director or a potentially responsible party prior to the completion of the remedial investigation/feasibility study. This is not available if the property has been zoned as only residential. This section provides for notice and public comment through a non-contested case

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[18] 42 U.S.C. § 9613 (f)(2)

[19] Final Policy Toward Owners of Property Containing Contaminated Aquifers, Environmental Protection Agency Memorandum. "This Policy states the agency's position that, subject to certain conditions, where hazardous substances have come to be located on or in a property solely as the result of subsurface migration in an aquifer from a source or sources outside the property, EPA will not take enforcement actions against the owner of such property to require the performance of response actions or the payment of response costs".

[20] Texas Health & Safety Code § 361.275 (a)(3).

[21] Sponsored by Senator Brown. Significant portions of this bill were drafted by the author of this paper and other environmental practitioners around the State.

(i.e., legislative) meeting. The land use determination is to be included in the final order issued by the TNRCC for the site.[22]

3. Deletion From the State Registry: Voluntary Cleanup Program. Section 8 of the House Bill amends § 361.189 of the Code to clarify that the Executive Director may allow a State Superfund Site to be delisted from the State Superfund Registry because it will be managed under the VCP. However, in the event the VCP program is not effective in addressing the cleanup adequately, the Executive Director, with-out public comment, may move the site back to the Registry, where it regains it former status and priority. This section also amends Code § 361.189 (b) to delete the requirement that a public "hearing" be held for review of delisting requests and now specifies only that public "meetings" be held.

4. Mandatory Cost Recovery Requirements. The House Bill amends § 361.197 of the Code by adding subsection (d) to require the TNRCC to seek recovery of costs against each responsible party for the total costs incurred by the State of :

a. Necessary and appropriate removal and remediation, where other funds are not available
b. Necessary and appropriate maintenance, where other funds are not available
c. Immediate spill response activities
d. Voluntary Cleanup Program activities
e. Immediate cleanup or removal actions at sites eligible, proposed or on the State Superfund List.

5. Settlement: Increased Flexibility. The House Bill amends § 361.200 of the Code to expand the types of parties and situations eligible for settlement with the State. Under the prior version of this provision, only deminimis parties (those responsible for only a "minor" portion of the hazardous substances at the site) were eligible for settlement with the State. Under this amendment, there are no restrictions on which parties may settle with the State. In addition, the State is now specifically authorized to develop and enter into deminimis settlements, covenants not to sue, mixed funding and partial settlements.

6. Private Cost Recovery Rights Expanded. The House Bill amends § 361.344(a) of the Code to expand the class of persons who have the right to file a private cost recovery action in state district court. Under the prior version of this provision, only those who had been subject to an administrative order or court injunction issued under Chapter 361 of the Code could file a private cost recovery action pursuant to this section. Under this amendment, any person who conducts a removal or remedial action *that is approved by the commission*, and which is necessary to address a release or threatened release, may bring suit in district court to

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[22] Texas Health & Safety Code § 361.188(a).

recover the reasonable and necessary costs of that action and other costs as the court in its discretion considers reasonable (attorney's fees?). Reasonable prior notice must have been given to the party being sued for cost recovery of the existence of the release and of the plaintiff's intent to take steps to eliminate the release. The amount of cost recovery is to be apportioned by the court using the following factors:

a. Relationship of the party's waste management activities to the remedy required
b. Relationship of the volume contributed to the cost of the remedy
c. Relationship of the toxicity contributed to the cost of the remedy
d. Degree of cooperation and amount of care exercised

The share owed by a party is reduced by the amount of the party's past costs, as long as these costs were expended in a cleanup "approved by the commission".

7. Contribution Bar. The House Bill amends Code § 361.277 to offer greater protection to settling parties against later contribution actions by non-settling parties. A person who enters into a settlement agreement with the State resolving all of their liability to the State *for a site listed on the registry*, is released, by operation of law, from liability for cost recovery, contribution or indemnity to any other person who has expended funds at the site pursuant to approval by the Commission.

8. Lender/Fiduciary Liability Exemption. In the wake of the infamous *Fleet Factors*[23] line of decisions, which created the risk that a lender's normal activities of making loans and managing assets could impose joint and several liability under the federal Superfund program, Congress passed the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 to add exclusions from liability for typical activities carried out by lenders. With the addition of new Subchapter U to Chapter 361 of the Code, lenders now have similar protections under Texas state law.

The new provisions amend the definitions of "owner" and "operator" contained in § 361.271 of the Code, by providing in relevant part, that:

> the term "owner or operator" does not include a person that is a lender that:
>
> (1) without participating in the management of a solid waste facility, holds a security interest in or with regard to the solid waste facility; or

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[23] *See generally, United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th cir. 1990) *cert. denied*, 498 U.S. 1046 (1991).

(2) did not participate in management of a solid waste facility before foreclosure, notwithstanding the fact that the person:

(A) forecloses on the solid waste facility; and

(B) after foreclosure, sells, re-leases, in the case of a lease finance transaction, or liquidates the solid waste facility, maintains business activities, winds up operations, undertakes a response action with respect to the solid waste facility under the national contingency plan adopted under 42 U.S.C. § 9605, under a commission-approved cleanup plan, or under the direction of an on-scene coordinator appointed under the national contingency plan or a commission-approved cleanup plan, or takes any other measure to preserve, protect, or prepare the solid waste facility before sale or disposition, if the person seeks to sell, re-lease, in the case of a finance transaction, or otherwise divest the person of the facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.[24]

Several key definitions are worthy of further discussion. First, the definition of "participation in management" excludes most of the normal functions of a lender and as a result, participation in these activities now presents lower risk of liability to a lender. Perhaps most importantly, the definition specifies that the mere capacity or right to influence or control a facility does not in and of itself create liability. The full definition, set out below, provides a laundry list of activities in which a lender can participate without incurring liability:

(a) For purposes of § 361.702, the term "participate in management":

(1) means actually participating in the management or operational affairs of a solid waste facility; and

(2) does not include merely having the capacity to influence, or the unexercised right to control, a solid waste facility or facility operations.

(b) A person that is a lender that holds a security interest in or with regard to a solid waste facility is considered to participate in management only if, while the borrower is still in possession of the solid waste facility encumbered by the security interest, the person:

(1) exercises decision-making control over the environmental compliance related to the solid waste facility such that

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[24] Texas Health & Safety Code § 361.702(a) (emphasis added).

the person has undertaken responsibility for the solid waste handling or disposal practices related to the solid waste facility; or

(2) exercises control at a level comparable to that of a manager of the solid waste facility such that the person has assumed or manifested responsibility:

(A) for the overall management of the solid waste facility encompassing day-to-day decision making with respect to environmental compliance; or

(B) over all or substantially all of the operational functions, as distinguished from financial or administrative functions, of the solid waste facility other than the function of environmental compliance.

(c) The term "participate in management" does not include:

(1) performing an act or failing to act before the time at which a security interest is created in a solid waste facility;

(2) holding a security interest or abandoning or releasing a security interest;

(3) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

(4) monitoring or enforcing the terms and conditions of the extension of credit or security interest;

(5) monitoring or undertaking one or more inspections of the solid waste facility;

(6) requiring a response action or other lawful means of addressing the release or threatened release of solid waste in connection with the solid waste facility before, during, or on the expiration of the term of the extension of credit;

(7) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the solid waste facility;

(8) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

(9) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

(10) conducting a response action under the national contingency plan adopted under 42 U.S.C. § 9605, under a commission-approved cleanup plan, or under the direction of an on-scene coordinator appointed under the national contingency plan or a commission-approved cleanup plan, if the actions do not rise to

the level of participating in management within the meaning of Subsections (a) and (b). [25]

Even after foreclosure, a lender may manage a collateral asset without incurring liability if it seeks to sell, re-lease, in the case of a finance transaction, or otherwise divest itself of the facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements. The new provisions specify certain presumptions that this condition has been met:

> [A] lender is presumed to divest [itself] of the solid waste facility at the earliest practicable, commercially reasonable time if, within 12 months after foreclosure, the lender:
>
> (1) lists the solid waste facility with a broker, dealer, or agent who deals in that type of property; or
>
> (2) advertises the solid waste facility for sale or other disposition at least monthly in:
>
> (A) a real estate publication;
>
> (B) a trade or other publication appropriate for the solid waste facility being advertised; or
>
> (C) a newspaper of general circulation in the area in which the solid waste facility is located.
>
> (c) For purposes of Subsection (b), the 12-month period begins:
>
> (1) when the lender acquires marketable title if the lender, after the expiration of any redemption period or other waiting period required by law, was acting diligently to acquire marketable title; or
>
> (2) on the date of foreclosure or its equivalent if the lender does not act diligently to acquire marketable title.
>
> (d) Except as otherwise provided by Subchapter I, Chapter 26, Water Code, or rules adopted under that subchapter, a lender is not liable under this code or the Water Code to undertake a removal or remedial action or to pay a fine or penalty arising from the release or threatened release of solid waste at, from, or in connection with the solid waste facility in which the lender maintains a security interest or that the lender has acquired through foreclosure if:
>
> (1) the lender has not participated in management before foreclosure;

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[25] Texas Health & Safety Code § 361.703.

(2) the conditions giving rise to the release or threat of release existed before foreclosure; and

(3) the lender seeks to divest the lender of the property under Subsections (a)(2)(B) and (b).

(e) Notwithstanding Subsection (d), if a lender after foreclosure operates, directs the operation of, or maintains the operation of business activities, this section does not exempt or excuse the lender from compliance with legal requirements applicable to the operation of that business. Those operational requirements include permitting, reporting, monitoring, compliance with emission limitations, financial responsibility and assurance requirements, payment of fees, and payment of fines and penalties for noncompliance with those requirements.[26]

Additional definitions were added by the House Bill that the reader will want to evaluate in determining the extent to which these protections apply. The new provision supplies a broad definition of "lender"[27], as well as definitions for "foreclosure"[28]and "solid waste facility".[29]

Fiduciary liability is also addressed by amendments added by Section 15 of the House Bill. These amendments add a new subchapter T to Chapter 361 of the Code, entitled "Fiduciary Liability".[30] While outside the scope of this paper, a brief review of these new provisions reveals a far more limited set of exclusions from liability than that afforded by the new lender liability provisions.[31]

9. Innocent Adjacent Owner/Operator. The House Bill adds a new Subchapter V to Chapter 361 of the Code, entitled "Immunity from Liability of Innocent Owner or Operator". Loosely based on the Environmental Protection Agency's Final Policy Toward Owners of Property Containing Contaminated Aquifers, the subchapter has two distinct sections. The first, § 361.752, provides a self implementing defense to liability for investigation and cleanup costs, or penalties, arising from owning or operating a property that has become

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[26] Texas Health & Safety Code § 361.702(b)-(e).

[27] Texas Health & Safety Code § 361.701(4).

[28] Texas Health & Safety Code § 361.701(3).

[29] Texas Health & Safety Code § 361.701(7).

[30] Texas Health & Safety Code §§ 361.651-.652.

[31] For example, the definition of "Fiduciary" has significant limitations. *See* Texas Health & Safety Code § 361.651 (1). In addition, the exemptions from liability are subject to many limitations. *See* Texas Health & Safety Code § 361.652.

contaminated as a result of a release or migration from a source or sources not located on or at the property. The second provision, § 361.753, establishes a means of obtaining a certificate from the TNRCC confirming that an off-site source is responsible for the contaminants. It is not necessary, however, to obtain such a certificate to gain the defense provided by law.

Several important provisions of the self implementing defense include the so-called "subdivision rule" and the requirement to provide access to the property under reasonable terms and conditions. First, due to concern that someone would attempt to subdivide a contaminated "source" property to sell a "non-source" portion free and clear of liability, the new provision states that:

> (b) A person that acquires a portion of the tract on which the source of a release of contaminants is located from the person that caused the release is eligible for immunity under Subsection (a) only if, after appropriate inquiry consistent with good commercial or customary practice, the person did not know or have reason to know of the contamination at the time the person acquired the property.[32]

In addition, as a condition to the self implementing defense, reasonable access to the property must be granted to a responsible party designated by the TNRCC. This provision was inserted to guard against a "recalcitrant" innocent owner/operator refusing to allow anyone to enter his property to perform corrective action. However, the provision also specifies what "reasonable" access agreements may include. As a result, the statute provides:

> (c) To be eligible for immunity under Subsection (a), an owner or operator must grant reasonable access to the property for purposes of investigation or remediation to a person designated by the executive director. An agreement for reasonable access may provide:
>
> (1) that the designated person may not unreasonably interfere with the use of the property;
>
> (2) for payment of reasonable compensation for access to the property; or
>
> (3) that the owner or operator is indemnified from liability for an intentional or negligent act of the designated person arising from the person's access to and use of the property.
>
> (d) This section does not limit any right of the commission under another provision of this code or the Water Code to obtain access to the property.[33]

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[32] Texas Health & Safety Code § 361.752 (b).

[33] Texas Health & Safety Code § 361.752(c).

> The certificate to be issued by the Commission requires the submittal of a complete site investigation report that demonstrates:
>
> (1) the property has become contaminated as a result of a release or migration of contaminants from a source or sources not located on or at the property;
> (2) the owner or operator has not caused or contributed to the source or sources of the contamination referred to in Subdivision (1); and
> (3) the owner or operator is eligible for immunity under § 361.752(b).[34]

In addition, the Commission can charge a fee to cover its review costs. The commission may condition the issuance of the certificate on the placement of restrictions on the use of the property that are reasonably necessary to protect the public health, including:

> (1) institutional controls such as deed restrictions or municipal zoning restrictions; or
>
> (2) at the owner's or operator's option, other control measures.[35]

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[34] Texas Health & Safety Code § 361.753(a).

[35] Texas Health & Safety Code § 361.753 (g).

AN ACT

relating to the regulation of state superfund sites.

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

SECTION 1. Section 361.133, Health and Safety Code, is amended by adding Subsections (g)-(i) to read as follows:

(g) Notwithstanding Subsection (c), the executive director may use money in the fund, including interest credited under Subsection (b)(4), for expenses concerning a cleanup or removal of a spill, release, or potential threat of release of a hazardous substance if the site is eligible for listing under Subchapter F, proposed for listing under Subchapter F, or listed under the state registry before September 1, 1989, and:

(1) immediate action is appropriate to protect human health or the environment and there is a substantial likelihood that the cleanup or removal will prevent the site from needing to be listed under Subchapter F; or

(2) a cleanup or removal:

(A) can be completed without extensive investigation and planning; and

(B) will achieve a significant cost reduction for the site.

(h) If the commission collects a fee that is deposited in a dedicated fund established for the purpose of cleaning up a facility, tank, or site described by this subsection, the

commission may not use money in the hazardous and solid waste remediation fee fund to clean up a:

(1) waste tire recycling facility;

(2) municipal solid waste facility;

(3) petroleum storage tank; or

(4) used oil collection and recycling site that received used oil after August 31, 1995.

(i) Not later than the 31st day before the date the commission begins a cleanup or removal under Subsection (g), the commission must publish notice of its intent to perform the cleanup or removal in the Texas Register.

SECTION 2. Section 361.136(i), Health and Safety Code, is amended to read as follows:

(i) The storage, processing, or disposal of industrial solid wastes or hazardous wastes generated in a removal or remedial action accomplished through the expenditure of money [~~public fun~~] from the hazardous and solid waste remediation fee fund or generated in a removal or remedial action in this state conducted by the United States Environmental Protection Agency shall be exempt from the assessment of a waste management fee under this section.

SECTION 3. Section 361.183(a), Health and Safety Code, is amended to read as follows:

(a) Before [the] listing [of] a facility on the state registry, the executive director shall determine whether the potential endangerment to public health and safety or the environment at the facility can be resolved by:

(1) the present owner or operator under the federal Resource Conservation and Recovery Act of 1976 (42 U.S.C. Section 6901);

(2) [or by] some or all of the potentially responsible parties identified in Subchapter I, under an agreed administrative order issued by the commission; or

(3) an agreement under Subchapter S, as added by Chapter 986, Acts of the 74th Legislature, Regular Session, 1995.

SECTION 4. Subchapter F, Chapter 361, Health and Safety Code, is amended by adding Section 361.1855 to read as follows:

Sec. 361.1855. PROPOSAL OF LAND USE OTHER THAN RESIDENTIAL. (a) The executive director shall hold a public meeting to obtain public input and information regarding the appropriate use of land on which a facility is located that is the subject of a remedial investigation/feasibility study if:

(1) a land use other than residential is proposed as appropriate for the land by:

(A) the executive director; or

(B) a potentially responsible party who has entered into an agreed order with the commission;

(2) the proposal is made before the study is completed; and

(3) a local government has not zoned the land as residential only.

(b) Any interested person may comment at the meeting.

(c) The meeting is legislative in nature and not a contested case hearing under Chapter 2001, Government Code.

(d) Not later than the 31st day before the date of the meeting, the commission shall:

(1) publish notice of the meeting in the Texas Register and in a newspaper of general circulation in the county in which the facility is located;

(2) mail notice of the meeting to each potentially responsible party by certified mail, return receipt requested, at the party's most recent address as shown on the records of the commission; and

(3) make the commission's records regarding the facility available to any interested person.

(e) The notice shall:

(1) state the date, time, and place of the meeting; and

(2) provide information regarding the proposed land use.

(f) The failure of a potentially responsible party to receive a notice under this section does not affect the responsibilities, duties, or liabilities of the party.

(g) After the meeting, the executive director shall select the appropriate land use for purposes of selecting a proposed remedial action.

SECTION 5. Section 361.187(b), Health and Safety Code, is amended to read as follows:

(b) The commission shall publish notice of the meeting in the Texas Register and in a newspaper of general circulation in the county in which the facility is located at least 30 [45] days

before the date of the public meeting. The notice shall provide information regarding the proposed remedial action and the date, time, and place of the meeting. The commission shall also mail the same information to each potentially responsible party by certified mail, return receipt requested, at the party's last known address at least 30 [45] days before the public meeting. Contemporaneously with the issuance of notice of the public meeting, the executive director shall make available to all interested parties the public records the executive director has regarding the facility. For purposes of providing this information, the executive director shall provide a brief summary of those public records and make those public records available for inspection and copying during regular business hours. Nonreceipt of any notice mailed to a potentially responsible party under this section does not affect the responsibilities, duties, or liabilities imposed on the party.

SECTION 6. Section 361.188(a), Health and Safety Code, is amended to read as follows:

(a) After consideration of all good faith offers to perform a remedial action, the commission shall issue a final administrative order that must:

(1) list the facility on the state registry, thus determining that the facility poses an imminent and substantial endangerment to public health and safety or the environment;

(2) specify the appropriate land use for purposes of selecting the appropriate remedial action;

(3) specify the selected remedial action;

(4) [~~(3)~~] list the parties determined to be

responsible for remediating the facility;

(5) [~~(4)~~] make findings of fact describing actions voluntarily undertaken by responsible parties;

(6) [~~(5)~~] order the responsible parties to remediate the facility and, if appropriate, reimburse the hazardous waste disposal fee fund for remedial investigation/feasibility study and remediation costs;

(7) [~~(6)~~] establish a schedule for completion of the remedial action;

(8) [~~(7)~~] state any determination of divisibility of responsible party liability; and

(9) [~~(8)~~] give notice of the duties and restrictions imposed by Section 361.190.

SECTION 7. Section 361.189, Health and Safety Code, is amended to read as follows:

Sec. 361.189. DELETIONS FROM REGISTRY. (a) The executive director or an [~~Any~~] owner or operator or other named responsible party of a facility listed or to be listed on the state registry may request the commission to delete the facility from the state registry, modify the facility's priority within the state registry, or modify any information regarding the facility by submitting a written statement setting forth the grounds of the request in the form the commission may by rule require.

(b) The commission by rule shall establish procedures, including public meetings [~~hearings~~], for review of requests submitted under this section.

(c) If the commission deletes a facility from the state

registry because the cleanup of the facility is being addressed under Subchapter S, as added by Chapter 986, Acts of the 74th Legislature, Regular Session, 1995, the facility automatically reverts to the status the facility had immediately before the facility was deleted from the registry on the date of the executive director's determination that the cleanup of the facility is not being addressed adequately. A public meeting is not required for an action under this subsection.

SECTION 8. Sections 361.194(b) and (c), Health and Safety Code, are amended to read as follows:

(b) The lien imposed by this section arises and attaches to the real property subject to or affected by a remedial action at the time an affidavit is recorded and indexed in accordance with this section in the county in which the real property is located. The executive director shall determine whether to prepare an affidavit. In making the determination, the executive director shall proceed in the manner that the executive director determines will most likely result in the least overall costs to the state after any cost recovery action. For the purpose of determining rights of all affected parties, the lien does not relate back to a time before the date on which the affidavit is recorded, which date is the lien inception date. The lien continues until the liability for the costs is satisfied or becomes unenforceable through operation of law.

(c) An authorized representative of the commission must [~~shall~~] execute the affidavit. The affidavit must show:

(1) the names and addresses of the persons liable for

the costs;

(2) a description of the real property that is subject to or affected by the remediation action for the costs or claims; and

(3) the amount of the costs and the balance due.

SECTION 9. Section 361.197, Health and Safety Code, is amended by adding Subsection (d) to read as follows:

(d) The commission shall file a cost recovery action against each responsible party for the total costs of an action taken under Section 361.133(c)(1), (2), (3), (5), or (6) or Section 361.133(q).

SECTION 10. Section 361.200, Health and Safety Code, is amended to read as follows:

Sec. 361.200. [~~DE-MINIMIS~~] SETTLEMENT. The commission shall assess and by rule may develop and implement a [~~de-minimis~~] settlement program. Under the program, the commission shall consider the advantages of developing a final settlement with potentially responsible parties that are responsible for [~~only-a minor-portion-of-the~~] response costs at a facility because of [the] hazardous substances. The settlement program may include:

(1) de minimis settlements;

(2) covenants not to sue;

(3) mixed funding; and

(4) partial settlements [~~the-party-is-responsible--for are-minimal-in-amount-or-in-hazardous-effect-by-comparison-with-the hazardous-substances-attributable-to-other-parties~~].

SECTION 11. Section 361.271, Health and Safety Code, is amended by adding Subsections (e) and (f) to read as follows:

(e) A fiduciary's responsibility for solid waste is subject to Subchapter T.

(f) A lender's responsibility for solid waste is subject to Subchapter U.

SECTION 12. Section 361.277, Health and Safety Code, is amended to read as follows:

Sec. 361.277. EFFECT OF SETTLEMENT AGREEMENT WITH STATE [~~JUDGMENT---BY---STATE---AGAINST--NONSETTLING--PARTY;---ACTION--FOR CONTRIBUTION-BY-NONSETTLING-PARTY~~]. (a) If fewer than all of the persons identified as liable under this subchapter agree with the state to take remedial action to abate an actual or threatened release of solid waste that is an imminent and substantial endangerment to the public health and safety or the environment under an administrative order issued under Section 361.272 or an action filed by the state under this subchapter, the state may seek a judgment against a nonsettling person for the total amount of the cost of the remedial action minus that amount the settling persons agree to pay or spend.

(b) A person who enters a settlement agreement with the state that resolves all liability of the person to the state for a site subject to Subchapter F is released from liability to a person described by Section 361.344(a) for cost recovery, contribution, or indemnity under Section 361.344 regarding a matter addressed in the settlement agreement.

(c) A settlement agreement does not discharge the liability of a nonsettling person to the state unless the agreement provides otherwise.

(d) Notwithstanding Subsection (c), a settlement agreement reduces the potential liability to the state of the nonsettling persons by the amount of the settlement [~~In an action for contribution brought by a nonsettling person against a settling person, the nonsettling person has the burden to prove that the amount of cleanup costs that a settling person agreed to pay under an agreement with the state is unreasonable considering the factors under Section 361.343 and the need to undertake timely cleanup action concerning the release or threatened release~~].

SECTION 13. Section 361.343, Health and Safety Code, is amended by amending Subsection (b) and adding Subsection (c) to read as follows:

(b) In apportioning costs under Subsection (a), the court shall credit against a responsible party's share of the costs of eliminating a release or threatened release of solid waste the party's expenditures related to the cleanup at issue if the commission or the executive director approves the cleanup. If the expenditures were made before the property was proposed to be listed on the state registry and the commission or the executive director approves the cleanup, the court shall also reduce in an equitable and just manner the party's proportionate share of the costs.

(c) The apportionment of costs only adjusts the rights of parties identified by Section 361.271 and does not affect a person's liability to the state.

SECTION 14. Section 361.344(a), Health and Safety Code, is amended to read as follows:

(a) A person [~~subject to a court injunction or an administrative order issued under this chapter, or a third person identified by Section 361.192(c)~~] who conducts a removal or remedial action that is approved by the commission and is necessary to address [~~acts to eliminate~~] a release or threatened release[~~, in addition to having the right to file an action for contribution or indemnity, or both, in an appeal proceeding or in an action brought by the attorney general~~] may bring suit in a district court to recover the reasonable and necessary costs of that action [~~incurred to eliminate the release or threatened release~~] and other costs as the court, in its discretion, considers reasonable. This right is in addition to the right to file an action for contribution, indemnity, or both in an appeal proceeding or in an action brought by the attorney general.

SECTION 15. Chapter 361, Health and Safety Code, is amended by adding Subchapters T, U, and V to read as follows:

SUBCHAPTER T. FIDUCIARY LIABILITY

Sec. 361.651. DEFINITIONS. In this subchapter:

(1) "Fiduciary":

(A) means a person acting for the benefit of another party as a bona fide:

(i) trustee;

(ii) executor;

(iii) administrator;

(iv) custodian;

(v) guardian of an estate or guardian ad litem;

(vi) receiver;

(vii) conservator;

(viii) committee of the estate of an incapacitated person;

(ix) personal representative;

(x) trustee, including a successor to a trustee, under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender; or

(xi) representative in any other capacity that the commission, after providing public notice, determines to be similar to the capacities described in Subparagraphs (i)-(x); and

(B) does not include:

(i) a person that is acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit, unless the trust or other fiduciary estate was created as part of, or to facilitate, one or more estate plans or because of the incapacity of a natural person; or

(ii) a person that acquires ownership or control of a solid waste facility with the objective purpose of avoiding liability of the person or of any other person.

(2) "Fiduciary capacity" means the capacity of a

person in holding title to a solid waste facility or otherwise having control of or an interest in the solid waste facility pursuant to the exercise of the responsibilities of the person as a fiduciary.

(3) "Solid waste facility":

(A) means:

(i) all contiguous land, including structures, appurtenances, and other improvements on the land, used for processing, storing, or disposing of solid waste, including a publicly or privately owned solid waste facility consisting of several processing, storage, or disposal operational units such as one or more landfills, surface impoundments, or a combination of units; and

(ii) any building, structure, installation, equipment, pipe, or pipeline, including any pipe into a sewer or publicly owned treatment works, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or any site or area where a hazardous substance has been deposited, stored, disposed of, placed, or otherwise come to be located; and

(B) does not include a:

(i) consumer product in consumer use; or

(ii) vessel.

Sec. 361.652. LIABILITY OF FIDUCIARIES. (a) Except as otherwise provided by Subchapter I, Chapter 26, Water Code, or rules adopted under that subchapter, the liability of a fiduciary under this code or the Water Code for the release or threatened

release of solid waste at, from, or in connection with a solid waste facility held in a fiduciary capacity does not exceed the assets held in the fiduciary capacity.

(b) Subsection (a) does not apply to the extent that a person is liable independently of the person's ownership of a solid waste facility as a fiduciary or actions taken in a fiduciary capacity.

(c) Subsections (a) and (d) do not limit the liability pertaining to a release or threatened release of solid waste if negligence, gross negligence, or willful misconduct of a fiduciary causes or contributes to the release or threatened release.

(d) Except as otherwise provided by Subchapter I, Chapter 26, Water Code, or rules adopted under that subchapter, a fiduciary is not liable in the fiduciary's personal capacity under this code or the Water Code for:

(1) undertaking or directing another person to undertake a response action under the national contingency plan adopted under 42 U.S.C. Section 9605, under a commission-approved cleanup plan, or under the direction of an on-scene coordinator designated under the national contingency plan or a commission-approved cleanup plan;

(2) undertaking or directing another person to undertake any other lawful means of addressing solid waste in connection with the solid waste facility;

(3) terminating the fiduciary relationship;

(4) including in the terms of the fiduciary agreement a covenant, warranty, or other term or condition that relates to

compliance with an environmental law or monitoring or enforcing the term or condition;

(5) monitoring or undertaking one or more inspections of the solid waste facility;

(6) providing financial or other advice or counseling to other parties to the fiduciary relationship, including the settlor or beneficiary;

(7) restructuring, renegotiating, or otherwise altering the terms and conditions of the fiduciary relationship;

(8) administering, as a fiduciary, a solid waste facility that was contaminated before the fiduciary relationship began; or

(9) declining to take an action described by Subdivisions (2)-(8).

(e) This section does not:

(1) affect a right, immunity, or defense available under this code or the Water Code that is applicable to a person subject to this section;

(2) create any liability for a person; or

(3) create a private right of action against a fiduciary or any other person.

(f) This section does not apply to a person if the person:

(1) acts in a capacity other than that of a fiduciary or in a beneficiary capacity and, in that capacity, directly or indirectly benefits from a trust or fiduciary relationship; or

(2) is a beneficiary and a fiduciary with respect to the same fiduciary estate and, as a fiduciary, receives benefits

that exceed customary or reasonable compensation, and incidental benefits, permitted under other applicable law.

(g) This section does not preclude a claim under this code or the Water Code against:

(1) the assets of the estate or trust administered by the fiduciary; or

(2) a nonemployee agent or independent contractor retained by a fiduciary.

[Sections 361.653-361.700 reserved for expansion]

SUBCHAPTER U. LENDER LIABILITY

Sec. 361.701. DEFINITIONS. In this subchapter:

(1) "Extension of credit" includes a lease finance transaction:

(A) in which the lessor does not initially select the leased solid waste facility and does not during the lease term control the daily operations or maintenance of the solid waste facility; or

(B) that conforms with, as appropriate, regulations issued by:

(i) the appropriate federal banking agency or the appropriate state bank supervisor, as those terms are defined by Section 3, Federal Deposit Insurance Act (12 U.S.C. Section 1813); or

(ii) the National Credit Union Administration Board.

(2) "Financial or administrative function" includes a function such as a function of a credit manager, accounts payable

officer, accounts receivable officer, personnel manager, comptroller, or chief financial officer, or a similar function.

(3) "Foreclosure" and "foreclose" mean, respectively, acquiring, and to acquire, a solid waste facility through:

(A) purchase at sale under a judgment or decree, power of sale, or nonjudicial foreclosure sale;

(B) a deed in lieu of foreclosure, or similar conveyance from a trustee;

(C) repossession, if the solid waste facility was security for an extension of credit previously contracted;

(D) conveyance under an extension of credit previously contracted, including the termination of a lease agreement; or

(E) any other formal or informal manner by which the person acquires, for subsequent disposition, title to or possession of a solid waste facility in order to protect the security interest of the person.

(4) "Lender" means:

(A) an insured depository institution, as that term is defined by Section 3, Federal Deposit Insurance Act (12 U.S.C. Section 1813);

(B) an insured credit union, as that term is defined by Section 101, Federal Credit Union Act (12 U.S.C. Section 1752);

(C) a bank or association chartered under the Farm Credit Act of 1971 (12 U.S.C. Section 2001 et seq.);

(D) a leasing or trust company that is an

affiliate of an insured depository institution;

(E) any person, including a successor or assignee of any such person, that makes a bona fide extension of credit to or takes or acquires a security interest from a nonaffiliated person;

(F) the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Agricultural Mortgage Corporation, or any other entity that in a bona fide manner buys or sells loans or interests in loans;

(G) a person that insures or guarantees against a default in the repayment of an extension of credit, or acts as a surety with respect to an extension of credit, to a nonaffiliated person;

(H) a person that provides title insurance and that acquires a solid waste facility as a result of assignment or conveyance in the course of underwriting claims and claims settlement; and

(I) an agency of this state that makes an extension of credit to or acquires a security interest from:

(i) a federal or state agency;

(ii) a county, municipality, or other body politic or corporate of this state, including:

(a) a district or authority created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution;

(b) an interstate compact commission to which this state is a party; or

(C) a nonprofit water supply corporation created and operating under Chapter 76, Acts of the 43rd Legislature, 1st Called Session, 1933 (Article 1434a, Vernon's Texas Civil Statutes); or

(iii) another person.

(5) "Operational function" includes a function such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer.

(6) "Security interest" includes a right under a mortgage, deed of trust, assignment, judgment lien, pledge, security agreement, factoring agreement, or lease and any other right accruing to a person to secure the repayment of money, the performance of a duty, or any other obligation by a nonaffiliated person.

(7) "Solid waste facility":

(A) means:

(i) all contiguous land, including structures, appurtenances, and other improvements on the land, used for processing, storing, or disposing of solid waste, including a publicly or privately owned solid waste facility consisting of several processing, storage, or disposal operational units such as one or more landfills, surface impoundments, or a combination of units; and

(ii) any building, structure, installation, equipment, pipe, or pipeline, including any pipe into a sewer or publicly owned treatment works, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle,

rolling stock, or aircraft, or any site or area where a hazardous substance has been deposited, stored, disposed of, placed, or otherwise come to be located; and

(B) does not include a:

(i) consumer product in consumer use; or

(ii) vessel.

Sec. 361.702. EXCLUSION OF LENDERS NOT PARTICIPANTS IN MANAGEMENT. (a) In Section 361.271, the term "owner or operator" does not include a person that is a lender that:

(1) without participating in the management of a solid waste facility, holds a security interest in or with regard to the solid waste facility; or

(2) did not participate in management of a solid waste facility before foreclosure, notwithstanding the fact that the person:

(A) forecloses on the solid waste facility; and

(B) after foreclosure, sells, re-leases, in the case of a lease finance transaction, or liquidates the solid waste facility, maintains business activities, winds up operations, undertakes a response action with respect to the solid waste facility under the national contingency plan adopted under 42 U.S.C. Section 9605, under a commission-approved cleanup plan, or under the direction of an on-scene coordinator appointed under the national contingency plan or a commission-approved cleanup plan, or takes any other measure to preserve, protect, or prepare the solid waste facility before sale or disposition, if the person seeks to sell, re-lease, in the case of a finance transaction, or otherwise

divest the person of the facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

(b) For purposes of Subsection (a)(2)(B), a lender is presumed to divest the lender of the solid waste facility at the earliest practicable, commercially reasonable time if, within 12 months after foreclosure, the lender:

(1) lists the solid waste facility with a broker, dealer, or agent who deals in that type of property; or

(2) advertises the solid waste facility for sale or other disposition at least monthly in:

(A) a real estate publication;

(B) a trade or other publication appropriate for the solid waste facility being advertised; or

(C) a newspaper of general circulation in the area in which the solid waste facility is located.

(c) For purposes of Subsection (b), the 12-month period begins:

(1) when the lender acquires marketable title if the lender, after the expiration of any redemption period or other waiting period required by law, was acting diligently to acquire marketable title; or

(2) on the date of foreclosure or its equivalent if the lender does not act diligently to acquire marketable title.

(d) Except as otherwise provided by Subchapter I, Chapter 26, Water Code, or rules adopted under that subchapter, a lender is

not liable under this code or the Water Code to undertake a removal or remedial action or to pay a fine or penalty arising from the release or threatened release of solid waste at, from, or in connection with the solid waste facility in which the lender maintains a security interest or that the lender has acquired through foreclosure if:

(1) the lender has not participated in management before foreclosure;

(2) the conditions giving rise to the release or threat of release existed before foreclosure; and

(3) the lender seeks to divest the lender of the property under Subsections (a)(2)(B) and (b).

(e) Notwithstanding Subsection (d), if a lender after foreclosure operates, directs the operation of, or maintains the operation of business activities, this section does not exempt or excuse the lender from compliance with legal requirements applicable to the operation of that business. Those operational requirements include permitting, reporting, monitoring, compliance with emission limitations, financial responsibility and assurance requirements, payment of fees, and payment of fines and penalties for noncompliance with those requirements.

Sec. 361.703. PARTICIPATION IN MANAGEMENT. (a) For purposes of Section 361.702, the term "participate in management":

(1) means actually participating in the management or operational affairs of a solid waste facility; and

(2) does not include merely having the capacity to influence, or the unexercised right to control, a solid waste

facility or facility operations.

(b) A person that is a lender that holds a security interest in or with regard to a solid waste facility is considered to participate in management only if, while the borrower is still in possession of the solid waste facility encumbered by the security interest, the person:

(1) exercises decision-making control over the environmental compliance related to the solid waste facility such that the person has undertaken responsibility for the solid waste handling or disposal practices related to the solid waste facility; or

(2) exercises control at a level comparable to that of a manager of the solid waste facility such that the person has assumed or manifested responsibility:

(A) for the overall management of the solid waste facility encompassing day-to-day decisionmaking with respect to environmental compliance; or

(B) over all or substantially all of the operational functions, as distinguished from financial or administrative functions, of the solid waste facility other than the function of environmental compliance.

(c) The term "participate in management" does not include:

(1) performing an act or failing to act before the time at which a security interest is created in a solid waste facility;

(2) holding a security interest or abandoning or releasing a security interest;

(3) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

(4) monitoring or enforcing the terms and conditions of the extension of credit or security interest;

(5) monitoring or undertaking one or more inspections of the solid waste facility;

(6) requiring a response action or other lawful means of addressing the release or threatened release of solid waste in connection with the solid waste facility before, during, or on the expiration of the term of the extension of credit;

(7) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the solid waste facility;

(8) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

(9) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

(10) conducting a response action under the national contingency plan adopted under 42 U.S.C. Section 9605, under a commission-approved cleanup plan, or under the direction of an on-scene coordinator appointed under the national contingency plan or a commission-approved cleanup plan, if the actions do not rise to the level of participating in management within the meaning of

Subsections (a) and (b).

[Sections 361.704-361.750 reserved for expansion]

SUBCHAPTER V. IMMUNITY FROM LIABILITY OF INNOCENT OWNER OR OPERATOR

Sec. 361.751. DEFINITIONS. In this subchapter:

(1) "Contaminant" has the meaning assigned by Section 361.601.

(2) "Innocent owner or operator" means a person that:

(A) is an owner or operator of property that has become contaminated as a result of a release or migration of contaminants from a source or sources not located on or at the property; and

(B) did not cause or contribute to the source or sources of the contamination referred to in Paragraph (A).

Sec. 361.752. IMMUNITY FROM LIABILITY; ACCESS TO PROPERTY. (a) An innocent owner or operator of property is not liable under this code or the Water Code for investigation, monitoring, remediation, or corrective or other response action regarding the conditions attributable to a release or migration of a contaminant or otherwise liable regarding those conditions.

(b) A person that acquires a portion of the tract on which the source of a release of contaminants is located from the person that caused the release is eligible for immunity under Subsection (a) only if, after appropriate inquiry consistent with good commercial or customary practice, the person did not know or have reason to know of the contamination at the time the person acquired the property.

(c) To be eligible for immunity under Subsection (a), an owner or operator must grant reasonable access to the property for purposes of investigation or remediation to a person designated by the executive director. An agreement for reasonable access may provide:

(1) that the designated person may not unreasonably interfere with the use of the property;

(2) for payment of reasonable compensation for access to the property; or

(3) that the owner or operator is indemnified from liability for an intentional or negligent act of the designated person arising from the person's access to and use of the property.

(d) This section does not limit any right of the commission under another provision of this code or the Water Code to obtain access to the property.

Sec. 361.753. CERTIFICATION. (a) A person may apply to the commission for a certificate confirming that the person is an innocent owner or operator. The application must include a complete site investigation report that demonstrates that:

(1) the property has become contaminated as a result of a release or migration of contaminants from a source or sources not located on or at the property;

(2) the owner or operator has not caused or contributed to the source or sources of the contamination referred to in Subdivision (1); and

(3) the owner or operator is eligible for immunity under Section 361.752(b).

(b) The commission may charge an application fee in an amount not to exceed the cost of reviewing the application. The commission shall deposit a fee collected under this subsection to the credit of the hazardous and solid waste remediation fee fund.

(c) Not later than the 45th day after the date the commission receives the application, the commission shall notify the applicant whether the application is complete.

(d) Not later than the 90th day after the date the commission receives the application, the commission shall:

(1) issue or deny the certificate; or

(2) notify the applicant of any additional information needed to review the application.

(e) Not later than the 45th day after the date the commission receives the additional information requested under Subsection (d)(2), the commission shall issue or deny the certificate.

(f) The certificate evidences the immunity from liability of the applicant as provided by Section 361.752.

(g) The commission may condition the issuance of the certificate on the placement of restrictions on the use of the property that are reasonably necessary to protect the public health, including:

(1) institutional controls such as deed restrictions or municipal zoning restrictions; or

(2) at the owner's or operator's option, other control measures.

Sec. 361.754. RIGHTS OF INNOCENT OWNER OR OPERATOR REGARDING

CONTAMINATION FROM SOURCE NOT LOCATED ON OR AT PROPERTY. This subchapter does not limit the right of an innocent owner or operator to pursue any remedy available at law or in equity for conditions attributable to the release or migration of contaminants from a source or sources that are not located on or at the property.

SECTION 16. Subchapter C, Chapter 2155, Government Code, is amended by adding Section 2155.145 to read as follows:

Sec. 2155.145. CERTAIN PURCHASES BY TEXAS NATURAL RESOURCE CONSERVATION COMMISSION. The Texas Natural Resource Conservation Commission is delegated all purchasing functions relating to the administration of Subchapters F and I, Chapter 361, Health and Safety Code, subject to the rules adopted by the commission under Section 2155.132(c).

SECTION 17. Section 2166.003(a), Government Code, is amended to read as follows:

(a) Unless otherwise provided, this chapter does not apply to:

(1) a project constructed by and for the Texas Department of Transportation;

(2) a project constructed by and for a state institution of higher education;

(3) a pen, shed, or ancillary building constructed by and for the Department of Agriculture for the processing of livestock before export;

(4) a project constructed by the Parks and Wildlife Department;

(5) a repair or rehabilitation project, except a major renovation, of buildings and grounds on the commission inventory;

(6) a repair and rehabilitation project of another using agency, if all labor for the project is provided by the regular maintenance force of the using agency under specific legislative authorization and the project does not require the advance preparation of working plans or drawings; [or]

(7) a repair and rehabilitation project involving the use of contract labor, if the project has been excluded from this chapter by commission rule and does not require the advance preparation of working plans or drawings; or

(8) an action taken by the Texas Natural Resource Conservation Commission under Subchapter F or I, Chapter 361, Health and Safety Code.

SECTION 18. Subchapter A, Chapter 2253, Government Code, is amended by adding Section 2253.002 to read as follows:

Sec. 2253.002. EXEMPTION. This chapter does not apply to a public work contract entered into by a state agency relating to an action taken under Subchapter F or I, Chapter 361, Health and Safety Code, or Subchapter I, Chapter 26, Water Code.

SECTION 19. Section 26.265, Water Code, is amended by adding Subsections (h)-(j) to read as follows:

(h) Notwithstanding Subsection (g), a responsible person who enters into a settlement agreement with the state that resolves all liability of the person to the state for a site subject to Subchapter F, Chapter 361, Health and Safety Code, is released from liability to a person described by Section 361.344(a), Health and

Safety Code, for contribution or indemnity under this code regarding a matter addressed in the settlement agreement.

(i) A settlement agreement does not discharge the liability of a nonsettling person to the state unless the agreement provides otherwise.

(j) Notwithstanding Subsection (i), a settlement agreement reduces the potential liability to the state of the nonsettling persons by the amount of the settlement.

SECTION 20. This Act takes effect September 1, 1997.

SECTION 21. 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.

President of the Senate

Speaker of the House

I certify that H.B. No. 2776 was passed by the House on May 8, 1997, by a non-record vote; and that the House concurred in Senate amendments to H.B. No. 2776 on May 22, 1997, by a non-record vote.

Chief Clerk of the House

I certify that H.B. No. 2776 was passed by the Senate, with amendments, on May 20, 1997, by a viva-voce vote.

Secretary of the Senate

APPROVED: _____

Date

_____

Governor

Steve Morton

Shareholder
Jenkens & Gilchrist
Environmental Law Section

J.D. Vanderbilt University 1984
B.S. Environmental Science, Allegheny College 1980
Licensed in Texas and Tennessee

Steve represents commercial and industrial entities in the purchase and sale of distressed properties, as well as on regulatory and litigation issues associated with such transactions. Steve is a charter member and General Counsel of the Industry Council on the Environment, a trade association representing diverse business interests before state and federal environmental agencies. He is also the editor of the Second Edition of the American Bar Association's publication entitled ***What to do When the Environmental Client Calls***. Steve is a frequent lecturer on environmental topics, with some of the most recent topics relating to using the Internet in an environmental practice; the regulatory hurdles for use of bioremediation remedies; and federal and State release reporting requirements.

ROBERT L. SOZA

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PRACTICE CONCENTRATION AND EXPERIENCE SUMMARY

Environmental and Litigation. Robert is an associate practicing in the Environmental and Litigation areas in the San Antonio office of Jenkens & Gilchrist. He has represented clients on compliance and litigation matters related to CERCLA, RCRA, NEPA, the Clean Air Act, the Clean Water Act, insurance coverage involving claims for environmental remediation costs, and compliance with Mexican environmental laws and compliance with U.S. customs and trade laws, NAFTA and GATT compliance.

Administrative. Robert has represented and counseled clients in enforcement actions brought by governmental agencies related to alleged violations of environmental laws and U.S. customs and trade laws.

EDUCATION

B.A., English, University of Texas, 1986
J.D., University of Texas Law School, 1989

SELECTED PUBLICATIONS AND PRESENTATIONS

- Speaker, "Implementation of International Health Standards For A Multinational Company," Sematech International Occupational Health Symposium, May 1996
- Speaker, "El Trato de Libre Commercio y Los Meollos Ambientales," National Federation of Attorney Bars and Associations, June 1993
- Author, "Environmental Aspects of the North American Free Trade Agreement and Free Trade with Mexico," Shepard's California Environmental Law and Regulation Reporter, February 1993
- Author, "Defusing a Silent Time Bomb: Proposed Regulations for Contaminated Sediment," Shepard's California Environmental Law and Regulation Reporter, August 1992
- Author, "Conflict of Interest," Beverly Hills Bar Association Law Journal, Winter 1990

Ninth Annual Texas Environmental Superconference

Air Quality



CLEAN AIR ACT ("CAA")
TITLE V INTERIM PROGRAM

"It Just Keeps Going and Going and Going . . ."

KAREN OLSON

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Operating Permits Division

IMPLEMENTATION OF OPERATING PERMITS IN TEXAS



122.120 APPLICABILITY

Major Sources

- 10/25 tpy of HAPS
- 100 tpy of Any Air Contaminant
- 25/50/100 tpy VOC/NO_x in Ozone Nonattainment Area

Affected Sources Under Acid Rain Solid Waste Incineration Units

- Under Section 129(3) of Title 1

Nonmajor Section 111, §112 or Title III Sources

- Only if Designated by EPA Rulemaking

122.130(b) RESPONSIBILITY TO APPLY

Sources Under Interim Program

- Sites Brought in by SIC Code
  - Petroleum and Natural Gas 1311
  - Natural Gas Liquids 1321
  - Electric Services 4911
  - Natural Gas Transmission 4922
  - Natural Gas Transmission and Distribution 4923
  - Petroleum Bulk Station and Terminals 5171
- Title IV Acid Rain Sources

Sources Under Full Program

- All Remaining Major Sources
- Solid Waste Inceneration Units Under Section 129(e) of Title I

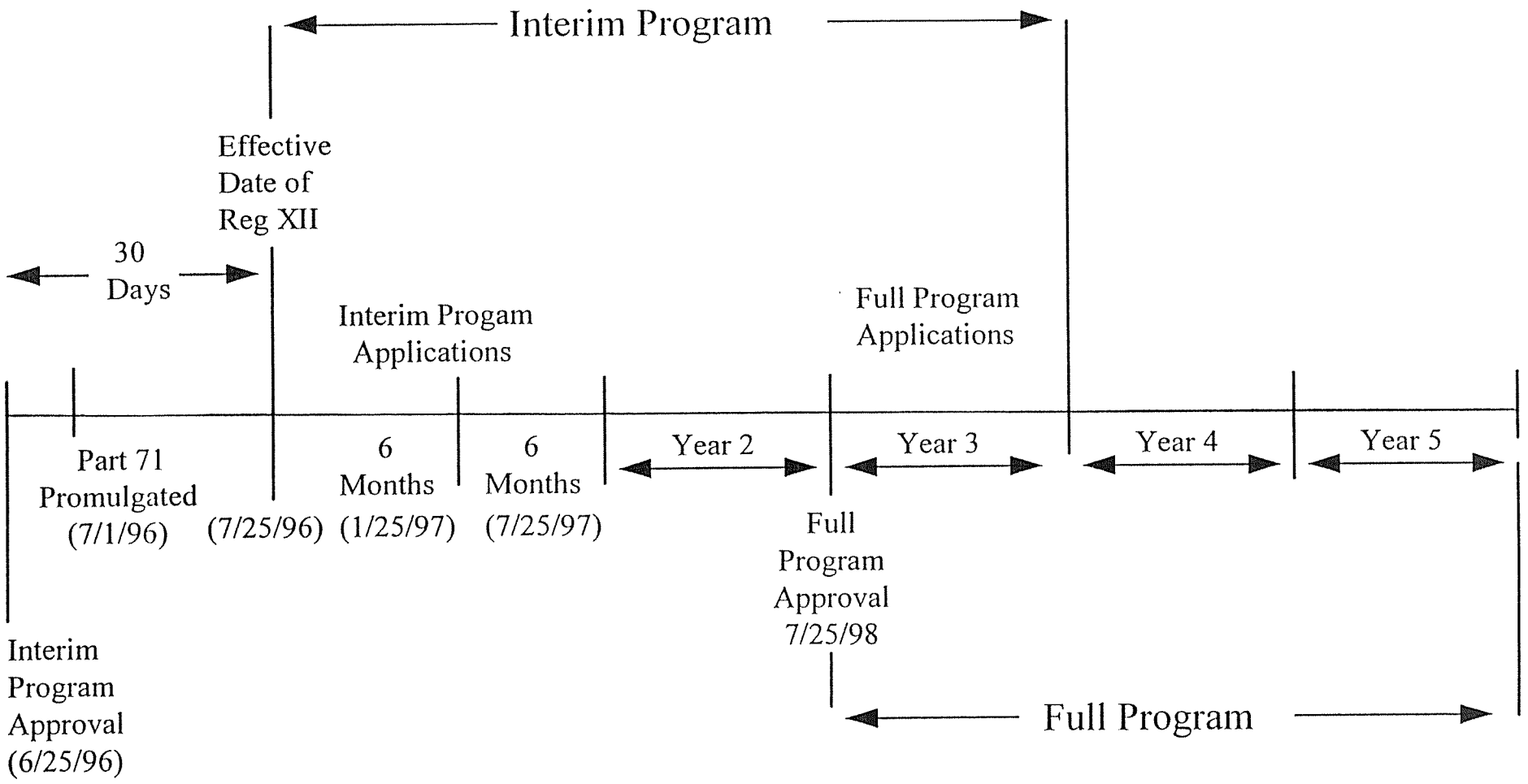
Sources Under Full Program

- All Remaining Major Sources
- Solid Waste Incineration Units Under Section 129(e) of Title I
- Nonmajor NSPS and NESHAP Sources if Designated by EPA Rulemaking

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Operating Permits Division

§122.130(c) RESPONSIBILITY TO APPLY



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TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

TNRCC OPERATING PERMIT PROGRAM

PERMIT CONTENT

Unit/Group/Process		Op-Scn Code	Pollutant	Emission Limitation/Standard or Equipment Specification		Textual Description	Monitoring And Testing Requirements	Recordkeeping Requirements [General Term and Condition 1.B.]	Reporting Requirements [General Term and Condition 1.C.]
ID No.	Type			Name	Citation				
GRP-TKS-1	GRP-EU	A	VOC	40 CFR 60, Subpart Kb	60.112b(a)(1), (a)(1)(i), (a)(1)(ii)(B), (a)(1)(iii)-(ix)	Installation of a fixed roof in combination with an internal floating roof meeting the specifications listed in §60.112b(a)(1)(i)-(ix).	60.113b(a)(1), [G]60.113b(a)(3) 60.113b(a)(4)-(5) 60.116b(a)-(c), (e)(1), (e)(2)(i)	60.115b, (a)(2) 60.116b(a)-(c)	60.113b(a)(5) 60.115b, (a)(1), (a)(4)
GRP-TKS-1	GRP-EU	A	VOC	30 TAC Chapter 115	115.112(c)(1), (c)(2)(A)-(B)	A tank shall not store any VOC, other than crude oil or condensate, unless it can maintain working pressure or is equipped with the proper control device according to Table I(b) in this section.	115.114(c)(1)	None	None
GRP-TKS-2	GRP-EU	A	VOC	30 TAC Chapter 115	115.112(c)(1), (c)(2)(A)-(B)	A tank shall not store any VOC, other than crude oil or condensate, unless it can maintain working pressure or is equipped with the proper control device according to Table I(b) in this section.	115.114(c)(1)	None	None
LR-6212	EU	A	VOC	40 CFR 60, Subpart XX	60.502(a), (c)-(d), (g)-(i)	Each affected facility shall be equipped with a VCS (VR-6212) designed to collect the total organic compounds vapors displaced from tank trucks during product loading.	60.502(j) 60.503(a)-(b), (c)(1), (c)(3)-(4), (c)(5)(ii), (c)(6)-(7) [G]60.503(d)	60.502(j) 60.503(c)(4), (d)(2) [G]60.505(c) 60.505(f)	None

TITLE V FEDERAL OPERATING PERMITS TEXAS PROGRAM

- Estimated 3,000 Major Sites
- Anticipated 8,100 Permits
- Estimated 150,000 Emission Units
- Air Quality Regulations
  - 72 NSPS Subparts
  - 22 NESHAPS
  - 174 MACT Standards
  - 43 State Rules

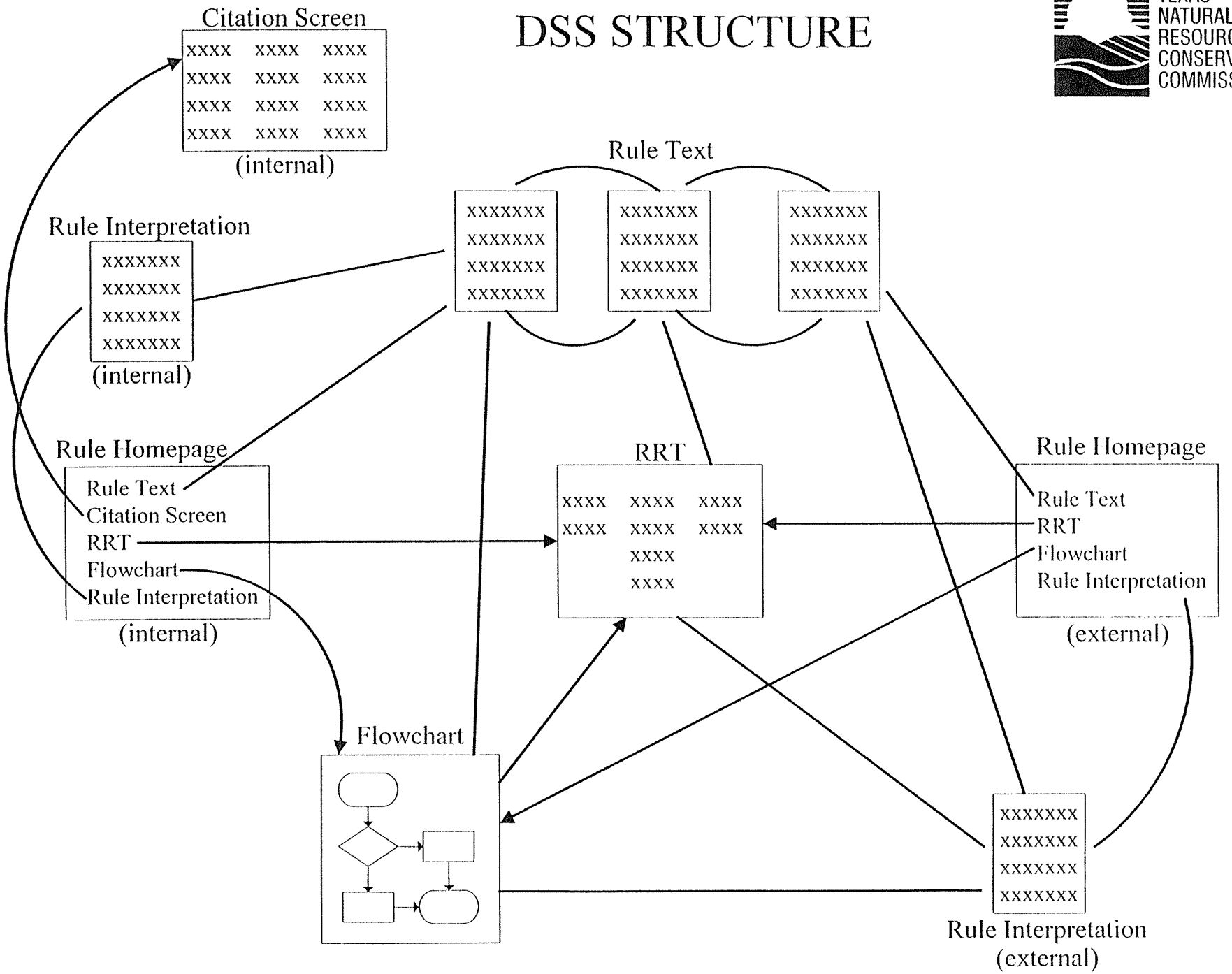
DECISION SUPPORT SYSTEM

- Purpose:
  - To Provide Documents Over the Internet to Aid in the Application and Review Process of Title V Permits and Associated Investigations

- What Will be Provided:
  - Federal and State Rules
  - Requirement Reference Tables
  - Flowcharts
  - Rule Interpretations (Title V and Non-Title V)

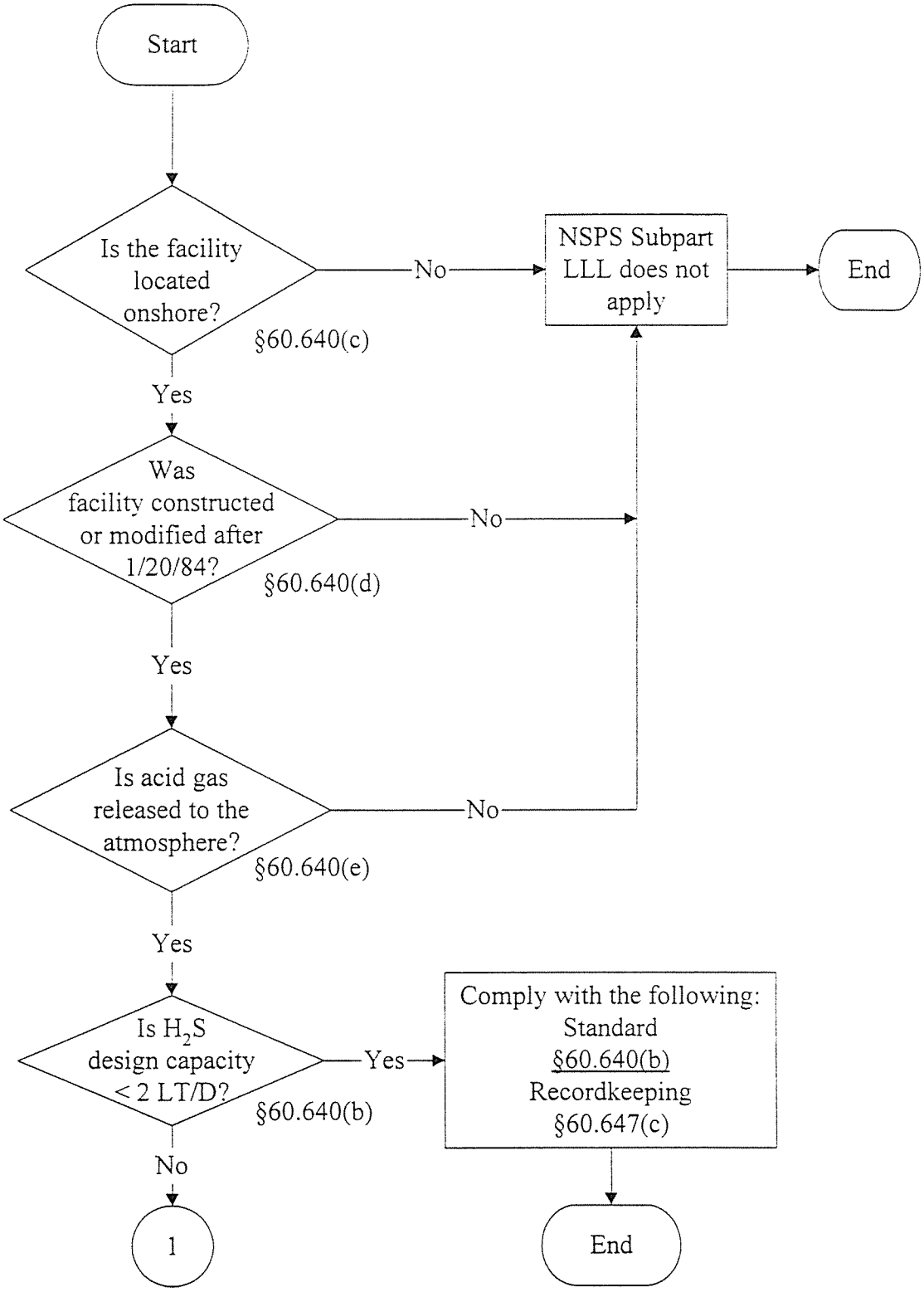
DSS STRUCTURE

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION



40 CFR 60, Subpart LLL

(1 of 3)



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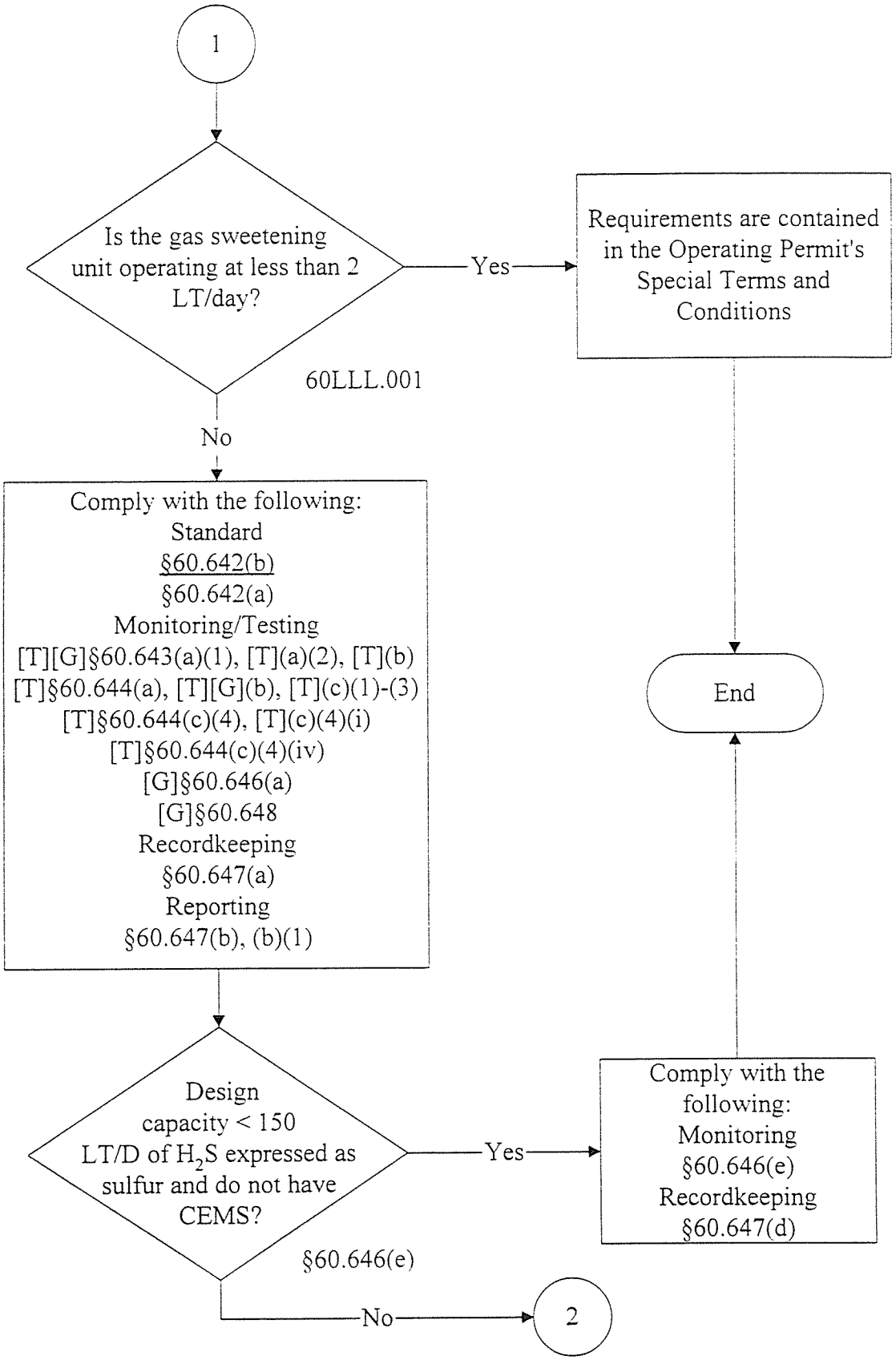
These flowcharts are for use by sources subject to the Texas Federal Operating Permits Program only and are subject to revision.

40 CFR 60, Subpart LLL

(2 of 3)



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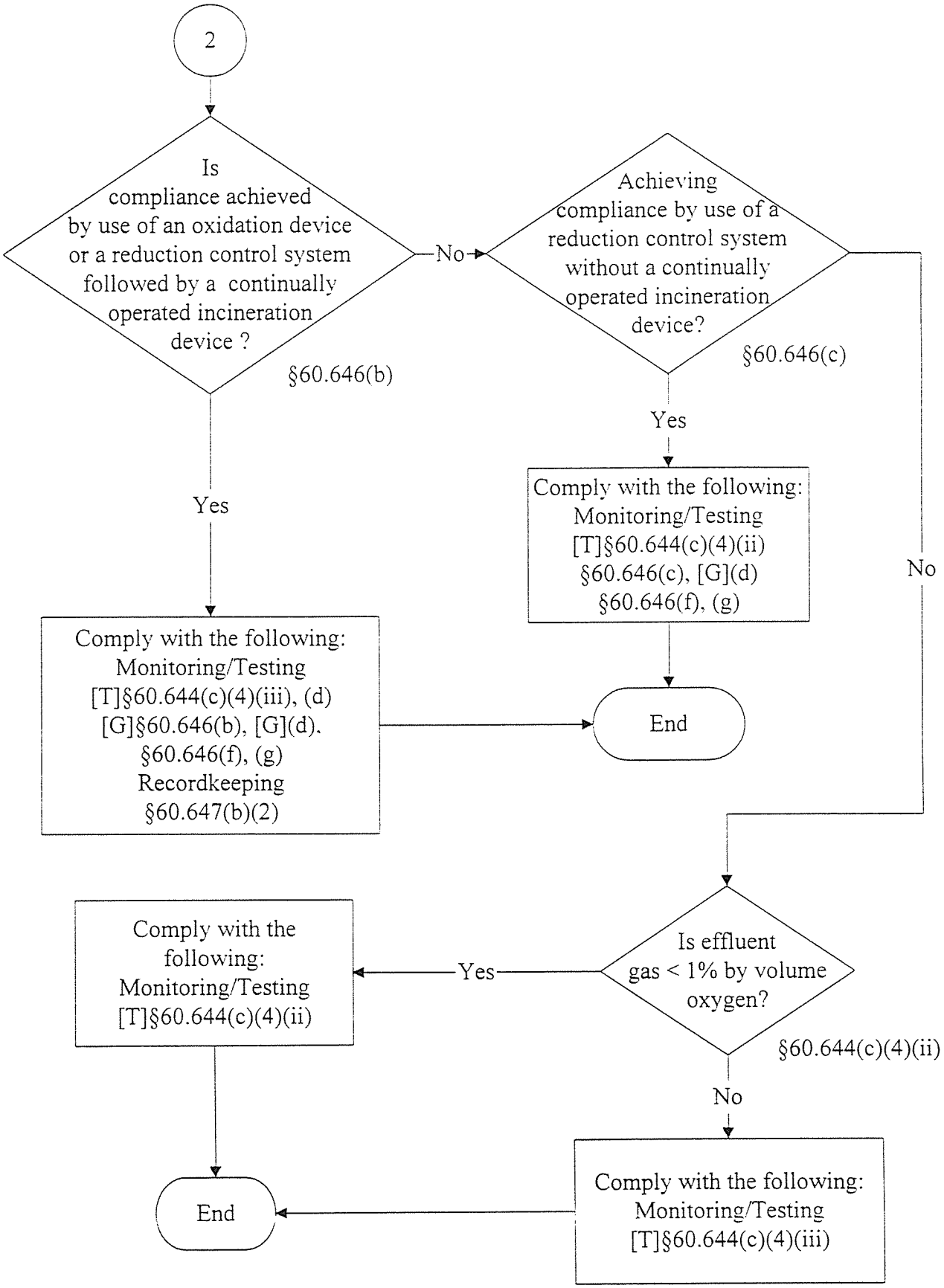
These flowcharts are for use by sources subject to the Texas Federal Operating Permits Program only and are subject to revision.

40 CFR 60, Subpart LLL

(3 of 3)



These flowcharts are for use by sources subject to the Texas Federal Operating Permits Program only and are subject to revision.

TNRCC

Relationship Entry Screen

Document: 40 CFR 60, Subpart LLL

Standard	Monitoring/Testing	Recordkeeping	Reporting
§60.640(b)		[R]§60.647(c)	
§60.642(b) *[R]§60.642(a)*	[T][GR]§60.643(a)(1) [T][R]§60.643(a)(2) [T][R]§60.643(b) [T][R]§60.644(a) [T][GR]§60.644(b) [T][R]§60.644(c)(1) [T][R]§60.644(c)(2) [T][R]§60.644(c)(3) [T][R]§60.644(c)(4) [T][R]§60.644(c)(4)(i) [T][D]§60.644(c)(4)(ii) [T][D]§60.644(c)(4)(iii) [T][R]§60.644(c)(4)(iv) [D]§60.644(d) [GR] §60.646(a) [GD] §60.646(b) [D] §60.646(c) [GD] §60.646(d) [D] §60.646(e) [D] §60.646(f) [D] §60.646(g) [GR]§60.648	[R]§60.647(a) [D]§60.647(d)	[R]§60.647(b) [R]§60.647(b)(1) [D]§60.647(b)(2)

TEXAS
NATURAL
RESOURCE
CONSERVATION
COMMISSION

Operating Permits Division

REQUIREMENT REFERENCE TABLES
&
FLOWCHARTS

For Full Program Development:

Total - 125 Air Quality Regulations
Current - 70 Air Quality Regulations

Projected Completion Date: October, 1998

MORE INFORMATION

- Guidance Documents
- TNRCC Bulletin Board (512) 239-0700
- World Wide Web
  - OPD: http://www.tnrcc.state.tx.us/air/opd/opdhmpg.htm
  - Rules: http://www.tnrcc.state.tx.us/oprd/index.html
- OPD Receptionist (512) 239-1334

Karen N.T. Olson

Texas Natural Resource Conservation Commission

Karen N.T. Olson, P.E. received her B.S. in Chemical Engineering from the University of Texas in Austin in 1978. September 1979, after a short time as an environmental consultant, she joined the Texas Air Control Board Permits Program. Ms. Olson was a permit engineer reviewing coatings, combustion, and chemical construction permits for approximately 10 years. She became technical specialist primarily responsible for negotiations and coordination with the U.S. Environmental Protection Agency concerning permitting and Federal Clean Air Act program development within the Permits Program. Ms. Olson is now Director of the Operating Permits Program in the Office of Air Quality of the Texas Natural Resources Conservation Commission. Her primary responsibility is the development and implementation of the Title III (Toxics) and Title V (Operating Permits) programs to satisfy the Federal Clean Air Act Amendments.

Telephone: (512) 239-1334

CAA TITLE V COMPLIANCE STRATEGIES

"Just Do It"

BRAD RAFFLE

NINTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

AN ENVIRONMENTAL "AD" VENTURE

BRADLEY I. RAFFLE
HUTCHESON & GRUNDY, L.L.P.
HOUSTON, TEXAS

CLEAN AIR ACT TITLE V COMPLIANCE STRATEGIES "JUST DO IT"

JULY 31 & AUGUST 1, 1997

FOUR SEASONS HOTEL
98 SAN JACINTO BLVD.
AUSTIN, TEXAS

TITLE V IMPLEMENTATION
(JUST DO IT!)

- AVOIDING TITLE V
- ASSEMBLING THE APPLICATION
- NEGOTIATING PERMIT TERMS
- DEFENDING OR CHALLENGING THE FINAL PERMIT

WHO MUST APPLY

OWNERS AND OPERATORS OF ONE OR MORE OF THE FOLLOWING ARE SUBJECT TO THE REQUIREMENT TO OBTAIN A FEDERAL OPERATING PERMIT UNDER 30 TAC CH. 122:

1) ANY SITE THAT IS A MAJOR SOURCE AS DEFINED IN § 122.10;

2) ANY SITE WITH AN AFFECTED UNIT SUBJECT TO THE REQUIREMENTS OF THE ACID RAIN PROGRAM;

3) ANY SOLID WASTE INCINERATION UNIT REQUIRED TO OBTAIN A PERMIT UNDER § 129(e) OF THE FEDERAL CLEAN AIR ACT; OR

4) CERTAIN SITES THAT ARE NON-MAJOR SOURCES WHICH THE EPA, THROUGH RULEMAKING, HAS DESIGNATED AS NO LONGER EXEMPT FROM THE OBLIGATION TO OBTAIN A PERMIT.

MAJOR SOURCE

(A) For pollutants other than radionuclides, any site that emits or has the potential to emit, in the aggregate the following quantities:

(i) ten tons per year (tpy) or more of any single hazardous air pollutant listed under FCAA, §112(b) (relating to Hazardous Air Pollutants);

(ii) 25 tpy or more of any combination of such hazardous air pollutant listed under FCAA, §112(b); or

(iii) any quantity less than those identified in subparagraph (A)(i) or (ii) of this definition established by the EPA through rulemaking.

(B) For radionuclides regulated under FCAA, §112, the term "major source" shall have the meaning specified by the EPA by rule.

MAJOR SOURCE
(Cont'd)

(C) Any site which directly emits or has the potential to emit, 100 tpy or more of any air pollutant. The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source, unless the stationary source belongs to one of the following categories of stationary sources:

(i) coal cleaning plants (with thermal dryers);

(ii) kraft pulp mills;

(iii) portland cement plants;

(iv) primary zinc smelters;

(v) iron and steel mills;

(vi) primary aluminum ore reduction plants;

(vii) primary copper smelters;

(viii) municipal incinerators capable of charging more than 250 tons of refuse per day;

MAJOR SOURCE
(Cont'd)

(ix) hydrofluoric, sulfuric, or nitric acid plants;

(x) petroleum refineries;

(xi) lime plants;

(xii) phosphate rock processing plants;

(xiii) coke oven batteries;

(xiv) sulfur recovery plants;

(xv) carbon black plants (furnace process);

(xvi) primary lead smelters;

(xvii) fuel conversion plant;

(xviii) sintering plants;

(xix) secondary metal production plants;

(xx) chemical process plants;

(xxi) fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units (Btu) per hour heat input;

MAJOR SOURCE
(Cont'd)

(xxii) petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) taconite ore processing plants;

(xiv) glass fiber processing plants;

(xxv) charcoal production plants;

(xxvi) fossil-fuel-fired steam electric plants of more than 250 million Btu per hour heat input; or

(xxvii) any stationary source category regulated under FCAA, §111 (relating to Standards of Performance for New Stationary Sources) or §112 for which the EPA has made an affirmative determination under FCAA, §302(j) (relating to Definitions).

(D) Any site, except those exempted under FCAA, §182(f) (relating to NO_x Requirements), which, in whole or in part, is a major source under FCAA, Title I, Part D (relating to Plan Requirements for Nonattainment Areas), including the following:

MAJOR SOURCE
(Cont'd)

(i) any site with the potential to emit 100 tpy or more of volatile organic compounds (VOC) or oxides of nitrogen (NO_x) in any ozone nonattainment area classified as "marginal or moderate";

(ii) any site with the potential to emit 50 tpy or more of VOC or NO_x in any ozone nonattainment area classified as "serious";

(iii) any site with the potential to emit 25 tpy or more of VOC or NO_x in any ozone nonattainment area classified as "severe";

(iv) any site with the potential to emit ten tpy or more of VOC or NO_x in any ozone nonattainment area classified as "extreme";

(v) any site with the potential to emit 100 tpy or more of carbon monoxide in any carbon monoxide nonattainment area classified as "moderate";

(vi) any site with the potential to emit 50 tpy or more of carbon monoxide in any carbon monoxide nonattainment area classified as "serious";

MAJOR SOURCE
(Cont'd)

(vii) any site with the potential to emit 100 tpy or more of inhalable particulate matter (PM-10) in any PM-10 nonattainment area classified as "moderate";

(viii) any site with the potential to emit 70 tpy or more of PM-10 in any PM-10 nonattainment area classified as "serious"; and

(ix) any site with the potential to emit 100 tpy or more of lead in any lead nonattainment area.

(E) The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source under subparagraph (D) of this definition, unless the stationary source belongs to one of the categories of stationary sources listed in subparagraph (C) of this definition.

MAJOR SOURCE
(Cont'd)

(F) Any temporary source which is located at a site for less than six months shall not affect the determination of major for other stationary sources at a site under this chapter or require a revision to the existing permit at the site.

(G) Emissions from any oil or gas exploration or production wells (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not the units are in a contiguous area or under common control, to determine whether the units or stations are major sources under subparagraph (A) of this definition.

SITE

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). IF A RESEARCH AND DEVELOPMENT OPERATION DOES NOT PRODUCE PRODUCTS FOR COMMERCIAL SALE, IT SHALL BE TREATED AS A SEPARATE SITE FROM ANY MANUFACTURING FACILITY WITH WHICH IT IS COLLOCATED.

POTENTIAL TO EMIT

THE MAXIMUM CAPACITY OF A STATIONARY SOURCE TO EMIT ANY AIR POLLUTANT UNDER ITS PHYSICAL AND OPERATIONAL DESIGN OR CONFIGURATION. ANY CERTIFIED REGISTRATION OR PRE-CONSTRUCTION AUTHORIZATION RESTRICTING EMISSIONS OR ANY PHYSICAL OR OPERATIONAL LIMITATION ON THE CAPACITY OF A STATIONARY SOURCE TO EMIT AN AIR POLLUTANT, INCLUDING AIR POLLUTION CONTROL EQUIPMENT AND RESTRICTIONS ON HOURS OF OPERATION OR ON THE TYPE OR AMOUNT OF MATERIAL COMBUSTED, STORED, OR PROCESSED, SHALL BE TREATED AS PART OF ITS DESIGN IF THE LIMITATION IS ENFORCEABLE BY THE EPA. THIS TERM DOES NOT ALTER OR AFFECT THE USE OF THIS TERM FOR ANY OTHER PURPOSES UNDER THE FCAA, OR THE TERM "CAPACITY FACTOR" AS USED IN ACID RAIN PROVISIONS OF THE FCAA OR THE ACID RAIN RULES.

AVOIDING TITLE V

- NATURAL MINOR SOURCE
- SYNTHETIC MINOR SOURCE

WHEN APPLICATIONS ARE DUE

§122.130. When Applications Are Due.

(a) Interim operating permit program.

(1) Owners and operators of the following sites shall submit initial applications under the interim operating permit program:

(A) any site with an affected unit subject to the requirements of the Acid Rain Program;

(B) any site with the following primary Standard Industrial Classification (SIC) code (as described in the Standard Industrial Classification Manual, 1987) (for purposes of this subparagraph, each site shall have only one primary SIC code):

(i) Petroleum and Natural Gas, 1311;

(ii) Natural Gas Liquids, 1321;

(iii) Electric Services, 4911;

(iv) Natural Gas Transmission, 4922;

(v) Natural Gas Transmission and Distribution, 4923; or

(vi) Petroleum Bulk Stations and Terminals, 5171.

(2) Except as provided in paragraph (3) of this subsection, applications for sites subject to the interim operating permit program shall be submitted by January 25, 1997.

WHEN APPLICATIONS ARE DUE
(Cont'd)

(3) If an owner or operator has more than one site listed in subsection (a)(1)(B) of this section, the owner or operator shall submit initial permit applications for no less than 10% of those sites by January 25, 1997. Applications for the remaining sites shall be submitted by July 25, 1997. This paragraph does not apply to any site with an affected source.

(b) Full operating permit program.

(1) Owners and operators of any site subject to the requirements of this chapter, except those identified in subsection (a)(1) of this section shall submit initial applications under the full operating permit program.

(2) Applications for sites with the following primary SIC major groups shall be submitted by January 25, 1999 (for purposes of this section, each site shall have only one primary SIC code):

(A) Mining and Quarrying of Nonmetallic Mineral, Except Fuels, 14;

(B) Food and Kindred Products, 20;

(C) Lumber and Wood Products, Except Furniture, 24;

(D) Rubber and Miscellaneous Plastics Products, 30;

(E) Stone, Clay, Glass, and Concrete Products, 32;

(F) Fabricated Metal Products, Except Machinery and Transportation Equipment, 34;

WHEN APPLICATIONS ARE DUE
(Cont'd)

(G) Motor Freight Transportation and Warehousing, 42; and

(H) Automotive Repair, Services, and Parking, 75.

(3) Except as specified in paragraph (2) of this subsection, applications for all other sites under the full operating permit program shall be submitted by July 25, 1999.

(c) After effective date of the interim or full operating permit program. Owners or operators of sites that become subject to this chapter after the effective date of either the interim operating permit program (July 25, 1996) or the full operating permit program (July 25, 1998), as applicable, shall submit permit applications as follows:

(1) no later than 12 months after the issuance or approval date of the preconstruction authorization, required under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification); or

(2) no later than 12 months after an action by the executive director or the EPA that subjects the site to the requirements of this chapter.

WHEN APPLICATIONS ARE DUE
(Cont'd)

(d) Applications submitted under 40 CFR Part 71 (relating to Federal Operating Permit Programs)..

(1) If 40 CFR Part 71 is implemented in Texas by the EPA, applications will only be required to be submitted to the EPA.

(2) If all or part of 40 CFR Part 71 is delegated to the commission, information required by this chapter and consistent with the delegation will be required to be submitted to the commission.

§122.131. Phased Application Process.

(a) Sites with 75 or more emission units in a nonattainment area, and sites with 150 or more emission units in an attainment area may qualify for the phased application process. Eligibility for the phased application process shall be based on the number of emission units individually listed in the initial permit application.

CONTENTS OF APPLICATION

An application shall include, but is not limited to, the following information:

(1) a general application form and all information requested by that form;

(2) for each emission unit, the following information:

(A) each potentially applicable requirement and potentially applicable state only requirement (e.g., NSPS Kb, or 30 TAC Chapter 111);

(B) the applicability determination for each potentially applicable requirement and potentially applicable state only requirement; and

(C) the basis for each determination made under subparagraph (B) of this paragraph;

CONTENTS OF APPLICATION
(Cont'd)

(3) for each emission unit, except as provided in §122.131 of this title, information regarding the detailed applicability determinations, which includes the following:

(A) the specific regulatory citations in each applicable requirement or state only requirement identifying the following:

(i) the emission limitations and standards; and

(ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards identified under clause (i) of this subparagraph;

(B) the basis for each applicability determination identified under subparagraph (A) of this paragraph;

(4) a compliance plan including the following information:

CONTENTS OF APPLICATION
(Cont'd)

(A) the following statement: "Based on my (the responsible official's) actual knowledge formed after reasonable inquiry at the time of submittal of an application under this chapter, all emission units shall comply, by the compliance dates, with any applicable requirements identified in the application that become effective during the permit term.";

(B) for all emission units addressed in the application, an indication of the apparent compliance status with respect to all applicable requirements, based on any compliance method specified in the applicable requirements;

(C) for any emission unit not in apparent compliance with the applicable requirements identified in the application, the following information:

(i) the method used for assessing the compliance status of the emission unit;

(ii) a narrative description of how the emission unit will come into compliance with all applicable requirements;

CONTENTS OF APPLICATION
(Cont'd)

(iii) a compliance schedule (resembling and at least as stringent as any compliance schedule contained in any judicial consent decree or administrative order to which the site is subject), including remedial measures to bring the emission unit into compliance with the applicable requirements; and

(iv) a schedule for the submission, at least every six calendar months after issuance of the permit, of certified progress reports;

(5) if applicable, information requested by the nationally-standardized forms for the acid rain portions of permit applications, and compliance plans required by the acid rain program;

CONTENTS OF APPLICATION
(Cont'd)

(6) if applicable, a statement certifying that a risk management plan, or a schedule to submit a risk management plan has been submitted to the appropriate agency in accordance with FCAA, §112(r)(7) (relating to Prevention of Accidental Releases);

(7) for applicants electing the phased application process under §122.131 of this title, a proposed schedule for the incorporation of the remaining detailed applicability determinations into the permit;

(8) for applicants requesting a permit shield, any information requested by the executive director in order to determine whether to grant the shield; and

(9) a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official).

IMPORTANCE OF THE APPLICATION PREPARATION EFFORT

- APPLICATION SHIELD
- CERTIFICATION AS TO CONTENTS AND COMPLIANCE STATUS BY A RESPONSIBLE OFFICIAL
- CLARITY AND ACCEPTABILITY OF THE PERMIT
- EARLY IDENTIFICATION OF COMPLIANCE CONCERNS

ISSUES FOR
PRIORITY ATTENTION

THE FOCUS IS ON COMPLIANCE-RELATED ISSUES, INCLUDING WHETHER EXISTING TERMS NEED TO BE MODIFIED, WHETHER FACILITY NONCOMPLIANCE NEEDS TO BE RECTIFIED, THE POTENTIAL FOR MONITORING OBLIGATIONS TO CREATE COMPLIANCE CONCERNS IN THE FUTURE, AND WHETHER SOURCES CAN REDUCE THEIR TITLE V-RELATED COSTS THROUGH EARLY AND THOUGHTFUL PLANNING.

IDENTIFYING "APPLICABLE REQUIREMENTS"

Applicable requirement-

(A) All of the following requirements of Chapter 111 of this title (relating to Control of Air Pollution From Visible Emissions and Particulate Matter) as they apply to the emission units at a site:

(i) §111.111(c)(1) and (2) of this title (relating to Requirements for Specified Sources);

(ii) §111.141 of this title (relating to Geographic Areas of Application and Date of Compliance), but only as it applies to El Paso and the Fort Bliss Military Reservation;

(iii) §111.143 of this title (relating to Materials Handling), but only as it applies to El Paso and the Fort Bliss Military Reservation;

(iv) §111.145 of this title (relating to Construction and Demolition), but only as it applies to El Paso and the Fort Bliss Military Reservation;

IDENTIFYING "APPLICABLE REQUIREMENTS" (Cont'd)

(v) §111.147 of this title (relating to Roads, Streets, and Alleys), but only as it applies to El Paso and the Fort Bliss Military Reservation; and

(vi) §111.149 of this title (relating to Parking Lots), but only as it applies to El Paso and the Fort Bliss Military Reservation.

(B) All of the following requirements of Chapter 112 of this title (relating to Sulfur Compounds) as they apply to the emission units at a site:

(i) §112.1 of this title (relating to Definitions);

(ii) §112.2 of this title (relating to Compliance, Reporting, and Recordkeeping);

(iii) §§112.5-112.9 of this title (relating to Allowable Emission Rates- Sulfuric Acid Plant Burning Elemental Sulfur; Allowable Emission Rates-Sulfuric Acid Plant; Allowable Emission Rates-Sulfur Recovery Plant; Allowable Emission Rates From Solid Fossil Fuel-Fired Steam Generators; and Allowable Emission Rates-Combustion of Liquid Fuel);

IDENTIFYING "APPLICABLE REQUIREMENTS" (Cont'd)

(iv) §112.14 of this title (relating to Allowable Emission Rates- Nonferrous Smelter Processes);

(v) §112.15 of this title (relating to Temporary Fuel Shortage Plan Filing Requirements);

(vi) §112.16 of this title (relating to Temporary Fuel Shortage Plan Operating Requirements);

(vii) §112.17 of this title (relating to Temporary Fuel Shortage Plan Notification Procedures);

(viii) §112.18 of this title (relating to Temporary Fuel Shortage Plan Reporting Requirements);

(ix) §112.41(b) of this title (relating to Allowable Emissions);

(x) §112.43(b) and (c) of this title (relating to Calculation Methods);

(xi) §112.45 of this title (relating to Inspection and Recordkeeping Requirements);

(xii) §112.47 of this title (relating to Compliance Schedules);

IDENTIFYING "APPLICABLE REQUIREMENTS" (Cont'd)

(xiii) §112.51 of this title (relating to Emissions Limits for TRS Compounds From Kraft Pulp Mills);

(xiv) §112.53 of this title (relating to Alternate Emission Limitations);

(xv) §112.55 of this title (relating to Inspection Requirements);

(xvi) §112.57 of this title (relating to Monitoring and Recordkeeping Requirements); and

(xvii) §112.59 of this title (relating to Compliance Schedules).

(C) All of the requirements of Subchapter B of Chapter 113 of this title (relating to Lead from Stationary Sources) as they apply to the emission units at a site.

IDENTIFYING "APPLICABLE REQUIREMENTS" (Cont'd)

(D) All of the requirements of Chapter 115 of this title (relating to Control of Air Pollution from Volatile Organic Compounds) as they apply to the emission units at a site.

(E) All of the requirements of Chapter 117 of this title (relating to Control of Air Pollution From Nitrogen Compounds), except Subchapter D of Chapter 117 of this title (relating to Administrative Provisions), as they apply to the emission units at a site.

(F) All of the requirements of Chapter 119 of this title (relating to Control of Air Pollution from Carbon Monoxide) as they apply to the emission units at a site.

(G) Any new requirement in Chapters 111, 112, 113, 115, 117, and 119 of this title, unless specifically identified in rulemaking as a state only requirement or exempted under subparagraph (J) of this definition.

IDENTIFYING "APPLICABLE REQUIREMENTS" (Cont'd)

(H) Any term or condition of any preconstruction permits issued under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) as necessary to implement the requirements of regulations approved or promulgated through rulemaking under FCAA, Title I, Parts C or D (relating to Prevention of Significant Deterioration of Air Quality or Plan Requirements for Nonattainment Areas);

(I) After the adoption of this chapter, any requirement in state regulations implementing federal new source review requirements for control of air pollution for new construction or modification, upon approval by the commission and approval as a State Implementation Plan revision by EPA, for the modification and construction of any stationary source within the areas covered by the State Implementation Plan as necessary to assure that national ambient air quality standards are achieved;

IDENTIFYING "APPLICABLE REQUIREMENTS" (Cont'd)

(J) All of the following federal requirements as they apply to the emission units at a site:

(i) any standard or other requirement under FCAA, §111 (relating to Standards of Performance for New Stationary Sources);

(ii) any standard or other requirement under FCAA, §112 (relating to Hazardous Air Pollutants), except requirements established under §112(g) or (j);

(iii) any standard or other requirement of the Acid Rain Program;

(iv) any requirements established under FCAA, §504(b) or §114(a)(3) (relating to Monitoring and Analysis or Inspections, Monitoring, and Entry);

(v) any standard or other requirement governing solid waste incineration under FCAA, §129 (relating to Solid Waste Combustion);

(vi) any standard or other requirement for consumer and commercial products under FCAA, §183(e) (relating to Federal Ozone Measures);

(vii) any standard or other requirement under FCAA, §183(f) (relating to Tank Vessel Standards);

(viii) any standard or other requirement under FCAA, §328 (relating to Air Pollution from Outer Continental Shelf Activities);

IDENTIFYING "APPLICABLE REQUIREMENTS" (Cont'd)

(ix) any standard or other requirement under FCAA, Title VI (relating to Stratospheric Ozone Protection), unless EPA has determined that the requirement need not be contained in a permit; and

(x) any NAAQS or increment or visibility requirement under FCAA, Title I, Part C, but only as it would apply to temporary sources permitted under FCAA, §504(e) (relating to Temporary Sources).

(K) State and federal ambient air quality standards, net ground level concentration limits, and ambient atmospheric concentration limits are not applicable requirements under this chapter, except as noted in subparagraph (I)(x) of this definition.

(L) Any requirements noted in this definition which have been promulgated by the EPA, but have not been adopted by and delegated to the commission are federally enforceable only. These applicable requirements will be designated as federally enforceable only in the permit.

REVIEWING APPLICABLE EMISSIONS LIMITATIONS IN LIGHT OF EPA'S NEW CREDIBLE EVIDENCE RULE

(62 FED. REG. 8314, FEB. 24, 1997)

- AVERAGING PERIODS
- NORMAL EMISSIONS VARIABILITY
- VARIABILITY OF TEST METHODS
- SIERRA CLUB V. P.S.C.C.
  894 F. SUPP. 1455 (D. COLO. 1995)

PREPARING FOR COMPLIANCE ASSURANCE MONITORING (CAM)

A) REGULATORY OR PERMIT MONITORING REQUIREMENTS

B) CAM REQUIREMENTS

C) IMPACT OF ACE RULE

PLANNING FOR OPERATIONAL FLEXIBILITY

A) NEW/RESTRUCTURED EMISSIONS LIMITS

B) USE OF ALTERNATIVE OPERATING SCENARIOS

C) STARTUPS/SHUTDOWNS/ MALFUNCTIONS

D) ADVANCE APPROVAL FOR CERTAIN FUTURE PLANT CHANGES

E) EMISSIONS CAPS

REVIEWING AND CLARIFYING AMBIGUOUS OR INAPPROPRIATE "APPLICABILITY REQUIREMENTS"

A) EMISSIONS LIMITS WHICH WERE BASED ON IMPRECISE ESTIMATION TECHNIQUES

B) RESTRICTIONS WHICH NO LONGER REFLECT ACTUAL PLANT CONDITIONS

C) EMISSIONS LIMITATIONS WHICH CANNOT BE ACHIEVED AT ALL TIMES

D) PERMIT TERMS WHICH MAY BE PURGED PER EPA GUIDANCE

PREPARING THE APPLICATION
OTHER PRIORITY ACTIONS

- STREAMLINING OVERLAPPING REQUIREMENTS, *e.g.*, LDAR

- EARLY IDENTIFICATION OF NONCOMPLIANCE

- ACHIEVING MINOR SOURCE STATUS OR OTHERWISE AVOIDING APPLICABILITY OF CERTAIN "APPLICABLE REQUIREMENTS"

  A) RACT/SIP

  B) MACT/NESHAP

- DECISIONS REGARDING PERMIT SHIELD PROTECTION

PREPARING TO SATISFY THE "REASONABLE INQUIRY" STANDARD FOR THE "RESPONSIBLE OFFICIAL" WHO WILL SIGN THE APPLICATION

A) "RESPONSIBLE OFFICIAL"

B) REASONABLE INQUIRY

C) DUTY TO SUPPLEMENT APPLICATION

DRAFTING TIPS

- USE CARE (*e.g.*, footnotes) IN SUBMITTING EMISSIONS INFORMATION. SUCH INFORMATION HAS THREE BASIC PURPOSES

  A) ESTABLISHING MAJOR SOURCE STATUS

  B) DEMONSTRATING COMPLIANCE

  C) ASSESSING PERMIT FEES

- DON'T MECHANICALLY FILL OUT STATE FORMS

- NO OBLIGATION TO REVISIT PRIOR "APPLICABILITY DETERMINATIONS"

- PROPOSE BROAD OPERATING FLEXIBILITY

NEGOTIATION OF PERMIT TERMS

- THE NEED FOR CLARITY REGARDING THE METHODOLOGY BY WHICH COMPLIANCE WILL BE ASSESSED!

- ADEQUATE ACCOMMODATION OF EXCESS EMISSIONS DURING STARTUPS, SHUTDOWNS, MALFUNCTIONS AND UPSETS

- CAREFULLY DRAFTED COMPLIANCE MONITORING PROVISIONS AND CLEAR DEFINITIONS OF "DEVIATIONS"

- APPROPRIATE PERMIT SHIELD PROTECTION

- ACCOMMODATION OF OPERATIONAL FLEXIBILITY

- A GOOD GUIDE: CONSIDER CITIZENS SUIT OPPORTUNITIES

THE PROPOSED INITIAL PERMIT ISSUANCE PROCESS FOR A LARGE MANUFACTURING FACILITY UNDER THE FULL TEXAS OPERATING PERMIT PROGRAM

© Bradley I. Raffle (July 1997)

FORMULATE FACILITY PERMIT OBJECTIVES (1997)

PREPARE AND TEST A DRAFT PERMIT/ASSEMBLE APPLICATION (1998)

DISCUSS APPLICATION WITH AGENCY STAFF (1998)

SUBMIT APPLICATION (1/25/99) [1/]

CONCLUDE DISCUSSIONS BETWEEN APPLICANT AND TNRCC REGARDING THE APPLICATION (4/25/99)

APPLICATION DEEMED COMPLETE BY THE TNRCC (6/25/99; DEADLINE FOR FINAL TNRCC ACTION IS 18 MONTHS, *i.e.*, 12/25/00) [2/]

DRAFT PERMIT PREPARED BY TNRCC FOR 30-DAY PUBLIC/EPA/AFFECTED STATE NOTICE AND COMMENT (3/25/00) [3/]

PUBLIC NOTICE OF DRAFT PERMIT PUBLISHED BY APPLICANT (4/25/00) (NOTICE MAY PROPOSE A HEARING DATE)

NOTICE AND COMMENT HEARING MAY BE REQUESTED BY AFFECTED MEMBERS OF THE PUBLIC WITHIN THE 30-DAY PUBLIC COMMENT PERIOD (5/25/00)

NOTICE OF PUBLIC HEARING PUBLISHED—ASSUMING A HEARING IS REQUESTED—UNLESS THE ORIGINAL PUBLIC NOTICE ALREADY SCHEDULED A HEARING (6/25/00)

PUBLIC HEARING OCCURS (7/25/00)

CLOSE OF PUBLIC COMMENT PERIOD (8/25/00)

TNRCC ISSUES PERMIT (10/25/00) SEE NEXT PAGE

APPLICANT OR AFFECTED THIRD PARTIES MAY CHALLENGE PERMIT ACTION IN TRAVIS COUNTY DISTRICT COURT UNDER § 382.032 OF THE TEXAS CLEAN AIR ACT (11/25/00)

[1/] CURRENTLY PROPOSED DEADLINE IS JULY 25, 1999. EARLY SUBMITTAL HELPS ENSURE APPLICATION SHIELD PROTECTION.

[2/] THIS OCCURS AUTOMATICALLY AFTER 60 DAYS UNLESS TNRCC REQUESTS ADDITIONAL INFORMATION. COMPLETENESS OF THE APPLICATION TRIGGERS AN 18-MONTH PERIOD FOR FINAL PERMIT ACTION BY THE TNRCC. *SEE* PROPOSED 30 TAC §§ 122.134(a), 122.139(4).

[3/] A MINIMUM 30-DAY COMMENT PERIOD WILL BE PROVIDED FOR THE PUBLIC, AFFECTED STATES (*i.e.*, NEW MEXICO, OKLAHOMA, KANSAS, COLORADO, ARKANSAS OR LOUISIANA IF SITE IS WITHIN 50 MILES AND WILL AFFECT THAT STATE'S AIR QUALITY) AND EPA. EPA MAY COMMIT TO PROVIDING ITS OBJECTIONS, IF ANY, DURING THIS PUBLIC COMMENT PERIOD, AS OPPOSED TO RAISING OBJECTIONS LATER.

THE PROPOSED INITIAL PERMIT ISSUANCE PROCESS FOR A LARGE MANUFACTURING FACILITY UNDER THE FULL TEXAS OPERATING PERMIT PROGRAM (Cont'd)

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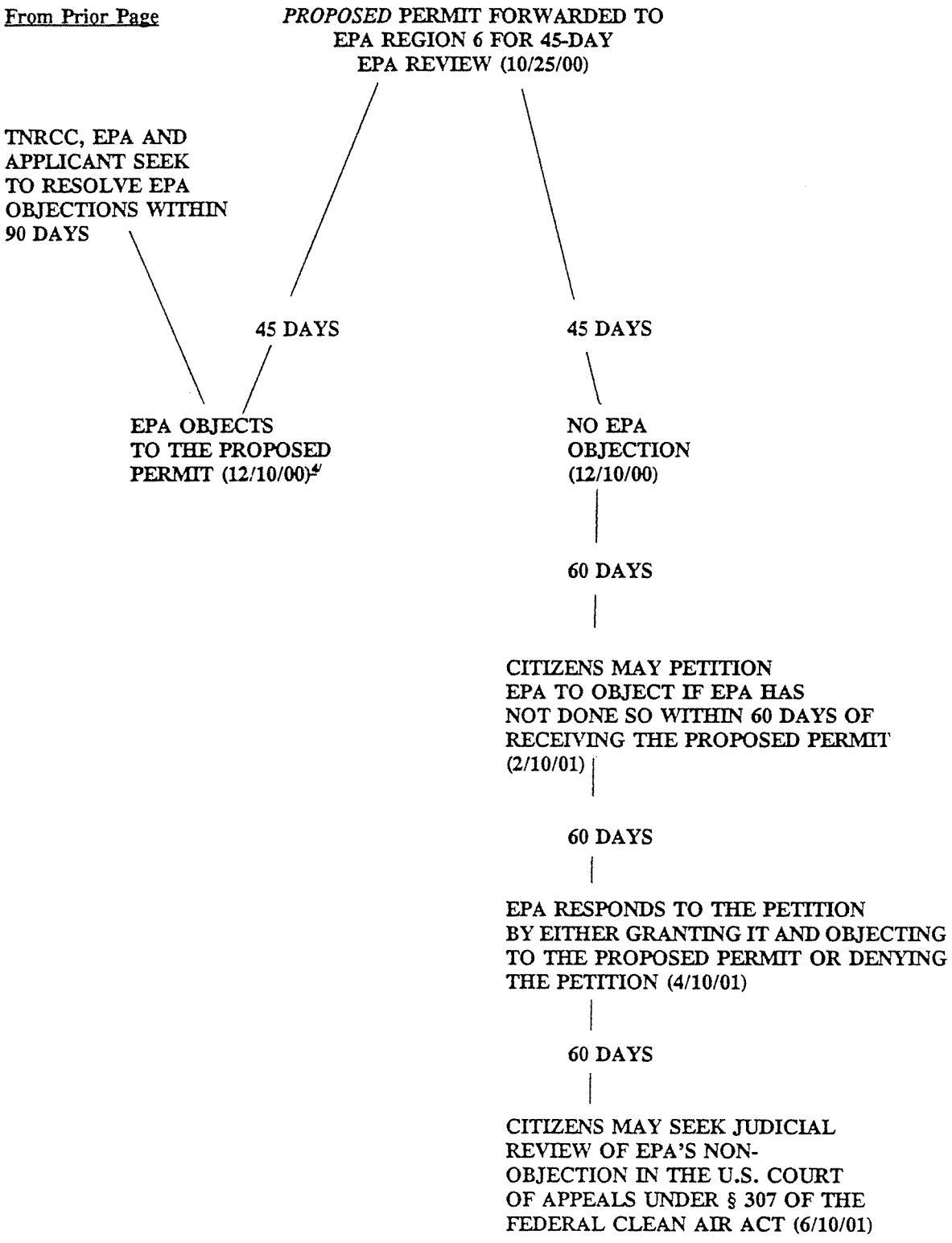

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[1] IF TNRCC HAS ISSUED THE PERMIT BEFORE EPA HAS OBJECTED, A 90-DAY CLOCK IS TRIGGERED TO RESOLVE EPA'S OBJECTIONS. NOTE THAT MAJOR CHANGES TO THE PERMIT DURING SUCH NEGOTIATIONS COULD TRIGGER A NEW ROUND OF PUBLIC COMMENT.

For further information, please call: (512) 463-7008

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Part II. Public Utility Commission of Texas

Chapter 22. Practice and Procedure

Subchapter E. Pleadings

16 TAC §22.71

The Public Utility Commission of Texas (PUC) proposes an amendment to §22.71, a Procedural Rule regarding Filing of Pleadings and Other Materials. The proposed amendment is made in order to assure that the commissioners of the PUC will have adequate time to fully review all documents necessary to conduct an open meeting. The proposed amendment will require that all documents addressed to the commissioners relating to any proceeding that has been placed on the agenda of an open meeting be filed with the commission filing clerk no later than six days prior to the open meeting on which the proceeding will be considered.

Paula Mueller, Director of Legal Administration Division, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section of the rule.

Ms. Mueller has also determined that for each year of the first five-year period the section is in effect, the public benefits anticipated as a result of enforcing the rule will be greater and more convenient access to public information on proceedings scheduled before an open meeting of the commission. There will be no effect on small businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Ms. Mueller has also determined that for each year of the first five years the proposed section is in effect there will be no impact on employment in the geographical area affected by implementing the requirements of the section.

Comments on the proposed amendment (16 copies) may be submitted to Paula Mueller, Secretary of the Commission, Public Utility Commission of Texas, P. O. Box 13326, Austin, Texas 78711-3326, within 30 days after this publication. All comments should refer to Project Number 17173.

This amendment is proposed under the Public Utility Regulatory Act of 1995, §1.101, Texas Revised Civil Statute Annotated article 1446c-O (Vernon Supplement 1997) which provides the Public Utility Commission of Texas with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Index to Statutes: Public Utility Regulatory Act of 1995, §1.101.

§22.71. Filings of Pleadings and Other Materials.

(a)-(g) (No change.)

(h) Filing deadlines for documents addressed to the commissioners.

(1) Except as provided in paragraph (2) of this subsection, all documents addressed to the commissioners relating to any proceeding that has been placed on the agenda of an open meeting shall be filed with the commission filing clerk no later than six [five] days prior to the open meeting at which the proceeding will be considered provided that no party is prejudiced by the timing of the filing of the documents. Documents that are not filed before the deadline and do not meet one of the exceptions in paragraph (2) of this subsection, will be considered untimely filed.

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

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

Issued in Austin, Texas, on April 30, 1997.

TRD-9705727
Paula Mueller
Secretary of the Commission
Public Utility Commission of Texas
Earliest possible date of adoption: June 12, 1997
For further information, please call: (512) 936-7283

♦ ♦ ♦

TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 122. Federal Operating Permits

The commission proposes the repeal of §§122.10-122.12, 122.120, 122.130, 122.132-122.136, 122.138, 122.139, 122.141, 122.143, 122.145, 122.150, 122.152-122.155, 122.161, 122.163-122.165, 122.201, 122.202, 122.204, 122.210-122.213, 122.215-122.217, 122.219-122.221, 122.231, 122.233, 122.241, 122.243, 122.310-122.312, 122.314, 122.410, 122.411, 122.420-122.422, 122.425, 122.427, 122.430, 122.432, 122.434, 122.435, 122.437, 122.438, and 122.440, concerning the federal operating permit program.

EXPLANATION OF PROPOSED RULES. The purpose of the repeals is to allow the adoption of new requirements contained in §§122.10, 122.12, 122.110, 122.120, 122.121, 122.130-122.134, 122.136, 122.138- 122.140, 122.142-122.146, 122.148, 122.161, 122.165, 122.201, 122.204, 122.210-122.213, 122.215-122.217, 122.219, 122.220, 122.221, 122.231, 122.241, 122.243, 122.312, 122.320, 122.322, 122.330, 122.350, 122.360, 122.410, 122.412, 122.414, 122.501-122.506, and 122.508, concerning the federal operating permit program.

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

PUBLIC BENEFIT. Mr. Minick also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be the improved consistency between state and federal requirements for permitting major air emission sources and more cost-effective regulation and control of air emissions. There are no economic costs anticipated to any person, including small businesses, who are required to comply with the repeals as proposed.

TAKINGS IMPACT ASSESSMENT. The commission has prepared a takings impact assessment for the proposed rulemaking under Texas Government Code, §2007.043. The following is a summary of that assessment. The agency was granted interim program approval in the June 25, 1996, issue of the *Federal Register*(61 FR 32693). Interim program approval provides the agency with the authority to implement the operating permit program (OPP) in Texas for two years. The agency will be required to submit a request for full program approval of the OPP to the United States Environmental Protection Agency (EPA) by January 26, 1998. The purpose of this rulemaking is to address comments received from EPA, the regulated community, and public interest groups, in addition to regulatory changes. In addition, the commissioners directed staff to revise certain aspects of the OPP. The proposed rulemaking will achieve its stated purpose by addressing EPA's comments from the interim program approval notice, allowing options in permit application review and post permit processing, and allowing the request for full program approval to be submitted by January 26, 1998. The proposed rulemaking will not be considered a burden on private real property because it is mandated by federal law.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW. The commission has determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resource Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3) relating to actions and rules subject to the CMP, agency rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this proposed action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and has determined that the proposed action is consistent with the applicable CMP goals and policies. The permits issued under Chapter 122, concerning Federal Operating Permits, do not authorize the increase in air emissions nor do these permits authorize new air emissions. Interested persons may submit comments on the consistency of the proposed rule with the CMP during the public comment period.

PUBLIC HEARING. A public hearing on the proposal will be held June 12, 1997, at 10:00 a.m. in Room 201S of Texas Natural Resource Conservation Commission Building E, located at 12100 Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

SUBMITTAL OF COMMENTS. Written comments regarding this proposal may be mailed to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 96159-122-AI. Comments must be received by 5:00 p.m., June 13, 1997. For further information or questions concerning this proposal, contact Cheryl Covone of the Operating Permits Division, Office of Air Quality, (512) 239-1144.

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

Subchapter A. Definitions

30 TAC §§122.10-122.12

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

STATUTORY AUTHORITY. The repeals are proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purpose of the TCAA.

The proposed repeals implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.10. General Definitions.

§122.11. Grandfather Definitions for State Only Requirements.

§122.12. Acid Rain Definitions.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705893
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966

♦ ♦ ♦

Subchapter B. Permit Requirements

Applicability

30 TAC §122.120

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

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

The proposed repeal implements the Texas Health and Safety Code, §382.017, concerning Rules.

§122.120. Applicability.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705892
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966

◆ ◆ ◆

Permit Application

30 TAC §§122.130, 122.132-122.136, 122.138, 122.139

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

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

The proposed repeals implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.130. Responsibility to Apply.

§122.132. Application and Required Information.

§122.133. Timely Application.

§122.134. Complete Application.

§122.135. Grandfather Requirements.

§122.136. Application Deficiencies.

§122.138. Application Shield.

§122.139. Application Review Schedule.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705891
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966

◆ ◆ ◆

Permit Content

30 TAC §§122.141, 122.143, 122.145

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

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

The proposed repeals implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.141. Authority.

§122.143. Permit Conditions.

§122.145. Permit Content Requirements.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705890
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966

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Public Notification And Comment Procedures

30 TAC §§122.150, 122.152-122.155

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

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

The proposed repeals implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.150. Applicability.

§122.152. Public Notification Requirements.

§122.153. Public Notice Format.

§122.154. Sign Posting Requirements.

§122.155. Public Comment Period.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705889
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966

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Miscellaneous

30 TAC §§122.161, 122.163-122.165

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

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

The proposed repeals implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.161. Miscellaneous.

§122.163. Effective Date.

§122.164. Confidential Information.

§122.165. Certification by a Responsible Official.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705888
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966

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Subchapter C. Permits Issuances, Revisions, Reopenings, And Renewals

Permit Issuance

30 TAC §§122.201, 122.202, 122.204

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

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

The proposed repeals implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.201. Permits.

§122.202. General Permits.

§122.204. Temporary Sources.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705887
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966

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Permit Revisions

§§122.210-122.213, 122.215-122.217, 122.219-122.221

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

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

The proposed repeals implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.210. Applicability.

§122.211. Administrative Permit Amendments.

§122.212. Administrative Permit Amendment Application.

§122.213. Administrative Permit Amendment Procedures.

§122.215. Permit Additions.

§122.216. Application for Permit Addition.

§122.217. Permit Addition Procedures.

§122.219. Significant Permit Modifications.

§122.220. Significant Permit Modification Application and Procedures.

§122.221. Operational Flexibility.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705886
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966

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Permit Reopenings

30 TAC §122.231, §122.233

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

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

The proposed repeals implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.231. Permit Reopenings.

§122.233. Permit Reopening Procedures.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705885
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966

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Permit Renewals

30 TAC §122.241, §122.243

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

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

The proposed repeals implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.241. Permit Renewals.

§122.243. Permit Expiration.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705884
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966

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Subchapter D. Affected State Review, United States Environmental Protection Agency Review, And Citizen Petition

30 TAC §§122.310-122.312, 122.314

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

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

The proposed repeals implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.310. Transmission of Information to the United States Environmental Protection Agency (EPA).

§122.311. Affected State Review.

§122.312. United States Environmental Protection Agency (EPA) Review.

§122.314. Public Petitions to United States Environmental Protection Agency (EPA).

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705894
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966

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Subchapter E. Acid Rain

General Acid Rain Permits Requirements

30 TAC §§122.410, 122.411

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

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

The proposed repeals implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.410. Standard Acid Rain Requirements.

§122.411. Operating Permit Interface.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705896
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966

♦ ♦ ♦

Acid Rain Application

30 TAC §§122.420-122.422, 122.425, 122.427

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

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

The proposed repeals implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.420. Enforceability of Acid Rain Permit Application.

§122.421. Timely Application.

§122.422. Complete Application.

§122.425. Acid Rain Compliance Plan.

§122.427. United States Environmental Protection Agency (EPA) Review.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705895
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966

♦ ♦ ♦

Acid Rain Permit Issuance, Revocations, And Reopenings

30 TAC §§122.430, 122.432, 122.434, 122.435, 122.437, 122.438

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

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

The proposed repeals implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.430. Acid Rain Permit Conditions.

§122.432. Acid Rain Permit Issuance.

§122.434. Acid Rain Permit Shield.

§122.435. Acid Rain Permit Revisions.

§122.437. Acid Rain Permit Revision Procedures.

§122.438. Permit Reopenings.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705905
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966

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Acid Rain Appeals

30 TAC §122.440

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

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

The proposed repeal implements the Texas Health and Safety Code, §382.017, concerning Rules.

§122.440. Acid Rain Appeals Procedure.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705904
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
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Chapter 122. Federal Operating Permits

The commission proposes new §§122.10, 122.12, 122.110, 122.120, 122.121, 122.130-122.134, 122.136, 122.138-122.140, 122.142-122.146, 122.148, 122.161, 122.165, 122.201, 122.204, 122.210-122.213, 122.215-122.217, 122.219, 122.220, 122.221, 122.231, 122.241, 122.243, 122.312, 122.320, 122.322, 122.330, 122.350, 122.360, 122.410, 122.412, 122.414, 122.501-122.506, and 122.508, concerning the federal operating permit program.

EXPLANATION OF PROPOSED RULES. The commission has chosen to propose revisions to the operating permit program through the repeal of affected sections and their replacement with new sections. This approach was determined to be more efficient than amending the existing sections due to the extensive nature of the revisions.

Title V of the Federal Clean Air Act Amendments of 1990 (FCAAA), enacted on November 15, 1990, requires the United States Environmental Protection Agency (EPA) to promulgate regulations within 12 months of enactment that require and specify the minimum elements of state operating permit programs. Part 70 of Chapter I, Title 40 of the Code of Federal Regulations (40 CFR 70) contains these provisions. Title 30 Texas Administrative Code Chapter 122 (30 TAC 122) was adopted August 23, 1993, to implement the regulatory authority of the federal operating permit program required by 40 CFR 70. Revisions to 30 TAC 122 are proposed as the result of comments received from the EPA, the regulated community, and public interest groups, in addition to regulatory reform changes.

The proposed revisions will reorganize 30 TAC 122 into six subchapters: Subchapter A, concerning Definitions; Subchapter B, concerning Permit Requirements; Subchapter C, concerning Initial Permit Issuances, Revisions, Reopenings, and Renewals; Subchapter D, concerning Public Announcement, Public Notice, Affected State Review, Notice and Comment Hearing, Notice of Proposed Final Action, EPA Review, and Public Petition; Subchapter E, concerning Acid Rain Permits; and Subchapter F, concerning General Operating Permits. These proposed revisions reflect changes based on EPA's proposed and final interim approval notices, discussions with the regulated community and public interest groups, and a regulatory reform effort by the agency to make rule language more straightforward and easy to understand.

If during the 1997 Texas Legislative Session, the Legislature proposes and enacts legislation revising the operating permit requirements, that legislation may be addressed in 30 TAC 122 at adoption. In addition, changes to the proposed rule language may be necessary to address concerns regarding program approval raised during the comment period, or as a result of negotiations with EPA.

REGULATORY REFORM. Proposed changes to the rule language as the result of ongoing efforts by the commission for regulatory reform appear throughout the rules and will not be individually discussed in this preamble. These changes are for purposes of simplification and clarification only and do not involve substantive changes in the requirements of this chapter. In general, these changes involve using shorter sentences, limiting each citation to one main concept, reordering requirements into a more logical sequence, and using more commonplace terminology. In addition, some of the definitions are proposed to be moved to more appropriate sections or chapters. Definitions that apply agencywide belong in 30 TAC Chapter 3, while definitions that apply to the all the air rules are appropriate in 30 TAC Chapter 101. Both the definitions for Act or Federal Clean Air Act (FCAA) and United States Environmental Protection Agency or EPA are being moved to Chapter 3. The nonattainment classifications for the counties in Texas which were listed under the definition of major sources are also being moved to Chapter 3. Furthermore, the definition of fugitive emissions is proposed to be removed because it is redundant with the essentially equivalent definition in Chapter 101. The definitions of affected state and responsible official are proposed to be moved to §122.330 and §122.165 respectively, where these terms have the most relevance. The definition of general permit is proposed to be removed because it does not provide any information beyond referring to the section of the rules addressing general permits.

Under the original Subchapter E, 40 CFR 72 (relating to the Acid Rain Program) was incorporated by reference; however, several Part 72 requirements are also explicitly stated in the state regulation. Through the regulatory reform process, the commission has determined that the combination of incorporating by reference and restating some of the federal requirements is inefficient and confusing. Therefore, except for the identification of the application deadlines, the redundant language is proposed to be removed from Subchapter E. The definitions in §122.12, relating to Acid Rain Definitions, that were redundant with the definitions in 40 CFR 72, incorporated by reference in Subchapter E, are also proposed to be removed. The only definition proposed in §122.12 that appears in 40 CFR 72 is the definition of acid rain program, which is included because the term is used several places in the rule language before the incorporation by reference of 40 CFR 72 in Subchapter E.

In addition, the commission proposes the repeal of existing sections and the proposal of new sections to conform with regulatory reform efforts. The new §122.121, relating to Prohibition on Operation, contains the requirement originally in §122.201(f). Section 122.141, relating to Authority, was determined to contain an unnecessary statement in subsection (a), while subsection (b) is proposed to be moved to §122.161. New §§122.144-122.146, relating to Recordkeeping Terms and Conditions; Reporting Terms and Conditions; and Compliance Certification Terms and Conditions, are proposed to be created to contain requirements originally grouped together under §122.143. The original §122.145, relating to Permit Content Requirements, is proposed to be moved to §122.142. Furthermore, §§122.150 and 122.152-122.155, concerning Public Notice Requirements, are proposed to be moved to Subchapter D; and §122.202, relating to General Permits, is proposed to be moved to Subchapter F. Section 122.163, relating to Effective Date, is proposed to be deleted, because it was determined to be unnecessary, while §122.164, relating to Confidential Information, is proposed to be deleted because 30 TAC §1.5 (d) addresses confidential information. Finally, the information in the original §122.243, relating to Permit Expiration, is proposed to be moved to §122.241.

RESPONSE TO EPA COMMENTS. In its June 7, 1995, proposal to grant interim approval, the EPA noted 19 specific deficiencies that the commission needed to address prior to obtaining both interim and full program approval (see 60 FR

30037). The commission responded to EPA's deficiencies in a letter to Jole Luehrs, Chief, New Source Review Section, EPA Region 6 from Jeff Saitas, Deputy Director, Office of Air Quality, TNRCC dated October 3, 1995.

In its June 25, 1996, notice of final interim approval, the EPA provided 18 specific comments, some of which cited deficiencies that the commission needed to address prior to full program approval (see 61 FR 30037). Many of the deficiencies that EPA noted in the June 25, 1996, notice restated original deficiencies raised in the June 7, 1995, notice. In addition, the June 25, 1996, notice also included EPA's comments (i.e., further deficiencies) on the commission's responses to the deficiencies stated in the June 7, 1995, notice.

With regard to the criteria used for full program approval, the EPA stated in the June 25, 1996, notice that it would rely on the version of Part 70 in effect at the time of full program submittal (see 61 FR 32693). The EPA expects the final Part 70 revisions to be adopted no earlier than September 1997. Because it would be unreasonable for Texas (or any other state) to fully comply with a major rule revision by the time the full program submittal is due to EPA (January 26, 1998), the EPA recently clarified this remark by stating that the commission may comply with either the July 21, 1992, Part 70 regulation or a later version (March 27, 1997, letter from Lydia Wegman, Deputy Director, EPA Office of Air Quality Planning and Standards to Dan Pearson, Executive Director, TNRCC).

The following summarizes the commission's response to the deficiencies that EPA indicated in both its June 7, 1995, and June 25, 1996, *Federal Register* notices. It should be noted that unless otherwise indicated in this preamble, the proposed revisions to 30 TAC 122 are intended to be consistent with the July 21, 1992, Part 70 regulations (see 57 FR 32295). In certain cases, the proposed revisions to 30 TAC 122 reflect the commission's most current understanding of the Part 70 revisions that are expected to be finalized no earlier than September 1997. In the event that the supplemental proposal is promulgated before the end of the comment period for this rulemaking, the commission may revise 30 TAC 122 based on the final revisions.

1. Minor New Source Review (NSR)/Part 70 Integration. In the June 7, 1995 notice, the EPA pointed out that 30 TAC 122 does not properly address minor NSR as an applicable requirement. Specifically, the EPA noted that the definition of applicable requirement, sections on permit application, permit revisions, and permit content do not properly include minor NSR. For full program approval, the EPA maintains that the appropriate sections of 30 TAC 122 must be revised to include minor NSR (see 60 FR 30039). In the June 25, 1996, notice, the EPA commented that for full program approval, the commission must provide operating permits that include all minor NSR permits (see 61 FR 32694).

In response, the commission is proposing to revise the definition of applicable requirement in 30 TAC 122 to include those elements of the Texas minor NSR program necessary to meet the requirements of the Federal Clean Air Act, §110(a)(2)(C) and 40 CFR Part 51 §§51.160-51.164. The revised definition of applicable requirement would include the following: "after the adoption of this chapter, any requirement in state regulations implementing federal new source review requirements for control of air pollution for new construction or modification, upon approval by the commission and approval as a State Implementation Plan revision by EPA, for the modification and construction of any stationary source within the areas covered by the State Implementation Plan as necessary to assure that national ambient air quality standards are achieved." This proposed definition would be in addition to the current definition of applicable requirement that includes any term or condition of any PSD or nonattainment preconstruction permit.

In addition to PSD and nonattainment permits, those federal NSR requirements that are approved by the commission through rulemaking and approved as a State Implementation Plan (SIP) revision by EPA as necessary to assure compliance with the National Ambient Air Quality Standards (NAAQS) would be codified in the site's federal operating permit, if applicable.

The commission is in the process of proposing revisions to Chapter 116 and possibly creating a new chapter that will clarify the new source review regulations that are necessary to assure compliance with the NAAQS. At this time, it has not been determined which subsections of Chapter 116 will contain these revisions or whether an entirely new chapter will be proposed. However, the adopted version of 30 TAC 122 will reference the appropriate Chapter 116 subsections and/or the new chapter containing the regulations necessary to assure compliance with the NAAQS. Under the proposed 30 TAC 122, minor NSR requirements would not be codified through the operating permit until rulemaking was completed on Chapter 116 and/or the new chapter and the EPA approved these revisions into the SIP.

The revisions to Chapter 116 and/or the new chapter are expected to be proposed in mid-to-late 1997. Comments pertaining to the portions of Chapter 116 necessary to assure compliance with the NAAQS will only be addressed at the time of the proposed revisions to Chapter 116 and/or the new chapter.

2. Compliance with the June 20, 1996, Part 70 Rule. In the June 7, 1995, notice, the EPA stated that if the August 29, 1994, proposal for Operating Permit Program Interim Approval Criteria became final (see 59 FR 44572), the commission would be required to meet the requirements of that rule in order to receive *interim approval.* On June 20, 1996, the EPA promulgated the final rule that provided a mechanism to approve programs (on an interim basis) that did not include minor NSR requirements (see 61 FR 31443). For any program that does not include minor NSR requirements, the final rule requires that each permit issued during the interim program comply with the following: include a statement in permits that minor NSR requirements are not included in permits issued during the interim period; indicate how citizens may obtain access to excluded minor NSR permits; include a cross-reference in each operating permit to the minor NSR permit; include a statement indicating that the excluded minor NSR requirements are not eligible for the permit shield under 40 CFR §70.6; and require reopening of permits for incorporation of minor NSR permit conditions upon or before granting of full approval.

The commission will include standardized permit provisions in each operating permit issued under the interim program to meet the requirements of the first four items listed in the previous

paragraph. Furthermore, as requested in the June 25, 1996 notice, the commission will also include a standardized permit provision that clearly states that major NSR authorizations (prevention of significant deterioration and nonattainment authorizations) are incorporated in each operating permit issued during the interim program.

With regard to the requirement to reopen the operating permit to include minor NSR upon or before granting full program approval, if it is finally determined necessary, the commission is proposing to follow the permit revision procedure in effect for incorporating minor NSR at the time that EPA grants Texas full program approval. This approach is consistent with 40 CFR §70.4(d)(3)(ii)(D) provided in the final rule promulgated on June 20, 1996 (see 61 FR 31448-31449).

3. Source Applicability of Part 70. In the June 7, 1995, notice, the EPA states that §122.120(4)(A)-(C), regarding applicability of Part 70 and the Texas federal operating permit program, is inconsistent with the federal definition specified in 40 CFR §70.3(a) (see 60 FR 30039-30040).

With regard to §122.120(4)(A) and (B), EPA believes that there could be some confusion over whether the rule exempts major sources subject to FCAA, §111 or §112 from the requirement to obtain a federal operating permit.

The commission reads §122.120(4) to clearly state that non-major sources are not required to obtain a federal operating permit until EPA no longer exempts these sources through rulemaking. Therefore, it follows that subparagraphs (A)-(C) only apply to non-major sources. The purpose of subparagraphs (A)-(C) was to define non-major sources consistent with Part 70.

In the October 3, 1995, letter to Jole Luehrs, Chief, New Source Review Section, EPA Region 6 from Jeff Saitas, Deputy Director, Office of Air Quality, TNRCC responding to the EPA's June 7, 1995 notice, the commission proposed revisions to §122.120(4)(A)-(C) to address the deficiency.

In the June 25, 1996 notice, the EPA noted that the commission did not adequately address revisions to §122.120(4)(C) (see 61 FR 32695). Specifically, the EPA disagreed with the commission proposal that included "any area source, in a source category designated by the Administrator." EPA maintained that the administrator may designate a number of different types of sources subject to Title V permitting, not just area sources.

In order to minimize any confusion and to resolve these deficiencies, the commission proposes to revise §122.120(4)(A)-(C) as indicated in this proposed rulemaking.

4. Treatment of Research and Development (R&D) Facilities. In the June 7, 1995 notice, the EPA maintains that the treatment of research and development facilities through the definition of site in 30 TAC 122 is inconsistent with the original Part 70 (July 21, 1992) (see 60 FR 30040). Furthermore, EPA states that the commission must treat research and development facilities consistent with Part 70 in order to obtain full program approval.

The commission believes that the preamble to the July 21, 1992, Part 70 rule clearly states that research and development facilities would be treated as though they were a separate source (and required to have a Title V permit) only if the research and development facility were itself a major source (see 57 FR 32264). "White Paper Number 1," Streamlined Development of Part 70 Permit Application, published on July 10, 1995, seems to clarify EPA's position on research and development facilities. As stated in the White Paper Number 1, EPA intends to clarify through final rulemaking of Part 70 that research and development facilities will only be considered major sources if the research and development facility itself is major or the research and development facility is a support facility making a significant contribution to the product of a collocated manufacturing facility and the combined emissions exceed the major source thresholds. In the August 31, 1995, supplemental proposal to Part 70, referred to as the "supplemental proposal," EPA proposed a definition of major source which reflects its position in White Paper Number 1 (see 60 FR 45565).

The commission proposes to revise the definition of site in 30 TAC 122 to clearly reflect that if research and development facilities produce products for commercial sale, they will be included with the collocated facility for purposes of Title V applicability and permitting. Otherwise, research and development facilities will be considered a separate site. The commission believes that this proposed revision is consistent with White Paper Number 1 and will be consistent with the final Part 70 revisions.

5. Definition of Regulated Air Pollutant. In the June 7, 1995 notice, the EPA points out that 30 TAC 122 does not define regulated air pollutant but rather air pollutant (see 60 FR 30040). The EPA claims in the proposed interim approval notice that major sources should be determined on the potential to emit *any* air pollutant including those compounds *listed* in FCAA, §112 (including §112(r)(3)), regardless of whether the compounds are subject to a standard or other requirement.

However, supplemental proposal (see 60 FR 45565), EPA revised its position and proposed that being listed in FCAA, §112(r)(3) is not a criterion in determining the status of a regulated air pollutant. Therefore, the commission will revise the 30 TAC 122 definition of air pollutant as follows: "(F) any pollutant subject to a standard promulgated under FCAA, §112 (relating to Hazardous Air Pollutants) or other requirements established under §112, including §112(g) and (j)."

6. Definition of Regulated Major Source. In the June 7, 1995, and the June 25, 1996 notices, the EPA stated that the 30 TAC 122 definition of major source as it relates to requiring the inclusion of fugitive emissions for source categories regulated under FCAA, §111 or §112 is not consistent with the existing (July 21, 1992) Part 70 (see 60 FR 30041, 61 FR 32695). For full program approval, EPA indicated that the commission definition of major source as it relates to requiring the inclusion of fugitive emissions must be consistent with Part 70.

Specifically, in the 30 TAC 122 definition, source category xxvii only applies to "any other stationary source category which as of August 7, 1980, is being regulated under the Act, §111 or §112" whereas the July 21, 1992, Part 70 does not limit the stationary source categories to those which existed as of August 7, 1980.

In EPA's August 29, 1994, proposed Part 70 revisions (see 59 FR 44527), the definition of major source, source category xxvii, was revised to include references to those source categories regulated by a FCAA, §111 or §112 standard promulgated as

paragraph. Furthermore, as requested in the June 25, 1996 notice, the commission will also include a standardized permit provision that clearly states that major NSR authorizations (prevention of significant deterioration and nonattainment authorizations) are incorporated in each operating permit issued during the interim program.

With regard to the requirement to reopen the operating permit to include minor NSR upon or before granting full program approval, if it is finally determined necessary, the commission is proposing to follow the permit revision procedure in effect for incorporating minor NSR at the time that EPA grants Texas full program approval. This approach is consistent with 40 CFR §70.4(d)(3)(ii)(D) provided in the final rule promulgated on June 20, 1996 (see 61 FR 31448-31449).

3. Source Applicability of Part 70. In the June 7, 1995, notice, the EPA states that §122.120(4)(A)-(C), regarding applicability of Part 70 and the Texas federal operating permit program, is inconsistent with the federal definition specified in 40 CFR §70.3(a) (see 60 FR 30039-30040).

With regard to §122.120(4)(A) and (B), EPA believes that there could be some confusion over whether the rule exempts major sources subject to FCAA, §111 or §112 from the requirement to obtain a federal operating permit.

The commission reads §122.120(4) to clearly state that non-major sources are not required to obtain a federal operating permit until EPA no longer exempts these sources through rulemaking. Therefore, it follows that subparagraphs (A)-(C) only apply to non-major sources. The purpose of subparagraphs (A)-(C) was to define non-major sources consistent with Part 70.

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In the June 25, 1996 notice, the EPA noted that the commission did not adequately address revisions to §122.120(4)(C) (see 61 FR 32695). Specifically, the EPA disagreed with the commission proposal that included "any area source, in a source category designated by the Administrator." EPA maintained that the administrator may designate a number of different types of sources subject to Title V permitting, not just area sources.

In order to minimize any confusion and to resolve these deficiencies, the commission proposes to revise §122.120(4)(A)-(C) as indicated in this proposed rulemaking.

4. Treatment of Research and Development (R&D) Facilities. In the June 7, 1995 notice, the EPA maintains that the treatment of research and development facilities through the definition of site in 30 TAC 122 is inconsistent with the original Part 70 (July 21, 1992) (see 60 FR 30040). Furthermore, EPA states that the commission must treat research and development facilities consistent with Part 70 in order to obtain full program approval.

The commission believes that the preamble to the July 21, 1992, Part 70 rule clearly states that research and development facilities would be treated as though they were a separate source (and required to have a Title V permit) only if the research and development facility were itself a major source (see 57 FR 32264). "White Paper Number 1," Streamlined Development of Part 70 Permit Application, published on July 10, 1995, seems to clarify EPA's position on research and development facilities. As stated in the White Paper Number 1, EPA intends to clarify through final rulemaking of Part 70 that research and development facilities will only be considered major sources if the research and development facility itself is major or the research and development facility is a support facility making a significant contribution to the product of a collocated manufacturing facility and the combined emissions exceed the major source thresholds. In the August 31, 1995, supplemental proposal to Part 70, referred to as the "supplemental proposal," EPA proposed a definition of major source which reflects its position in White Paper Number 1 (see 60 FR 45565).

The commission proposes to revise the definition of site in 30 TAC 122 to clearly reflect that if research and development facilities produce products for commercial sale, they will be included with the collocated facility for purposes of Title V applicability and permitting. Otherwise, research and development facilities will be considered a separate site. The commission believes that this proposed revision is consistent with White Paper Number 1 and will be consistent with the final Part 70 revisions.

5. Definition of Regulated Air Pollutant. In the June 7, 1995 notice, the EPA points out that 30 TAC 122 does not define regulated air pollutant but rather air pollutant (see 60 FR 30040). The EPA claims in the proposed interim approval notice that major sources should be determined on the potential to emit *any* air pollutant including those compounds *listed* in FCAA, §112 (including §112(r)(3)), regardless of whether the compounds are subject to a standard or other requirement.

However, supplemental proposal (see 60 FR 45565), EPA revised its position and proposed that being listed in FCAA, §112(r)(3) is not a criterion in determining the status of a regulated air pollutant. Therefore, the commission will revise the 30 TAC 122 definition of air pollutant as follows: "(F) any pollutant subject to a standard promulgated under FCAA, §112 (relating to Hazardous Air Pollutants) or other requirements established under §112, including §112(g) and (j)."

6. Definition of Regulated Major Source. In the June 7, 1995, and the June 25, 1996 notices, the EPA stated that the 30 TAC 122 definition of major source as it relates to requiring the inclusion of fugitive emissions for source categories regulated under FCAA, §111 or §112 is not consistent with the existing (July 21, 1992) Part 70 (see 60 FR 30041, 61 FR 32695). For full program approval, EPA indicated that the commission definition of major source as it relates to requiring the inclusion of fugitive emissions must be consistent with Part 70.

Specifically, in the 30 TAC 122 definition, source category xxvii only applies to "any other stationary source category which as of August 7, 1980, is being regulated under the Act, §111 or §112" whereas the July 21, 1992, Part 70 does not limit the stationary source categories to those which existed as of August 7, 1980.

In EPA's August 29, 1994, proposed Part 70 revisions (see 59 FR 44527), the definition of major source, source category xxvii, was revised to include references to those source categories regulated by a FCAA, §111 or §112 standard promulgated as

of August 7, 1980, and would be consistent with the definition in 30 TAC 122 if adopted. However, in the supplemental proposal (see 60 FR 45565), EPA again revised the definition of major source, source category xxvii. This proposed revision requires fugitive emissions be included for source categories subject to standards promulgated under FCAA, §111 or §112 for which the *administrator has made an affirmative determination under FCAA, §302(j).* In the preamble to the supplemental proposal (see 60 FR 45547), EPA states that "until it promulgates this future 302(j) rulemaking, EPA believes that fugitives should not be counted for source categories subject to section 111 or 112 standards promulgated after August 7, 1980."

Both proposed Part 70 revisions seem to indicate that fugitive emissions will not be included for source categories subject to FCAA, §111 or §112 standards promulgated after August 7, 1980, until further FCAA, §302(j) rulemaking. At this time, the commission is proposing a revision of the definition of major source (category (xxvii)) to be consistent with the supplemental proposal as follows: "(xxvii) any stationary source category regulated under FCAA, §111 or §112 for which the EPA has made an affirmative determination under FCAA, §302(j), relating to Definitions."

7. Definition of Title I Modification. In the June 7, 1995 notice, the EPA points out that if the definition of Title I modification is finalized to include minor NSR changes, Texas would be eligible for interim but not final approval (see 60 FR 30041). However, if the final definition excludes changes reviewed under minor NSR and changes that trigger a pre-1990 National Emission Standards for Hazardous Air Pollutants requirement, the commission's definition of Title I modification would be consistent with Part 70.

In the June 25, 1996 notice, the EPA stated that if the definition of Title I modification was finalized as proposed in the supplemental proposal, then the commission's proposed definition would be consistent with Part 70 (see 61 FR 32695). However, if the definition of Title I modification was changed from that proposed in the supplemental proposal, the commission would have to revise the definition consistent with Part 70.

The supplemental proposal (see 60 FR 45565) indicates that minor new source review is not included in the definition of Title I modification. However, the revision process proposed in the supplemental proposal does not make reference to Title I modification.

Similarly, the commission is not proposing to reference Title I modification in the revision process proposed in 30 TAC 122. As such, the commission is proposing to delete the definition of Title I modification from 30 TAC 122, resulting in an approach that should be consistent with the final Part 70 revisions.

8. Compliance Schedule Requirements. In the June 7, 1995, notice, the EPA stated that §122.132(b)(3)(B) was not as stringent as 40 CFR §70.5(c)(8)(iii)(C) because it did not require the compliance schedules to be at least as stringent as "any judicial consent decree or administrative order to which the source is subject." (see 60 FR 30041).

As such, the commission is proposing to revise this section (now §122.132(e)(4)(C)(iii)) to clarify that the compliance schedule shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject.

9. Application Shield for Significant Modifications. In both the June 7, 1995, notice and the June 25, 1996 notice, the EPA stated that the provisions in §122.138 incorrectly allow an application shield for significant permit modifications (see 60 FR 30041 and 61 FR 32695). The EPA stated that 40 CFR §70.7(b) does not allow significant permit modifications to be afforded an application shield for a timely and complete application, but rather only applies to a "timely and complete application for permit issuance (including for renewal)."

In response, the commission is proposing to delete reference to "significant permit modification" from the application shield provisions of §122.138.

10. Changes Allowed Under Administrative Amendment. In the June 7, 1995 notice, the EPA objected to the procedure specified in §122.211(5), because it allowed "changes similar to those in §122.211(1)-(4)" to be made by administrative amendment without approval by EPA as a part of the approved Part 70 program (see 60 FR 30041). For full approval, EPA suggests that §122.211(5) specifically list those "similar" changes to be allowed under administrative amendment.

In response, the commission is proposing to revise §122.211(5) (now §122.211(6)) to require that "similar" changes be approved by EPA.

11. Permit Addition Procedures. In the June 7, 1995 notice, the EPA stated that it does not consider the permit addition procedures outlined in §122.215 to be equivalent with the minor permit modification procedures specified in 40 CFR §70.7(e)(2) and stipulates that it must be revised for Texas to gain full approval (see 60 FR 30042). In the June 25, 1996 notice, the EPA further states that the commission must comply with the version of Part 70 in effect at the time of full program submittal (see 61 FR 32696). As previously mentioned, the EPA recently clarified this remark by stating that the commission may comply with either the July 21, 1992, Part 70 regulation or a later version (March 27, 1997, letter from Lydia Wegman, Deputy Director, EPA Office of Air Quality Planning and Standards to Dan Pearson, Executive Director, TNRCC).

In response, the commission is proposing to replace the existing revision process contained in Subchapter C of 30 TAC 122. In doing so, permit additions would be deleted and replaced with a revision process substantially equivalent to the revision process outlined in EPA's July 21, 1992, final Part 70 regulation.

12. Public Notice to Include Emissions Change. In the June 7, 1995 notice, the EPA stated that 40 CFR §70.7(h) requires that the public notice include the emissions change involved in any permit modification. EPA pointed out that §122.153 does not specify this requirement (see 60 FR 30042). The EPA reiterated this point in the June 25, 1996, notice by stating that in order to obtain full program approval, the commission must include the emissions changes in (the public notice for) any permit modification (see 61 FR 32696).

In response, the commission emphasizes that 40 CFR §70.7(h) seems to require that "emissions change" information be included in the public notice for significant permit modifications only, not all modifications. Section 70.7(h) begins by stating

"Except for modifications qualifying for minor permit modification procedures...." Therefore, it follows that "emissions change" information need only be included in the public notice for significant permit modifications, not all modifications. As a result, in §122.320(b)(5), the commission is proposing that the public notice for all significant permit revisions, as defined in §122.219, include "the air pollutants with emission changes."

13. Fugitive Emissions Included in Permit Application. In the June 7, 1995 notice, the EPA stated that the permit application must include fugitive emissions from units not subject to an applicable requirement as specified in 40 CFR §70.3(d) (see 60 FR 30043). EPA stated that 30 TAC 122 may not include such fugitive emissions. Furthermore, EPA believes that this omission is tied to the fact that minor NSR was not an applicable requirement of the original 30 TAC 122 regulation (adopted August 23, 1993).

In the June 25, 1996 notice, the EPA maintains that in order to obtain full program approval, the commission must require sources to quantify fugitive emissions from units covered by an applicable requirement. For fugitive emission units that are not covered by an applicable requirement, EPA states that a general description of the emissions would suffice (see 61 FR 32696).

It should be noted that when determining whether a site in Texas is major and therefore subject to the operating permit program, the potential emissions from all emission units are summed for each individual air pollutant, regardless of whether the emission unit has an applicable requirement. Thus, the potential emissions of both point sources and fugitive sources (if the source is one of the 27 named source categories) should be included when determining a site's major source status.

With respect to describing emissions of regulated pollutants for all emission units (including fugitive emissions) from units without any applicable requirements, White Paper Number 1 (issued by EPA on July 10, 1995) and "White Paper Number 2," White Paper Number 2 for Improved Implementation of The Part 70 Operating Permits Program (issued by EPA on March 6, 1996) seem to indicate that additional emissions information will not be necessary where a source would stipulate to the applicability of a requirement and/or its major status. With the emphasis on defining applicable requirements, rather than emission rates, it is not necessary to quantify the emissions of fugitive emission sources (or a point source, for that matter) unless it has an associated applicable requirement. However, if emission rates are necessary to verify compliance with an applicable requirement, then the source must provide that information. For purposes of computing a fee associated with Part 70, sources in Texas are required to base the fee on either their most recent emissions inventory or the potential emissions represented in their preconstruction authorizations or an enforceable commission order. The public can access a source's emissions inventory and fee-related information if desired.

The commission is not proposing to require any specific emissions data to be submitted with operating permit applications. However, the commission will require applicants to provide a general description of the site's emissions in the process description submitted with the initial permit application.

14. Limiting a Source's Potential to Emit. In the June 7, 1995 notice, the EPA stated that §122.122 may serve as a mechanism for sources that choose to establish federally-enforceable emission limitations during the transition period set out by EPA in a January 25, 1995, policy memorandum ("Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under 112 and Title V of the Clean Air Act (Act)," John Seitz) if an acceptable certification process can be developed between Texas and EPA addressing the source's acceptance of federal enforceability (see 60 FR 30043). The commission notes that the transition period was extended from January 25, 1997 to July 31, 1998 in an August 27, 1996, policy memorandum ("Extension of January 25, 1995 Potential to Emit Transition Policy," John Seitz). Although the EPA did not cite a deficiency associated with this issue and no revisions to §122.122 are proposed, the commission is taking this opportunity to respond to EPA's comments.

The commission uses a similar registration procedure in the New Source Review Division to establish federally-enforceable emission rates for standard exempted facilities. Under this procedure that has been used since September 13, 1993, under §116.213, a source may establish federally-enforceable emission rates in a registration that is maintained on-site. The certified registration of emissions established under §122.122 is required to be kept on-site and will be submitted to the commission or EPA upon request. These registrations would be available for inspection and review for the EPA, commission, or any other air pollution control agency having jurisdiction. The commission staff believes this is an acceptable certification process and intends to use this certification process to ensure federal enforceability for those sites limiting their potential to emit under the operating permit program.

15. Renewal of General Permits. In the June 7, 1995 notice, the EPA stated that 40 CFR §70.4(b)(3)(iii) requires states to issue operating permits for a period not to exceed five years, and therefore the commission should limit the general operating permit term to a maximum of five years (see 60 FR 30043).

In response, the commission is proposing to revise §122.505(a) to require that authorizations to operate under general operating permits expire no later than five years from the date of the initial authorization to operate or renewal of the authorization. Prior to the expiration of the five-year authorization to operate, the permittee must submit a renewal application to the commission.

16. Section 122.145(e) Interpretation Shield. In the June 7, 1995 notice, the EPA expressed concerns with the potential ambiguities surrounding the "interpretation shield" outlined in §122.145(e) and called out three specific items that had to be addressed through a written commitment by the commission *prior to obtaining final interim approval* (see 60 FR 30043). These items included: interpretations made under §122.145(e) must be limited to applicability issues only; EPA shall have opportunity to review and veto every §122.145(e) action; and interpretations must be based on the most recent EPA guidance and any commission written guidance pre-approved by EPA.

The commission satisfied these requirements and was granted final interim approval by EPA on June 25, 1996. For full program approval, EPA insisted that the commission revise §122.145(e) to reflect the three requirements mentioned. How-

ever, the commission is proposing to delete the "interpretation shield" concept outlined in §122.145(e) and replace it with a more traditional permit shield described in 40 CFR 70, §70.6(f). The commission believes the permit shield proposed under §122.148 is consistent with §70.6(f).

17. Emergency Provisions. In the June 7, 1995 notice, the EPA stated that the notification requirements for major upsets outlined in Chapter 101 (General Rules), §101.6, are inconsistent with the emergency provisions of 40 CFR §70.6(g)(3)(iv) (see 60 FR 30043-30044). In addition, in the June 25, 1996 notice, the EPA states that in order for Texas to receive full approval, 30 TAC 122 must be consistent with Part 70 (see 61 FR 32696).

Section 70.6(g)(3)(iv) requires that emergencies be reported to the agency *not later than two working days* after the onset of the emergency. Section 101.6 requires a major upset to be reported to the agency as soon as possible.

As discussed in the supplemental proposal (see 60 FR 45559), the emergency provisions of 40 CFR §70.6(g) provide states the *option* of allowing an affirmative defense to an action brought for noncompliance with technology-based emission limitations due to an "emergency" if the conditions of 40 CFR §70.6(g)(3) are met. This affirmative defense option is in addition to any emergency or upset provision contained in any applicable requirement.

The commission is not proposing its own version of 40 CFR §70.6(g). In fact, the commission did not intend for §122.143(3)(C) to be used as an affirmative defense for noncompliance with applicable requirements in the event of an emergency. Rather, §122.143(3)(C) specifies that emissions resulting from an upset, start-up, shutdown, or maintenance activity be reported according to the requirements of Chapter 101. Therefore, the commission does not plan to make any changes regarding the reporting requirements specified in 30 TAC 122 relating to upset, start-up, shutdown, or maintenance activities.

However, the commission will continue to implement the upset and maintenance rules contained in §101.6 and §101.7, respectively, in accordance with §101.11, governing exemptions from the commission rules and regulations.

18. Operational Flexibility. In the June 7, 1995 notice, the EPA stated that the operational flexibility section of 30 TAC 122, §122.221, is inconsistent with 40 CFR §70.4(b)(12) and §502(b)(10) because it could potentially allow modifications that violate what EPA considers applicable requirements (see 60 FR 30044). In addition, in the June 25, 1996 notice, the EPA states that in order for Texas to receive full approval, 30 TAC 122 must be consistent with the version of Part 70 in effect at the time of full program submittal (see 61 FR 32696). As previously mentioned, the EPA recently clarified this remark by stating that the commission may comply with either the July 21, 1992, Part 70 regulation or a later version (March 27, 1997, letter from Lydia Wegman, Deputy Director, EPA Office of Air Quality Planning and Standards to Dan Pearson, Executive Director, TNRCC).

As evidenced in the supplemental proposal, EPA has decided to delete the definition of FCAA, §502(b)(10) from 40 CFR §70.(2) as well as delete the reference to §502(b)(10) changes in 40 CFR §70.4(b)(12). As such, the commission is proposing to delete the operational flexibility provisions previously contained in §122.221 to be consistent with the anticipated final Part 70 revisions. Operational flexibility would be provided largely through the proposed revision process outlined in Subchapter C of the proposed 30 TAC 122.

19. Off-permit Changes Compared with Permit Additions. In the June 7, 1995 notice, the EPA stated that the permit addition procedures specified in §122.215 would allow companies to make changes that EPA does not consider "off-permit" (See 60 FR 30044). The EPA cited the commission's narrow definition of "applicable requirement" as the main problem.

In response, the commission proposes to delete references to off-permit changes under the permit addition revision process outlined in §122.215 and replace them with a new revision process that would not allow an applicant to make changes to EPA considers to be off-permit. The proposed revision process has been structured to provide a level of flexibility substantially equivalent to that outlined in the July 21, 1992, Part 70. As previously mentioned, the commission is proposing to broaden the definition of applicable requirement by including those elements of the Texas minor NSR program necessary to meet the requirements of FCAA, §110(a)(2)(C) and 40 CFR Part 51 §§51.160-51.164, which should further address EPA's concerns with off-permit changes.

20. Permit Fee Demonstration (see 60 FR 30044, first and second column). In the June 7, 1995 notice, the EPA pointed out that 40 CFR §70.4(b)(8)(v) requires the state to provide an estimate of the permit program costs for the first four years after approval and a description of how the state plans to cover the costs.

The commission has provided EPA with the agency's operating budget for fiscal years 1994 and 1995. On March 11, 1997, the commission provided EPA with the approved 1996-1997 budgets, which included the estimated costs of the operating permit program (OPP) in a letter from Karen Olson, Director, TNRCC Operating Permits Division to Allyn Davis, Director, Multimedia Planning and Permitting Division, EPA Region 6.

SUBCHAPTER A: DEFINITIONS. Several other changes to the rule language are being proposed as the result of comments received from the regulated community and public interest groups. In addition to the changes proposed as a result of incorporating aspects of the Texas minor NSR program, the definition of applicable requirement is proposed to be revised to include only those sections of the state regulations within the scope of the federal operating permit program.

Those are the state regulations which implement relevant requirements of Title I of the FCAA and were developed for the SIP. This includes the SIP revisions submitted by the commission that EPA may not have acted on. Subparagraph (G) of the definition of applicable requirement is proposed to address future state rulemaking by specifying that any requirement in Chapters 111-113, 115, 117, and 119 will be an applicable requirement under 30 TAC 122 unless identified in this or subsequent rulemaking as a state only requirement. Each time the commission goes through rulemaking for one of these chapters, an analysis of whether the new requirement is an applicable requirement will be made and the public will be provided

an opportunity to comment on the resulting determination. By establishing whether or not new requirements are applicable requirements at the time they are adopted, the commission can avoid revising 30 TAC 122 each time one of the relevant chapters is amended.

In addition, the definition of applicable requirement is proposed to be revised to remove the references to 30 TAC Chapter 114 (relating to Control of Air Pollution from Motor Vehicles) and 30 TAC Chapter 118 (relating to Control of Air Pollution Episodes), neither of which are within the scope of the federal operating permit program.

Furthermore, the definition of applicable requirement is proposed to be revised to include a subset of requirements termed federally enforceable only applicable requirements. Federally enforceable only applicable requirements are those applicable requirements which have been promulgated by the EPA, but have not been adopted by and delegated to the commission. Until such action by the commission, these requirements will be federally enforceable only and will be designated as such in the permit. Federally enforceable only applicable requirements will be subject to all the procedural requirements under the operating permit program.

Several other changes to the definitions are proposed to accommodate revisions to the program. In order to remove any ambiguity, the definition of deviation is proposed to be tied to the requirements codified in the permit. The definition for emission allowable under the permit is proposed to be removed, because this terminology is never used within the rule language. The definition of major source is proposed to be revised to account for any exemptions granted under FCAA, §182(f), relating to NO_x requirements. For purposes of clarification, a definition for notice and comment hearing is proposed to be included in response to a request from a public interest group. The definition of preconstruction authorization is proposed to be expanded to include requirements established under FCAA, §122(g) and (j), which will be implemented through Texas' New Source Review Program. Furthermore, a definition of provisional terms and conditions is proposed to address the new revision process outlined in the discussion of revisions to Subchapter C.

In addition, a definition for state only requirement is proposed. Although state only requirements are not applicable requirements, they will be included in the permit in order to provide a more comprehensive compliance and enforcement tool. The requirements in Chapters 111-113, 115, 117, and 119, which do not implement relevant requirements of Title I of the FCAA and were not developed for the SIP are designated as state only requirements. State only requirements will be listed in the operating permit and will be subject to requirements for public notice, affected state review, notice and comment hearing, recordkeeping, and six-month monitoring reporting. All reference to state only requirements throughout this chapter are subject to the definition in §122.10.

As a result of Senate Bill 1126 enacted by the 74th Texas Legislature and the subsequent changes made to Chapter 116, the agency has decided not to address the establishment of grandfather rates through the provisions of 30 TAC 122. Consequently §122.11, concerning Grandfather Definitions, is proposed to be repealed. All other references to grandfather requirements, including §122.132(a)(5) and §122.135, are also proposed to be removed from the rule language. The deleted grandfather requirements do not implement any part of Title V or 40 CFR 70.

SUBCHAPTER B: PERMIT REQUIREMENTS. At the direction of the commission, the proposed §122.110 provides for delegation of authority to the executive director to take action on any permit on behalf of the commission. The executive director may delegate authority to staff, as appropriate. Section 122.130, concerning When Applications Are Due, is proposed to be revised to allow the executive director to meet the deadline under §122.139. Section 122.139 requires that the executive director take final action on one-third of the applications submitted within the first year of the full operating permit program by the end of the first year of the operating permit program. In order to meet this deadline, the proposed rule language requires that applications be submitted for sites with specified SIC major groups within six months of the full program effective date. During the comment period, staff will evaluate the processing of the interim program application and determine whether the proposed rule language will allow the executive director to meet the requirements under §122.139 for full program applications. Based on this determination, the proposed language may be changed at adoption to require that applications be submitted earlier or increase the number applications required to be submitted early. The commission will set reasonable deadlines to allow applicants sufficient time to prepare and submit applications. The SIC major groups required to be submitted at six months, or earlier if necessary, are those belonging to sites expected to have less complicated permit applications and sites expected to be potential candidates for full program general operating permits. This section is also proposed to be revised to address application deadlines for sites that become subject to the program as the result of some action by the EPA or the commission. For instance, the reclassification of a county's attainment or nonattainment status or the release of new calculation methods by the EPA could cause a site to exceed the major source thresholds and become subject to the operating permit program.

The phased application process is a new concept introduced in the proposed §122.131 as a result of the large number of complex sources in Texas. This approach will allow applicants who qualify more time to submit accurate and complete application information and provide the OPD the extra time needed to thoroughly review that information. As agreed by EPA in the February 7, 1996, letter from Mary Nichols, EPA Assistant Administrator for Air and Radiation, the phased application process will allow applicants with 75 or more emission units in a nonattainment area, or 150 or more emission units in an attainment area, to submit a portion of their detailed applicability information in phases. All general applicability determinations (e.g., New Source Performance Standards (NSPS) Kb, or 30 TAC Chapter 111) must be submitted with the initial application. For each emission unit, the initial permit application must include detail sufficient to clarify the applicant's obligations with respect to its applicable requirements, including emission limits and compliance terms. The initial application will include a portion of the detailed applicability determinations, identifying the specific regulatory citations within the rules and regulations

that the source is subject to. The remaining detailed applicability determinations will be incorporated into the permit annually through the reopening process. Upon renewal, any detailed applicability determinations not yet addressed in the permit will be incorporated through the renewal process. All permits will include all detailed applicability determinations by no later than July 25, 2003.

The EPA is currently in the process of establishing requirements pursuant to FCAA, §504(b) and §114(a)(3) through the proposed Compliance Assurance Monitoring (CAM) rule, 40 CFR 64. Based on EPA's August 2, 1996 draft rule, CAM is anticipated to satisfy the enhanced monitoring requirements under the FCAA. The agency will review and address additional monitoring requirements when the CAM rule is promulgated.

The proposed §122.132(c) allows, at the executive director's discretion, applicants to submit abbreviated applications. The abbreviated application will include at a minimum, a general application form identifying the applicant and the site and a certification by a responsible official. The executive director will require the remaining information to be submitted when it is needed for review of the application. Because the initial applications will be reviewed and issued over a period of several years, this approach will help minimize the number of times the applications need to be updated before the review begins. The concept of the abbreviated application is consistent with guidelines in EPA's White Paper Number 1.

Proposed §122.132(e)(4) contains language found originally in §122.132(b), related to application compliance plan and schedules. The original language is proposed to be modified to provide clarity as to the basis on which the compliance status statements are to be made. The proposed changes will narrow the demonstrations of monitoring to specific regulatory citations and descriptions of the monitoring method used, thus removing doubt as to what monitoring was conducted.

An application's timely and complete status determines whether or not the applicant qualifies for a application shield. Therefore, §122.133 and §122.134, concerning Timely Application and Complete Application, are proposed to be revised to address only those situations in which an application shield is relevant. The references to permit revisions are proposed to be removed, because the applicant is already operating under a permit and is in no need of an application shield.

A new §122.140, concerning Representations in Application, is proposed to clarify that for general permit applications and acid rain permit applications, representations in the applications do become conditions under which the owner or operator must operate.

The requirements in the original §122.143(1)(H) are proposed to be moved to §122.143(10) and revised to specify that a new applicable requirement or state only requirement must be incorporated into a permit within 12 months of promulgation, regardless of the length of time remaining in the permit term. This change was initiated by public interest groups as a suggestion to make the requirement consistent with the revision process proposed in Subchapter C that requires most revisions to be submitted annually by the permit holder.

Section 122.143 is also proposed to be modified to include procedures for revising a permit to incorporate changes in federally enforceable only or state only designations. In addition, new language is proposed to specify that the permit (or authorization to operate, application, and a copy of the general operating permit) must be maintained at the location specified in the permit (or authorization to operate).

Permit requirements found originally in §122.143(1)(D), (2), and (3) related to recordkeeping and reporting requirements are proposed to be moved to and clarified in §122.144, concerning Recordkeeping Terms and Conditions, and §122.145, concerning Reporting Terms and Conditions. In addition, the proposed changes affect the frequency of some of the reporting requirements.

The annual compliance certification requirements are proposed to be moved from the original §122.143(4) to §122.146(5). The requirements for annual certification closely mirror those of the application compliance plan and certification in style. The content of the annual certification is clarified for emission units that experience deviations over a certification period. The intent of the annual compliance certification is to identify all emission units subject to the permit and identify units that have had deviations. The proposed change highlights the emission units that have potential complaint problems and provides significant detail for a meaningful assessment of compliance.

The Certification by Responsible Official information is proposed to be consolidated into §122.165. In this proposed section, a definition of duly authorized representative (DAR) is provided to allow a streamlined assignment of signature authority while reducing unnecessary case-by-case procedural steps related to agency approval of the DAR. Through this rulemaking, the commission is proposing to approve in advance, the delegation of authority to anyone meeting the qualifications for a DAR. In revising the definition of responsible official, the commission is relying in part on the flexibility provided in White Paper Number 1 as well as the expected final revisions to Part 70. In addition, language is proposed that would allow for certification of required submittals by persons consistent with the relative significance of the content of the submittals. For example, permit applications or annual compliance certifications would be certified by a person with overall control of the facility; while routine submittals for a given emission unit would be certified by a person more familiar with the particular unit (e.g. six-month deviation reports could be certified by the person responsible for the emission unit in question). The definition of responsible official is proposed to be revised to allow an alternate designated representative to sign the acid rain portion of the permit, and to allow the designated representative, the alternate designated representative, or the responsible official to sign the Title V portion of the permit. In addition, the definition of responsible official is proposed to be revised to allow delegation to a duly authorized representative for a partnership, or sole proprietorship, or a municipality, state, federal, or other public agency as well as a corporation.

SUBCHAPTER C: INITIAL PERMIT ISSUANCES, REVISIONS, REOPENINGS, AND RENEWALS. To provide adequate, streamlined, and reasonable procedures for expeditiously processing permit revisions, the commission proposes to replace the existing revision process under 30 TAC 122 with

a process that is substantially equivalent to the July 21, 1992, Part 70 revision process. In general, the proposed revision process provides for an annual review of changes at a site allowing the source to operate changes meeting specified criteria prior to issuance of the permit revision.

For those revisions not requiring approval, the permit holder must submit and comply with provisional terms and conditions as defined in §122.10. Provisional terms and conditions must be consistent with the applicable requirements and state only requirements and shall not authorize the violation of any applicable requirement or state only requirement. In addition, the provisional terms and conditions must contain the applicable requirements and state only requirements in the same level of detail a will be required in the permit. If the permit holder fails to comply with the provisional terms and conditions, the existing terms and conditions shall be enforceable. With all types of revisions, the permit holder may be subject to enforcement action if the change to the permit is later determined not to qualify for the type of permit revision submitted.

For administrative permit revisions, the permit holder would maintain a record of all the changes occurring over each 12-month period that meet the criteria in §122.211. The permit holder would then submit a permit application for those changes to the executive director on an annual basis. Changes requiring an administrative permit revision could be operated prior to permit revision, provided the requirements in §122.213 are satisfied.

For minor permit revision, the permit holder would be required to submit a notice to the executive director for any change specified in §122.215 no later than two weeks of the end of the calendar month in which the change took place. For example, if a change took place on June 7th, then the permit holder would be required to submit a notice to the executive director no later than July 14. Likewise, if a change took place on June 30th, then the permit holder would also be required to submit a notice to the executive director no later than July 14. The notice would include the information required to be submitted in a permit application and the application would be submitted on an annual basis. The executive director would then act on all minor permit revisions after the end of each 12-month period after permit issuance or renewal. Changes requiring a minor permit revision could be operated prior to permit revision, provided the requirements in §122.217 are satisfied.

A significant permit revision would be required if the permit holder triggers a change defined in §122.219. The significant permit revision procedures will be subject to procedures identical to initial permit issuance. Significant permit revisions would require, in some cases, approval prior to operation; while the remaining significant permit revisions would require notification to the executive director within two weeks of the end of the calendar month in which the change took place.

For those significant permit revisions that may be operated before issuance of the permit revision, the permit holder would also be required to submit an application to the executive director for all significant permit revisions that took place over each 12-month period. The executive director would then act on those significant permit revisions after the end of 12-month period after permit issuance or renewal. Consistent with the previous discussion of changes made without prior approval, significant permit revisions not requiring prior approval are subject to all requirements for provisional terms and conditions. The permit holder may be subject to enforcement action if the provisional terms and conditions are not complied with.

The commission requests comments recommending whether the agency adopt the proposed revision process or retain the existing process, or certain aspects of the existing process.

SUBCHAPTER D: PUBLIC ANNOUNCEMENT, PUBLIC NOTICE, AFFECTED STATE REVIEW, NOTICE AND COMMENT HEARING, NOTICE OF PROPOSED FINAL ACTION, EPA REVIEW, AND PUBLIC PETITION. In order to provide adequate, streamlined, and reasonable public notice procedures, the public announcement alternative is proposed to be utilized for the minor permit revisions. The process was developed to match the significance of the change to the level of public review. The public announcement will be available statewide on the agency's electronic bulletin board. The announcement can be accessed electronically with a modem or through the Internet. The public announcement will allow for expeditious permit revisions in a more streamlined fashion while providing the public an adequate opportunity to comment. The EPA, the public, and regulated community will have an opportunity to comment for 30 days after the notice of the draft permit is posted electronically.

At the direction of the commission, the proposed 30 TAC 122 provides for bilingual notice and a single publication in a newspaper of general circulation in the city where a site is located. These changes are consistent with statutory requirements and the requirements of 40 CFR 70. In a previous rule proposal, the commission proposed to allow a combination of the public notice of the draft permit and the notice of hearing. At the direction of the commission, the proposed 30 TAC 122 provides that if the notices are combined, and a bilingual notice is required to be published, the complete combined notice will be published in the appropriate alternate language. The public notice requirements will apply to initial issuance, significant permit revisions, reopenings, and renewals.

SUBCHAPTER E: ACID RAIN PERMITS. The acid rain requirements of 40 CFR 72, 74, and 76 are proposed to be incorporated by reference into Subchapter E. The agency has not been delegated the authority to enforce the acid rain program; consequently, 40 CFR Parts 73, 75, 77, and 78 have not been included. In order to provide a more streamlined and efficient process, a provision is proposed to allow the requirements in 30 TAC 122 to substitute for any references to Part 70 in Parts 72, 74, and 76. In addition, language is proposed to allow the acid rain portion of the permit to be revised through procedures similar to those used for revising the Title V portion of the permit. For purposes of clarification, the deadlines for submitting acid rain permit applications are proposed to be included in §122.412. Except for the application deadlines, the requirements specifically listed in the original Subchapter E that are redundant to the requirements incorporated by reference are proposed to be deleted. EPA published proposed revisions to 40 CFR Parts 72 and 74 in the *Federal Register* on December 27, 1996. Since these proposed revisions are not expected to be promulgated before November 1997, any consequences from the revisions will be addressed in future rulemaking.

SUBCHAPTER F: GENERAL OPERATING PERMITS. The requirements for general operating permits are proposed to be consolidated in Subchapter F. General Permits are operating permits for numerous similar sources which are developed through rulemaking consistent with the requirements of the Government Code, Administrative Procedure Act, Chapter 2001 or 2002. Section 122.501 is proposed to clearly identify which procedural requirements the general operating permits will undergo at adoption. The adoption of general operating permits will be subject to public notice, affected state review, notice and comment hearings, EPA review and public petition, as are all permits issued under 30 TAC 122. Therefore, public notice and notice and comment hearing requirements specifically tailored for general operating permits are proposed in §122.506 and §122.508.

Since representations in a general operating permit application become conditions under which the permit holder must operate, procedures for revising the application to address changes at a site are proposed in §122.503. Section 122.504 is also proposed to clarify the requirements for reapplying for a general operating permit that is amended, and §122.505 is proposed to address procedures for renewing the authorizations to operate under general operating permit.

FISCAL NOTE. Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections. The sections are proposed to replace existing sections governing the operating permit program under the FCAAA. While the operating permit program represents a major federal environmental rule with significant implementation costs, the new sections are not anticipated to result in fiscal implications either to state government or to affected persons that are materially different from those resulting from administration of and compliance with the existing rules proposed to be replaced.

PUBLIC BENEFIT. Mr. Minick also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be improved consistency between federal and state requirements and in the enforcement of both state and federal rules. Revisions to the operating permit program will enable affected facility operators to achieve compliance with air permit standards with greater flexibility. There will also be a clearer understanding by both the regulated community and the public of the emission standards applicable to each facility throughout the codification of these standard into operating permits. The recordkeeping requirements that are specifically stated in each federal operating permit will provide assurance that the affected facility is in compliance with its operations and emission limitations. There are no significant fiscal implications anticipated for small businesses as a result of the proposed rules. Implementation of these rules may result in minor cost savings for persons required to comply with the rules; however, these cost savings have not been estimated.

TAKINGS IMPACT ASSESSMENT. The commission has prepared a takings impact assessment for this rule proposal under Texas Government Code, §2007.043. The following is a summary of that assessment. The agency was granted interim program approval in the June 25, 1996, issue of the *Federal Register* (61 FR 32693). Interim program approval provides the agency with the authority to implement the OPP in Texas for two years. The agency will be required to submit a request for full program approval of the OPP to the EPA by January 26, 1998. The purpose of this rulemaking is to address comments received from EPA in the June 7, 1995, proposal to grant interim approval and the June 25, 1996, interim approval notice, the regulated community, and public interest groups, in addition to regulatory reform changes. In addition, the commissioners directed staff to revise certain aspects of the operating permit program. The proposed rulemaking will achieve its stated purpose by addressing EPA's comments from the interim program approval notice, allowing options in permit application review and post-permit processing, and allowing the request for full program approval to be submitted by January 26, 1998. The adoption and enforcement of these rules will not be considered a burden on private real property because they are mandated by federal law.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW. The commission has determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resource Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3) relating to actions and rules subject to the CMP, agency rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this proposed action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and has determined that the proposed action is consistent with the applicable CMP goals and policies. The permits issued under Chapter 122, concerning Federal Operating Permits, do not authorize the increase in air emissions nor do these permits authorize new air emissions. Interested persons may submit comments on the consistency of the proposed rule with the CMP during the public comment period.

PUBLIC HEARING. A public hearing on the proposal will be held June 12, 1997, at 10:00 a.m. in Room 201S of Texas Natural Resource Conservation Commission Building E, located at 12100 Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

SUBMITTAL OF COMMENTS. Written comments regarding this proposal may be mailed to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 96159-122-AI. Comments must be received by 5:00 p.m., June 13, 1997. For further information or questions concerning this proposal, contact Cheryl Covone of the Operating Permits Division, Office of Air Quality, (512) 239-1144.

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

Subchapter A. Definitions

30 TAC §§122.10-122.12

STATUTORY AUTHORITY. The new sections are proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purpose of the TCAA.

The proposed new sections implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.10. General Definitions.

The definitions in the Texas Clean Air Act, Chapter 101 of this title (relating to General Rules), and Chapter 3 of this title (relating to Definitions) apply to this chapter. In addition, the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

Air pollutant-Any of the following regulated air pollutants:

(A) nitrogen oxides;

(B) volatile organic compounds;

(C) any pollutant for which a National Ambient Air Quality Standard (NAAQS) has been promulgated;

(D) any pollutant that is subject to any standard promulgated under FCAA, §111 (relating to Standards of Performance for New Stationary Sources);

(E) unless otherwise specified by the EPA by rule, any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI (relating to Stratospheric Ozone Protection); or

(F) any pollutant subject to a standard promulgated under FCAA, §112 (relating to Hazardous Air Pollutants) or other requirements established under §112, including §112(g) and (j).

Applicable requirement-

(A) All of the following requirements of Chapter 111 of this title (relating to Control of Air Pollution From Visible Emissions and Particulate Matter) as they apply to the emission units at a site:

(i) §111.111(c)(1) and (2) of this title (relating to Requirements for Specified Sources);

(ii) §111.141 of this title (relating to Geographic Areas of Application and Date of Compliance), but only as it applies to El Paso and the Fort Bliss Military Reservation;

(iii) §111.143 of this title (relating to Materials Handling), but only as it applies to El Paso and the Fort Bliss Military Reservation;

(iv) §111.145 of this title (relating to Construction and Demolition), but only as it applies to El Paso and the Fort Bliss Military Reservation;

(v) §111.147 of this title (relating to Roads, Streets, and Alleys), but only as it applies to El Paso and the Fort Bliss Military Reservation; and

(vi) §111.149 of this title (relating to Parking Lots), but only as it applies to El Paso and the Fort Bliss Military Reservation.

(B) All of the following requirements of Chapter 112 of this title (relating to Sulfur Compounds) as they apply to the emission units at a site:

(i) §112.1 of this title (relating to Definitions);

(ii) §112.2 of this title (relating to Compliance, Reporting, and Recordkeeping);

(iii) §§112.5-112.9 of this title (relating to Allowable Emission Rates- Sulfuric Acid Plant Burning Elemental Sulfur; Allowable Emission Rates-Sulfuric Acid Plant; Allowable Emission Rates-Sulfur Recovery Plant; Allowable Emission Rates From Solid Fossil Fuel-Fired Steam Generators; and Allowable Emission Rates-Combustion of Liquid Fuel);

(iv) §112.14 of this title (relating to Allowable Emission Rates- Nonferrous Smelter Processes);

(v) §112.15 of this title (relating to Temporary Fuel Shortage Plan Filing Requirements);

(vi) §112.16 of this title (relating to Temporary Fuel Shortage Plan Operating Requirements);

(vii) §112.17 of this title (relating to Temporary Fuel Shortage Plan Notification Procedures);

(viii) §112.18 of this title (relating to Temporary Fuel Shortage Plan Reporting Requirements);

(ix) §112.41(b) of this title (relating to Allowable Emissions);

(x) §112.43(b) and (c) of this title (relating to Calculation Methods);

(xi) §112.45 of this title (relating to Inspection and Recordkeeping Requirements);

(xii) §112.47 of this title (relating to Compliance Schedules);

(xiii) §112.51 of this title (relating to Emissions Limits for TRS Compounds From Kraft Pulp Mills);

(xiv) §112.53 of this title (relating to Alternate Emission Limitations);

(xv) §112.55 of this title (relating to Inspection Requirements);

(xvi) §112.57 of this title (relating to Monitoring and Recordkeeping Requirements); and

(xvii) §112.59 of this title (relating to Compliance Schedules).

(C) All of the requirements of Subchapter B of Chapter 113 of this title (relating to Lead from Stationary Sources) as they apply to the emission units at a site.

(D) All of the requirements of Chapter 115 of this title (relating to Control of Air Pollution from Volatile Organic Compounds) as they apply to the emission units at a site.

(E) All of the requirements of Chapter 117 of this title (relating to Control of Air Pollution From Nitrogen Compounds), except Subchapter D of Chapter 117 of this title (relating to Administrative Provisions), as they apply to the emission units at a site.

(F) All of the requirements of Chapter 119 of this title (relating to Control of Air Pollution from Carbon Monoxide) as they apply to the emission units at a site.

(G) Any new requirement in Chapters 111, 112, 113, 115, 117, and 119 of this title, unless specifically identified in rulemaking as a state only requirement or exempted under subparagraph (J) of this definition.

(H) Any term or condition of any preconstruction permits issued under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) as necessary to implement the requirements of regulations approved or promulgated through rulemaking under FCAA, Title I, Parts C or D (relating to Prevention of Significant Deterioration of Air Quality or Plan Requirements for Nonattainment Areas);

(I) After the adoption of this chapter, any requirement in state regulations implementing federal new source review requirements for control of air pollution for new construction or modification, upon approval by the commission and approval as a State Implementation Plan revision by EPA, for the modification and construction of any stationary source within the areas covered by the State Implementation Plan as necessary to assure that national ambient air quality standards are achieved;

(J) All of the following federal requirements as they apply to the emission units at a site:

(i) any standard or other requirement under FCAA, §111 (relating to Standards of Performance for New Stationary Sources);

(ii) any standard or other requirement under FCAA, §112 (relating to Hazardous Air Pollutants), except requirements established under §112(g) or (j);

(iii) any standard or other requirement of the Acid Rain Program;

(iv) any requirements established under FCAA, §504(b) or §114(a)(3) (relating to Monitoring and Analysis or Inspections, Monitoring, and Entry);

(v) any standard or other requirement governing solid waste incineration under FCAA, §129 (relating to Solid Waste Combustion);

(vi) any standard or other requirement for consumer and commercial products under FCAA, §183(e) (relating to Federal Ozone Measures);

(vii) any standard or other requirement under FCAA, §183(f) (relating to Tank Vessel Standards);

(viii) any standard or other requirement under FCAA, §328 (relating to Air Pollution from Outer Continental Shelf Activities);

(ix) any standard or other requirement under FCAA, Title VI (relating to Stratospheric Ozone Protection), unless EPA has determined that the requirement need not be contained in a permit; and

(x) any NAAQS or increment or visibility requirement under FCAA, Title I, Part C, but only as it would apply to temporary sources permitted under FCAA, §504(e) (relating to Temporary Sources).

(K) State and federal ambient air quality standards, net ground level concentration limits, and ambient atmospheric concentration limits are not applicable requirements under this chapter, except as noted in subparagraph (I)(x) of this definition.

(L) Any requirements noted in this definition which have been promulgated by the EPA, but have not been adopted by and delegated to the commission are federally enforceable only. These applicable requirements will be designated as federally enforceable only in the permit.

Deviation-Any indication of noncompliance with a term or condition of the permit, as found using compliance method data from required monitoring, recordkeeping, reporting, or testing specified in and required to be collected by the permit.

Draft permit-The version of a permit available for public announcement or public notice and affected state review.

Emission unit-The smallest discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a point of origin of air pollutants.

(A) A point of origin of fugitive emissions from individual pieces of equipment, e.g., valves, flanges, pumps, and compressors, shall not be considered an individual emission unit. The fugitive emissions shall be collectively considered as an emission unit based on their relationship to the associated process.

(B) The term may also be used in this chapter to refer to a group of similar emission units.

(C) This term is not meant to alter or affect the definition of the term "unit" for purposes of the acid rain program.

Final action-Issuance or denial of the permit by the executive director.

Major source-

(A) For pollutants other than radionuclides, any site that emits or has the potential to emit, in the aggregate the following quantities:

(i) ten tons per year (tpy) or more of any single hazardous air pollutant listed under FCAA, §112(b) (relating to Hazardous Air Pollutants);

(ii) 25 tpy or more of any combination of such hazardous air pollutant listed under FCAA, §112(b); or

(iii) any quantity less than those identified in subparagraph (A)(i) or (ii) of this definition established by the EPA through rulemaking.

(B) For radionuclides regulated under FCAA, §112, the term "major source" shall have the meaning specified by the EPA by rule.

(C) Any site which directly emits or has the potential to emit, 100 tpy or more of any air pollutant. The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source, unless the stationary source belongs to one of the following categories of stationary sources:

(i) coal cleaning plants (with thermal dryers);

(ii) kraft pulp mills;

(iii) portland cement plants;

(iv) primary zinc smelters;

(v) iron and steel mills;

(vi) primary aluminum ore reduction plants;

(vii) primary copper smelters;

(viii) municipal incinerators capable of charging more than 250 tons of refuse per day;

(ix) hydrofluoric, sulfuric, or nitric acid plants;

(x) petroleum refineries;

(xi) lime plants;

(xii) phosphate rock processing plants;

(xiii) coke oven batteries;

(xiv) sulfur recovery plants;

(xv) carbon black plants (furnace process);

(xvi) primary lead smelters;

(xvii) fuel conversion plant;

(xviii) sintering plants;

(xix) secondary metal production plants;

(xx) chemical process plants;

(xxi) fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units (Btu) per hour heat input;

(xxii) petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) taconite ore processing plants;

(xiv) glass fiber processing plants;

(xxv) charcoal production plants;

(xxvi) fossil-fuel-fired steam electric plants of more than 250 million Btu per hour heat input; or

(xxvii) any stationary source category regulated under FCAA, §111 (relating to Standards of Performance for New Stationary Sources) or §112 for which the EPA has made an affirmative determination under FCAA, §302(j) (relating to Definitions).

(D) Any site, except those exempted under FCAA, §182(f) (relating to NO_x Requirements), which, in whole or in part, is a major source under FCAA, Title I, Part D (relating to Plan Requirements for Nonattainment Areas), including the following:

(i) any site with the potential to emit 100 tpy or more of volatile organic compounds (VOC) or oxides of nitrogen (NO_x) in any ozone nonattainment area classified as "marginal or moderate";

(ii) any site with the potential to emit 50 tpy or more of VOC or NO_x in any ozone nonattainment area classified as "serious";

(iii) any site with the potential to emit 25 tpy or more of VOC or NO_x in any ozone nonattainment area classified as "severe";

(iv) any site with the potential to emit ten tpy or more of VOC or NO_x in any ozone nonattainment area classified as "extreme";

(v) any site with the potential to emit 100 tpy or more of carbon monoxide in any carbon monoxide nonattainment area classified as "moderate";

(vi) any site with the potential to emit 50 tpy or more of carbon monoxide in any carbon monoxide nonattainment area classified as "serious";

(vii) any site with the potential to emit 100 tpy or more of inhalable particulate matter (PM-10) in any PM-10 nonattainment area classified as "moderate";

(viii) any site with the potential to emit 70 tpy or more of PM-10 in any PM-10 nonattainment area classified as "serious"; and

(ix) any site with the potential to emit 100 tpy or more of lead in any lead nonattainment area.

(E) The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source under subparagraph (D) of this definition, unless the stationary source belongs to one of the categories of stationary sources listed in subparagraph (C) of this definition.

(F) Any temporary source which is located at a site for less than six months shall not affect the determination of major for other stationary sources at a site under this chapter or require a revision to the existing permit at the site.

(G) Emissions from any oil or gas exploration or production wells (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not the units are in a contiguous area or under common control, to determine whether the units or stations are major sources under subparagraph (A) of this definition.

Notice and comment hearing-Any hearing held under this chapter. Hearings held under this chapter are for the purpose of receiving oral and written comments regarding draft permits.

Permit-

(A) any federal operating permit, or group of federal operating permits covering a site, that is issued, renewed, or revised under this chapter; or

(B) any general operating permit, or group of general operating permits, adopted by the commission under this chapter.

Permit application-An application for an initial permit, permit revision, permit renewal, permit reopening, general operating permit, or any other similar application as may be required.

Permit holder-A person who has been issued a permit or granted the authority by the executive director to operate under a general operating permit.

Permit revision-Any administrative permit revision, minor permit revision, or significant permit revision that meets the related requirements of Subchapter C of this chapter (relating to Permits Issuances, Revisions, Reopenings, and Renewals).

Potential to emit-The maximum capacity of a stationary source to emit any air pollutant under its physical and operational design or configuration. Any certified registration or preconstruction authorization restricting emissions or any physical or operational limitation on the capacity of a stationary source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the EPA. This term does not alter or affect the use of this term for any other purposes under the FCAA, or the term "capacity factor" as used in acid rain provisions of the FCAA or the acid rain rules.

Preconstruction authorization-Any authorization to construct or modify an existing facility or facilities under Chapter 116 of this title. In this chapter, references to preconstruction authorization will also include the following:

(A) any requirement established under FCAA, §112(g) (relating to Modifications) after delegation of §112(g) to the commission;

(B) requirement established under FCAA, §112(j) (relating to Equivalent Emission Limitation by Permit) after delegation of §112(j) to the commission; and

(C) where appropriate, preconstruction authorization under Chapter 120 of this title (relating to Control of Air Pollution from Hazardous Waste or Solid Waste Management Facilities) (as effective until December 1996) or Chapter 121 of this title (relating to Control of Air Pollution from Municipal Solid Waste Management Facilities).

Proposed permit-The version of a permit that the executive director forwards to the EPA for a 45-day review period.

Provisional terms and conditions-Temporary terms and conditions for an emission unit affected by a change at a site, under which the permit holder is authorized to operate prior to a revision or renewal of a permit.

(A) Provisional terms and conditions will only apply to changes not requiring prior approval by the executive director under Subchapter C of this chapter (relating to Permits Issuances, Revisions, Reopenings, and Renewals).

(B) Provisional terms and conditions shall not authorize the violation of any applicable requirement or state only requirement.

(C) Provisional terms and conditions shall be consistent with the applicable requirements and state only requirements.

(D) Provisional terms and conditions for applicable requirements and state only requirements shall include the following:

(i) the specific regulatory citations in each applicable requirement or state only requirement identifying the emission limitations and standards; and

(ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards identified under subparagraph (D)(i) of this definition.

Renewal-The process by which a permit or an authorization to operate under a general operating permit is renewed at the end of its term under §122.241 or §122.505 of this title (relating to Permit Renewals or Renewal of the Authorization to Operate Under a General Operating Permit).

Site-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). If a research and development operation does not produce products for commercial sale, it shall be treated as a separate site from any manufacturing facility with which it is collocated.

State only requirement-

(A) All of the following requirements of Chapter 111 of this title as they apply to the emission units at a site:

(i) §111.111 of this title, except §111.111(a)(5) and (6) and (c)(1) and (2);

(ii) §111.113 of this title (relating to Alternate Opacity Limitations);

(iii) §111.121 of this title (relating to Single-, Dual-, and Multiple-Chamber Incinerators);

(v) §111.127 of this title (relating to Monitoring and Recordkeeping Requirements);

(vii) §111.131 of this title (relating to Definitions);

(viii) §111.133 of this title (relating to Testing Requirements);

(ix) §111.135 of this title (relating to Control Requirements for Surfaces with Coatings Containing Lead);

(x) §111.137 of this title (relating to Control Requirements for Surfaces with Coatings Containing Less Than 1.0% Lead);

(xi) §111.139 of this title (relating to Exemptions);

(xii) §111.141 of this title, but only as they apply to Harris County and Nueces County;

(xiii) §111.143 of this title, but only as they apply to Harris County and Nueces County;

(xiv) §111.145 of this title, but only as they apply to Harris County and Nueces County;

(xv) §111.147 of this title, but only as they apply to Harris County and Nueces County;

(xvi) §111.149 of this title, but only as they apply to Harris County and Nueces County;

(xvii) §111.151 of this title (relating to Allowable Emissions Limits);

(xviii) §111.153 of this title (relating to Emissions Limits For Steam Generators);

(xix) §111.171 of this title (relating to Emissions Limits Based on Process Weight Method);

(xx) §111.173 of this title (relating to Emissions Limits Based on Alternate Method);

(xxi) §111.175 of this title (relating to Exemptions);

(xxii) §111.181 of this title (relating to Exemption Policy);

(xxiii) §111.183 of this title (relating to Requirements for Exemption);

(xxiv) §111.201 of this title (relating to General Prohibition);

(xxv) §111.203 of this title (relating to Definitions);

(xxvi) §111.205 of this title (relating to Exception for Fire Training);

(xxvii) §111.207 of this title (relating to Exception for Fires Used for Recreation, Ceremony, Cooking, and Warmth);

(xxviii) §111.209 of this title (relating to Exception for Disposal Fires);

(xxix) §111.211 of this title (relating to Exception for Prescribed Burn);

(xxx) §111.213 of this title (relating to Exception for Hydrocarbon Burning);

(xxxi) §111.215 of this title (relating to Executive Director Approval of Otherwise Prohibited Outdoor Burning);

(xxxii) §111.219 of this title (relating to General Requirements for Allowable Outdoor Burning); and

(xxxiii) §111.221 of this title (relating to Responsibility for Consequences of Outdoor Burning).

(B) Any other requirement in Chapters 111, 112, 113, 115, 117, and 119 of this title identified in rulemaking as being a state only requirement.

Stationary source-Any building, structure, facility, or installation that emits or may emit any air pollutant.

§122.12. Acid Rain Definitions.

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

Acid rain permit-The legally binding and segregable portion of the federal operating permit issued under this chapter, including any permit revisions, specifying the acid rain program requirements applicable to an affected source, to each affected unit at an affected source, and to the owners and operators and the designated representative of the affected source or the affected unit.

Acid rain program-The national sulfur dioxide and nitrogen oxides air pollution control and emissions reduction program established in accordance with FCAA, Title IV, contained in 40 Code of Federal Regulations, Parts 72, 73, 74, 75, 76, 77, and 78.

Designated representative-The responsible individual authorized by the owners and operators of an affected source and of all affected units at the site, as evidenced by a certificate of representation submitted in accordance with the acid rain program, to represent and legally bind each owner and operator, as a matter of federal law, in matters pertaining to the acid rain program. Such matters include, but are not limited to: the holdings, transfers, or dispositions of allowances allocated to a unit; and the submission of or compliance with acid rain permits, permit applications, compliance plans, emission monitoring plans, continuous emissions monitor (CEM), and continuous opacity monitor (COM) certification notifications, CEM and COM certification and applications, quarterly monitoring and emission reports, and annual compliance certifications. Whenever the term "responsible official" is used in this chapter, it shall refer to the "designated representative" with regard to all matters under the acid rain program.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705903
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966



Subchapter B. Permit Requirements

General Requirements

30 TAC §§122.110, 122.120, 120.121

The new sections are proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purpose of the TCAA.

The proposed new sections implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.110. Delegation of Authority to Executive Director.

(a) The purpose of this section is to delegate authority to the executive director to take action on any permit on behalf of the commission.

(b) The executive director may delegate authority, by memorandum, to the director of the Operating Permits Division to take action on any permit on behalf of the commission; but may not delegate authority to other agency personnel.

§122.120. Who Shall Apply for a Permit.

Owners and operators of one or more of the following are subject to the requirements of this chapter:

(1) any site that is a major source as defined in §122.10 of this title (relating to General Definitions);

(2) any site with an affected unit subject to the requirements of the Acid Rain Program;

(3) any solid waste incineration unit required to obtain a permit under FCAA, §129(e), (relating to Solid Waste Combustion); or

(4) any site that is a non-major source which the EPA, through rulemaking, has designated as no longer exempt from the obligation to obtain a permit. For the purposes of this chapter, those sources may be any of the following:

(A) any non-major source so designated by the EPA, and subject to a standard, limitation, or other requirement under FCAA, §111 (relating to Standards of Performance for New Stationary Sources);

(B) any non-major source so designated by the EPA, and subject to a standard or other requirement under FCAA, §112 (relating to Hazardous Air Pollutants), except for FCAA, §112(r) (relating to Prevention of Accidental Releases); or

(C) any non-major source in a source category designated by the EPA.

§122.121. Prohibition on Operation.

Except as provided in §122.138 of this title (relating to Application Shield), owners and operators of sites identified in §122.120 of this title (relating to Who Shall Apply for a Permit) shall not operate emission units at those sites without a permit issued or granted under this chapter.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705902
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966

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Subchapter B. Permit Requirements

Permit Application

30 TAC §§122.130-122.134, 122.136, 122.138-122.140

(Editor's note: The text of the following section was omitted from the May 13, 1997, issue. The preamble for this section can be found in the May 13, 1997, issue (22 TexReg 4146). TNRCC make the text of the entire 30 TAC Chapter 122 proposed available on its web site (http://home.tnrcc.state.tx.us). The proposed date of adoption will not be affected).

The new sections are proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purpose of the TCAA.

The proposed new sections implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.130. When Applications Are Due.

(a) Interim operating permit program.

(1) Owners and operators of the following sites shall submit initial applications under the interim operating permit program:

(A) any site with an affected unit subject to the requirements of the Acid Rain Program;

(B) any site with the following primary Standard Industrial Classification (SIC) code (as described in the Standard Industrial Classification Manual, 1987) (for purposes of this subparagraph, each site shall have only one primary SIC code):

(i) Petroleum and Natural Gas, 1311;

(ii) Natural Gas Liquids, 1321;

(iii) Electric Services, 4911;

(iv) Natural Gas Transmission, 4922;

(v) Natural Gas Transmission and Distribution, 4923; or

(vi) Petroleum Bulk Stations and Terminals, 5171.

(2) Except as provided in paragraph (3) of this subsection, applications for sites subject to the interim operating permit program shall be submitted by January 25, 1997.

(3) If an owner or operator has more than one site listed in subsection (a)(1)(B) of this section, the owner or operator shall submit initial permit applications for no less than 10% of those sites by January 25, 1997. Applications for the remaining sites shall be submitted by July 25, 1997. This paragraph does not apply to any site with an affected source.

(b) Full operating permit program.

(1) Owners and operators of any site subject to the requirements of this chapter, except those identified in subsection (a)(1) of this section shall submit initial applications under the full operating permit program.

(2) Applications for sites with the following primary SIC major groups shall be submitted by January 25, 1999 (for purposes of this section, each site shall have only one primary SIC code):

(A) Mining and Quarrying of Nonmetallic Mineral, Except Fuels, 14;

(B) Food and Kindred Products, 20;

(C) Lumber and Wood Products, Except Furniture, 24;

(D) Rubber and Miscellaneous Plastics Products, 30;

(E) Stone, Clay, Glass, and Concrete Products, 32;

(F) Fabricated Metal Products, Except Machinery and Transportation Equipment, 34;

(G) Motor Freight Transportation and Warehousing, 42; and

(H) Automotive Repair, Services, and Parking, 75.

(3) Except as specified in paragraph (2) of this subsection, applications for all other sites under the full operating permit program shall be submitted by July 25, 1999.

(c) After effective date of the interim or full operating permit program. Owners or operators of sites that become subject to this chapter after the effective date of either the interim operating permit program (July 25, 1996) or the full operating permit program (July 25, 1998), as applicable, shall submit permit applications as follows:

(1) no later than 12 months after the issuance or approval date of the preconstruction authorization, required under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification); or

(2) no later than 12 months after an action by the executive director or the EPA that subjects the site to the requirements of this chapter.

(d) Applications submitted under 40 CFR Part 71 (relating to Federal Operating Permit Programs).

(1) If 40 CFR Part 71 is implemented in Texas by the EPA, applications will only be required to be submitted to the EPA.

(2) If all or part of 40 CFR Part 71 is delegated to the commission, information required by this chapter and consistent with the delegation will be required to be submitted to the commission.

§122.131. Phased Application Process.

(a) Sites with 75 or more emission units in a nonattainment area, and sites with 150 or more emission units in an attainment area may qualify for the phased application process. Eligibility for the phased application process shall be based on the number of emission units individually listed in the initial permit application.

(b) Applicants with sites that qualify for the phased application process may submit in the initial permit application a portion of the detailed applicability determination information required by §122.132(e)(3) of this title (relating to Application and Required Information for Initial Permit Issuance, Reopening, Renewal, or General Operating Permits) with a proposed schedule for the submission of the remaining detailed applicability determination information. For each emission unit, the initial permit application must include detail sufficient to clarify the applicant's obligations with respect to its applicable requirements, including emission limits and compliance terms.

(c) Any detailed applicability determination information not submitted with the initial permit application shall be submitted according to the schedule included as a term or condition of the permit.

(d) The schedule in the permit must require the incorporation of the remaining detailed applicability determinations into the permit at least annually through the reopening or renewal process. The applications for permit reopenings shall be submitted no later than two weeks after the end of each 12 calendar month period after initial issuance. The month in which the permit is issued shall be counted as the first calendar month; however, the reporting period will not begin until the day after permit issuance.

(e) All detailed applicability determinations shall be codified in the permit no later than July 25, 2003, or during the first permit renewal, whichever occurs first.

(f) The reopening requirements of this section may be satisfied by the procedures for significant permit revisions requiring prior approval.

§122.132. Application and Required Information for Initial Permit Issuance, Reopening, Renewal, or General Operating Permits.

(a) A permit application shall provide any information, including confidential information, required by the executive director to determine the applicability of, or to codify, any applicable requirement or state only requirement.

(b) An application for a general operating permit shall only be required to provide the information necessary to determine qualification for, and to assure compliance with, the general operating permit.

(c) At the discretion of the executive director, an applicant may submit an abbreviated initial permit application, containing only the information in this section deemed necessary by the executive director. The executive director shall inform the applicant in writing of the deadline for submitting the remaining information.

(d) An application for a site qualifying under §122.131 of this title (relating to Phased Application Process) may be submitted under the phased application process.

(e) An application shall include, but is not limited to, the following information:

(1) a general application form and all information requested by that form;

(2) for each emission unit, the following information:

(A) each potentially applicable requirement and potentially applicable state only requirement (e.g., NSPS Kb, or 30 TAC Chapter 111);

(B) the applicability determination for each potentially applicable requirement and potentially applicable state only requirement; and

(C) the basis for each determination made under subparagraph (B) of this paragraph;

(3) for each emission unit, except as provided in §122.131 of this title, information regarding the detailed applicability determinations, which includes the following:

(A) the specific regulatory citations in each applicable requirement or state only requirement identifying the following:

(i) the emission limitations and standards; and

(ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards identified under clause (i) of this subparagraph;

(B) the basis for each applicability determination identified under subparagraph (A) of this paragraph;

(4) a compliance plan including the following information:

(A) the following statement: "Based on my (the responsible official's) actual knowledge formed after reasonable inquiry at the time of submittal of an application under this chapter, all emission units shall comply, by the compliance dates, with any applicable requirements identified in the application that become effective during the permit term.";

(B) for all emission units addressed in the application, an indication of the apparent compliance status with respect to all applicable requirements, based on any compliance method specified in the applicable requirements;

(C) for any emission unit not in apparent compliance with the applicable requirements identified in the application, the following information:

(i) the method used for assessing the compliance status of the emission unit;

(ii) a narrative description of how the emission unit will come into compliance with all applicable requirements;

(iii) a compliance schedule (resembling and at least as stringent as any compliance schedule contained in any judicial consent decree or administrative order to which the site is subject), including remedial measures to bring the emission unit into compliance with the applicable requirements; and

(iv) a schedule for the submission, at least every six calendar months after issuance of the permit, of certified progress reports;

(5) if applicable, information requested by the nationally-standardized forms for the acid rain portions of permit applications, and compliance plans required by the acid rain program;

(6) if applicable, a statement certifying that a risk management plan, or a schedule to submit a risk management plan has been submitted to the appropriate agency in accordance with FCAA, §112(r)(7) (relating to Prevention of Accidental Releases);

(7) for applicants electing the phased application process under §122.131 of this title, a proposed schedule for the incorporation of the remaining detailed applicability determinations into the permit;

(8) for applicants requesting a permit shield, any information requested by the executive director in order to determine whether to grant the shield; and

(9) a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official).

(f) The applicant shall submit a copy of the permit application to the EPA, if requested by EPA in writing.

§122.133. Timely Application.

A timely application for a permit is one that is submitted as follows:

(1) for initial permit issuance, in accordance with §122.130 of this title (relating to When Applications Are Due);

(2) for a permit renewal, at least six months, but no earlier than 18 months, before the date of permit expiration;

(3) for the initial authorization to operate under the general operating permit, in accordance with §122.130 of this title;

(4) for a renewal of an authorization to operate under a general operating permit, at least six months, but no earlier than 18 months, before the date of expiration of the authorization; and

(5) for the authorization to operate under an amended general operating permit, by the date specified in the amended general operating permit, but no later than six months after the date of the adoption of the amended general operating permit.

§122.134. Complete Application.

(a) An application is complete on the 61st day after receipt by the executive director, unless the executive director has requested additional information or otherwise notified the applicant of incompleteness.

(b) Except as provided in subsection (c) of this section, a complete application for a permit shall include the following:

(1) for initial permit issuance, all information required in §122.132 of this title (relating to Application and Required Information for Initial Permit Issuance, Reopening, Renewal, or General Operating Permits);

(2) for permit renewal, an update of the information held by the executive director and any information required by this chapter that has not been previously submitted;

(3) for the initial grant of authorization to operate under a general operating permit, information necessary to determine qualification for, and to assure compliance with, the general operating permit;

(4) for the renewal of an authorization to operate under a general operating permit, an update of the information held by the executive director and any information required by this chapter that has not been previously submitted; or

(5) for the authorization to operate under an amended general operating permit, the information required by §122.504 of this title (relating to Application Revisions When a General Operating Permit is Amended or Repealed).

(c) At the discretion of the executive director, an applicant may submit an abbreviated initial permit application, containing only the information in §122.132 of this title deemed necessary by the executive director. The executive director shall inform the applicant in writing of the deadline for submitting the remaining information.

§122.136. Application Deficiencies.

(a) All applications submitted under this chapter are subject to the requirements of this section.

(b) If an applicant omits any relevant facts or submits incorrect information in an application, the applicant shall submit the relevant facts or correct the information no later than 60 days of discovering the error.

(c) If the site becomes subject to additional applicable requirements or state only requirements after the application is submitted, the applicant shall submit any information necessary to address those requirements.

(d) If while processing an application, the executive director determines that additional information is necessary to evaluate or take final action on that application, the executive director may request the information in writing and set a reasonable deadline for a response.

§122.138. Application Shield.

(a) Before the executive director takes final action on an application for initial permit issuance, renewal, or a general operating permit, failure to have a permit is not a violation of this chapter provided a timely and complete application has been submitted to the executive director.

(b) The executive director may remove the application shield if the applicant fails to submit by the deadline any additional information necessary to process the application.

§122.139. Application Review Schedule.

The executive director shall take final action on permit applications according to the following schedule.

(1) Under the interim operating permit program, for those initial applications required to be submitted by January 25, 1997, or July 25, 1997, the executive director shall take final action on at least one-third of those applications annually.

(2) Under the full operating permit program, for those initial applications required to be submitted, by January 25, 1999, or July 25, 1999, the executive director shall take final action on at least one-third of those applications annually.

(3) For any permit application containing an early reduction demonstration under FCAA, §112(i)(5) (relating to Schedule for Compliance), the executive director shall take final action within nine months of receipt of the complete application.

(4) Except as noted in paragraphs (1)-(3) of this section, the executive director shall take final action on an application for an initial permit or permit renewal within 18 months of the date on which the executive director deems an application complete.

§122.140. Representations in Application.

The only representations in a permit application that become conditions under which a permit holder shall operate are the following:

(1) representations in an acid rain permit application;

(2) upon the granting of authorization to operate under a general operating permit, applicability determinations and the bases for the determinations in a general operating permit application; and

(3) any representation in an application which is specified in the permit as being a condition under which the permit holder shall operate.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705901
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966

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(b) Each permit issued under this chapter shall contain the information required by this subsection.

(1) Unless otherwise specified in the permit, each permit shall include the terms and conditions in §§122.143-122.146 of this title (relating to General Terms and Conditions; Recordkeeping Terms and Conditions; Reporting Terms and Conditions; and Compliance Certification Terms and Conditions).

(2) Each permit shall also contain specific terms and conditions for each emission unit regarding the following:

(A) the applicable requirements and state only requirements (e.g., NSPS Kb, 30 TAC Chapter 111);

(B) except as provided by the phased application process, the detailed applicability determinations, which include the following:

(i) the specific regulatory citations in each applicable requirement or state only requirement identifying the emission limitations and standards; and

(ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards identified under clause (i) of this subparagraph.

(c) Each permit shall contain specific terms and conditions for each emission unit fulfilling periodic monitoring requirements as established through the applicable requirements and state only requirements.

(d) For permits undergoing the phased application process, the permit shall contain a schedule for phasing in the detailed applicability determinations consistent with §122.131 of this title (relating to Phased Application Process).

(e) For emission units not in compliance with the applicable requirements at the time of initial permit issuance or renewal, the permit shall contain the following:

(1) a compliance schedule or a reference to a compliance schedule consistent with §122.132(e)(4)(C) of this title (relating to Application and Required Information for Initial Permit Issuance, Reopening, Renewal, or General Operating Permits); and

(2) a requirement to submit progress reports consistent with §122.132(e)(4)(C) of this title. The progress reports shall include the following information:

(A) the dates for achieving the activities, milestones, or compliance required in the compliance schedule;

(B) dates when the activities, milestones, or compliance required in the compliance schedule were achieved; and

(C) an explanation of why any dates in the schedule of compliance were not or will not be met, and any preventive or corrective measures adopted.

(f) At the executive director's discretion, and upon request by the applicant, the permit may contain a permit shield for specific emission units.

§122.143. General Terms and Conditions.

Unless otherwise specified in the permit, the following general terms and conditions shall become terms and conditions of each permit.

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30 TAC §§122.142-122.146, 122.148

The new sections are proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purpose of the TCAA.

The proposed new sections implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.142. Permit Content Requirements.

(a) The conditions of the permit shall provide for compliance with the requirements of this chapter.

(1) Compliance with the permit does not relieve the permit holder of the obligation to comply with any other applicable rules, regulations, or orders of the commission, or of the EPA, except for those requirements addressed by a permit shield.

(2) The term of the permit shall not exceed five years from the date of initial issuance or renewal of the permit. The authorization to operate under a general operating permit shall not exceed five years from the date the authorization was granted or renewed.

(3) Consistent with the authority in Texas Health and Safety Code, Chapter 382, Subchapter B (relating to Powers and Duties of Commission), the permit holder shall allow representatives from the commission or the local air pollution control program having jurisdiction to do the following:

(A) enter upon the permit holder's premises where an emission unit is located or emissions-related activity is conducted, or where records must be kept under the conditions of the permit;

(B) access and copy any records that must be kept under the conditions of the permit;

(C) inspect any emission unit, equipment, practices, or operations regulated or required under the permit; and

(D) sample or monitor substances or parameters for the purpose of assuring compliance with the permit at any time.

(4) The permit holder shall comply with all terms and conditions of the permit and any provisional terms and conditions. Except as provided for in paragraph (5) of this section, any noncompliance with the permit terms and conditions constitutes a violation of the FCAA and the TCAA and may be grounds for enforcement action.

(5) The permit holder shall comply with any provisional terms and conditions before issuance or denial of a requested revision or renewal.

(6) The permit holder need not comply with terms and conditions that have been replaced by provisional terms and conditions before issuance or denial of a revision or renewal.

(7) If the permit holder fails to comply with any provisional terms and conditions, the existing terms and conditions shall be enforceable.

(8) The permit may be revised, reopened for cause, or terminated. Permit terms or conditions remain enforceable regardless of the following:

(A) the filing of a request by the permit holder for a permit revision, reopening, or termination;

(B) a notification of planned changes or anticipated noncompliance; or

(C) a notice of intent by the executive director for a permit reopening or termination.

(9) The executive director may request in writing any information to determine compliance or whether cause exists for revising, reopening, or terminating the permit. The permit holder shall submit the information no later than 60 days after the request, unless the deadline is extended by the executive director.

(10) If a new applicable requirement or state only requirement is promulgated after permit issuance, it must be incorporated into the permit.

(A) If the compliance date is earlier than the permit expiration date, the permit holder shall request a permit revision no later than 12 months after the requirement is promulgated.

(B) If the compliance date for the new requirement is later than the permit expiration date, the new requirement may be incorporated at renewal.

(C) The permit holder may apply, no later than 12 months after the requirement is promulgated, for another permit that codifies the new requirement.

(11) If a federally enforceable only applicable requirement is adopted by the commission, the permit holder shall submit an application for an administrative permit revision for the removal of the federally enforceable only designation. The application shall be submitted no later than 12 months after the adoption of the requirement by the commission.

(12) If a state only requirement is determined by the commission to be an applicable requirement, the permit holder shall submit an application for a significant permit revision for the incorporation of the requirement into the permit as an applicable requirement. The application shall be submitted within 12 months of the determination by the commission that the requirement is an applicable requirement.

(13) The permit holder shall pay fees to the commission consistent with the fee schedule in §101.27 of this title (relating to Emissions Fees).

(14) Each portion of the permit is severable. Permit requirements in unchallenged portions of the permit shall remain valid in the event of a challenge to other portions of the permit.

(15) The permit does not convey any property rights of any sort, or any exclusive privilege.

(16) A copy of the permit shall be maintained at the location specified in the permit.

(17) For general operating permits, a copy of the permit, the permit application, and the grant letter shall be maintained at the location specified in the authorization to operate.

(18) Any report or annual compliance certification required by a permit to be submitted to the executive director shall contain a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official).

§122.144. Recordkeeping Terms and Conditions.

Unless otherwise specified in the permit, the following recordkeeping requirements shall become terms and conditions of the permit.

(1) Records of all monitoring data and support information required by the permit shall be maintained for a period of at least five years from the date of the monitoring sample, measurement, report, or application.

(A) If an applicable requirement or state only requirement specifies a shorter data retention period, the records shall be maintained for at least five years.

(B) If an applicable requirement or state only requirement specifies a longer data retention period, the records shall be maintained for at least the period of time specified in the applicable requirement or state only requirement.

(2) Records may be stored electronically.

(3) All records required to be maintained by this chapter shall be maintained at the location specified in the permit.

(4) Records required by the permit, including confidential information, shall be provided, upon request, in a legible form, to representatives from the commission or the local air pollution control program having jurisdiction within a reasonable period of time.

(5) The EPA may require that the records be sent directly to the EPA along with any claim of confidentiality. Any confidentiality claim should be made in accordance with federal law, including 40 Code of Federal Regulations, Part 2.

(6) Permit holders shall maintain records of the duration of the stay at a site of any temporary source

§122.145. Reporting Terms and Conditions.

Unless otherwise specified in the permit, the following reporting requirements shall become terms and conditions of the permit.

(1) Monitoring reports.

(A) Reports of monitoring data required to be submitted by an applicable requirement or state only requirement, shall be submitted to the executive director.

(B) Reports shall be submitted for at least each six calendar month period after permit issuance.

(i) If an applicable requirement or state only requirement specifies less frequent reporting, reports shall be submitted for at least every six calendar month period.

(ii) If an applicable requirement or state only requirement specifies more frequent reporting, reports shall be submitted for at least each reporting period specified in the applicable requirement or state only requirement.

(iii) The month in which the permit is issued shall be counted as the first calendar month; however, the reporting period will not begin until the day after permit issuance.

(C) The monitoring reports shall be submitted no later than 30 days after the end of each reporting period.

(D) The reporting of monitoring data does not change the data collection requirements specified in an applicable requirement or state only requirement.

(2) Deviation reports.

(A) The permit holder shall report, in writing, to the executive director all instances of deviations, the probable cause of the deviations, and any corrective actions or preventative measures taken.

(B) A deviation report shall be submitted for at least each six calendar month period after permit issuance.

(i) If an applicable requirement specifies less frequent reporting, reports shall be submitted for at least every six calendar month period.

(ii) If an applicable requirement specifies more frequent reporting, reports shall be submitted for at least each reporting period specified in the applicable requirement.

(iii) The month in which the permit is issued shall be counted as the first calendar month; however, the reporting period will not begin until the day after permit issuance.

(C) The deviation reports shall be submitted no later than 30 days after the end of each reporting period.

(D) If a deviation is reported, in writing, under paragraph (3) of this section, the deviation report need only include a reference to the upset, start-up, shutdown, or maintenance report containing details related to the deviation.

(E) State only requirements are not subject to the requirements of this subparagraph.

(3) Upset, start-up, shutdown, or maintenance reports. Reports of deviations resulting from any upset, start-up, shutdown, or maintenance activities shall be submitted in accordance with Chapter 101 of this title (relating to General Rules).

§122.146. Compliance Certification Terms and Conditions.

Unless otherwise specified in the permit, the following compliance certification requirements shall become terms and conditions of the permit.

(1) The permit holder shall certify compliance with the terms and conditions of the permit for at least each 12 calendar month period following initial permit issuance. The month in which the permit is issued shall be counted as the first calendar month; however, the certification period will not begin until the day after permit issuance.

(2) The certification shall be submitted no later than 30 days after the end of the certification period.

(3) Upon written request by the EPA, a copy of the compliance certification shall be provided to the EPA.

(4) State only requirements are not subject to the annual compliance certification requirements.

(5) The annual compliance certification shall include or reference the following information:

(A) the identification of each term, or condition, of the permit for which the permit holder is certifying compliance and the method used for determining the compliance status of each emission unit;

(B) for emission units addressed in the permit for which no deviations have occurred over the certification period, a statement that the emission units were in apparent compliance over the entire certification period; and

(C) for any emission unit addressed in the permit for which one or more deviations occurred over the certification period, the following information indicating the apparent compliance status of the emission unit:

(i) the identification of the emission unit;

(ii) the applicable requirement for which a deviation occurred;

(iii) the monitoring method required by the permit to be used to assess apparent compliance;

(iv) the frequency with which sampling or monitoring was required to be conducted by the monitoring requirement; and

(v) the total number of times that the assessment required by the monitoring method specified in the permit indicated that a deviation had occurred.

§122.148. Permit Shield.

(a) At the discretion of the executive director, and upon request by the applicant, the permit may contain a permit shield for specific emission units. The permit shield is a special condition stating that compliance with the conditions of the permit shall be deemed compliance with the specified potentially applicable requirements or specified potentially applicable state only requirements.

(b) In order for the executive director to determine that an emission unit qualifies for a permit shield, all information required by §122.132(e)(2), (3) and (8) of this title (relating to Application and Required Information for Initial Permit Issuance, Reopening, Renewal, or General Operating Permits) must be submitted with the permit application.

(c) The permit shall contain the following information for the emission units addressed by the permit shield:

(1) determinations by the executive director establishing one of the following:

(A) potentially applicable requirements or potentially applicable state only requirements specifically identified during the application review process are not applicable to the source; or

(B) duplicative, redundant, and/or contradicting applicable requirements or state only applicable requirements specifically identified during the application review process are superseded by a more stringent or equivalent requirement; and

(2) a statement that compliance with the conditions of the permit shall be deemed compliance with the specified potentially applicable requirements or specified potentially applicable state only requirements.

(d) Any permit that does not expressly state that a permit shield exists shall not provide a permit shield.

(e) Permit shield provisions shall not be modified by the executive director until notification is provided to the permit holder. Within 90 days of notification of a change in a determination made by the executive director, the permit holder shall apply for the appropriate permit revision to reflect the new determination.

(f) Provisional terms and conditions are not eligible for a permit shield. Any permit term or condition, under a permit shield, shall not be protected by the permit shield if it will be replaced by a provisional term or condition or the basis of the term or condition changes.

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

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Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-1966

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30 TAC §122.161, §122.165

The new sections are proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purpose of the TCAA.

The proposed new sections implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.161. Miscellaneous.

(a) The commission shall not grant a variance, under Texas Health and Safety Code, §382.028, from the requirements of this chapter.

(b) Unless specifically noted otherwise, requirements under this chapter do not supersede, substitute for, or replace any requirement under any other rule, regulation, or order of the commission or the EPA.

(c) None of the requirements in this chapter shall be construed as prohibiting the construction of new or modified facilities, provided that the owner or operator has obtained any necessary preconstruction authorization.

(d) FCAA, §112(g) (relating to Modifications) shall apply only to sites subject to the requirements of this chapter. FCAA, §112(g), shall apply at the earliest time at which the sites are required to apply in accordance §122.130 of this title (relating to When Applications Are Due).

§122.165. Certification by a Responsible Official.

(a) The following documents shall include a signed certification of accuracy and completeness:

(1) applications for initial permit issuance;

(2) applications for revisions;

(3) applications for reopenings;

(4) applications for renewals;

(5) applications for general operating permits;

(6) reports required by the permit; and

(7) annual compliance certifications.

(b) The certification of accuracy and completeness shall include the following statement: "I certify that, based on information and belief formed after reasonable inquiry, the statements and information contained in the attached documents are true, accurate, and complete."

(c) The certification shall be signed by one of the following individuals.

(1) Responsible official-any person meeting the requirements of subparagraphs (A), (B), (C), or (D) of this paragraph. Except for matters pertaining to the Acid Rain Program under FCAA, Title IV, the responsible official may authorize a duly authorized representative to certify documents. A corporation, a partnership, sole

proprietorship, municipality, state, federal, other public agency, or an affected source may have multiple responsible officials if each meets the requirements noted in this definition.

(A) The responsible official for a corporation may be a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation.

(B) The responsible official for a partnership or sole proprietorship may be a general partner or the proprietor, respectively.

(C) The responsible official for a municipality, state, federal, or other public agency may be either a principal executive officer or ranking elected official. For the purposes of this chapter, a principal executive officer of a federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a Regional Administrator of the EPA).

(D) The responsible official for an affected source subject to the acid rain program shall be the following:

(i) the designated representative or the alternate designated representative for matters pertaining to the Acid Rain Program; and

(ii) the designated representative, the alternate designated representative, or a person meeting the provisions of subparagraph (A), (B), or (C) of this definition for any other purposes under this chapter.

(2) Duly authorized representative-A person employed by the owner or operator and authorized by the responsible official, as defined in this section, to certify documentation requiring certification under this section. The responsible official may designate a particular job classification (e.g., production manager or environmental coordinator) as having the authority necessary to allow the person holding that classification to serve as the duly authorized representative. The responsible official may designate duly authorized representatives to certify documentation as follows.

(A) Any person responsible for the overall operation of one or more manufacturing, production, or operating facilities subject to this chapter may be authorized to certify any documents requiring certification under this section.

(B) Any person responsible for compiling documentation requiring certification may be authorized to certify that documentation, unless the documentation pertains to the submittal of an initial application, application compliance certification, annual compliance certification, renewal application, significant permit revision, or permit reopening.

(d) The responsible official need not be the same person for each required submittal, and the selection of a responsible official does not preclude the naming of a separate technical contact.

(e) The duly authorized representative need not be the same person for each required submittal, and the selection of a duly authorized representative does not preclude the naming of a separate technical contact.

(f) If the responsible official for the permit changes, the permit holder must maintain documentation of the change with permit. The permit holder must notify the executive director of any change in the responsible official no later than at the next submittal requiring certification under this chapter.

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

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Director, Legal Division
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Subchapter C. Initial Permit Issuances, Revisions, Reopenings, and Renewals

Initial Permit Issuances

30 TAC §122.201, §122.204

The new sections are proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purpose of the TCAA.

The proposed new sections implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.201. Initial Permit Issuance.

(a) A permit may be issued by the executive director provided the following:

(1) the executive director has received a complete permit application under §122.134 of this title (relating to Complete Application);

(2) the conditions of the permit provide for compliance with the requirements of this chapter; and

(3) the requirements of this chapter for public notice, affected state review, notice and comment hearing, and EPA review have been satisfied.

(b) Upon written request by the EPA, the executive director shall provide a copy of the permit application, the permit, and any required notices to the EPA.

(c) The permit will not be final until the public petition requirements of this chapter have been satisfied.

(d) All permits shall have terms not to exceed five years from initial issuance.

(e) More than one permit may be issued for a site.

(f) Neither the adoption of a general operating permit nor the granting of an authorization to operate under a general operating permit shall be required to meet the requirements of this section. General operating permits are subject to the requirements of Subchapter F of Chapter 122 of this title (relating to General Operating Permits).

(g) If the permit application does not meet the criteria of this chapter, the executive director may deny the permit application.

§122.204. Temporary Sources.

(a) A temporary source is a stationary source which changes location to another site at least once during any five-year period.

(b) An owner or operator of any temporary source subject to the requirements of this chapter, shall apply to the executive director for a permit consistent with this chapter.

(c) Each temporary source which is located at a site for less than six months shall not affect the determination of major for other stationary sources at a site under this chapter or require a revision to any existing permit at the site.

(d) Permit holders shall maintain records of the duration of the stay at a site of any temporary source.

(e) A single permit may be issued authorizing similar operations by the same temporary source at multiple temporary locations.

(f) The temporary source permit holder shall notify the executive director at least ten days in advance of each change in location, unless the executive director allows for a shorter notice due to an emergency.

(g) No affected unit subject to the acid rain program shall be permitted as a temporary source.

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

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Permit Revisions

30 TAC §§122.210-122.213, 122.215-122.217, 122.219-122.221

The new sections are proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purpose of the TCAA.

The proposed new sections implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.210. General Requirements for Revisions.

(a) The permit holder shall submit a complete application to the executive director for a revision to a permit for those activities at a site which change, add, or remove one or more permit term or condition.

(b) The permit holder shall submit a complete application to the executive director for a revision to a permit to address the following:

(1) the adoption and delegation of an applicable requirement previously designated as federally enforceable only;

(2) if applicable, the promulgation of a new applicable requirement;

(3) if applicable, the adoption of a new state only requirement; or

(4) a change in a state only designation.

(c) Upon written request by the EPA, the executive director shall provide a copy of the permit application, the permit, and any required notices to the EPA.

(d) Provisional terms and conditions are not eligible for a permit shield.

(e) The permit holder may be subject to enforcement action if the change to the permit is later determined not to qualify for the type of permit revision submitted.

(f) Changes qualifying as administrative permit revisions may be processed as minor or significant permit revisions at the permit holder's discretion.

(g) Changes qualifying as minor permit revisions may be processed as significant permit revisions at the permit holder's discretion.

§122.211. Administrative Permit Revisions.

A change to a permit may qualify as an administrative permit revision if the change satisfies one or more of the following:

(1) corrects typographical errors;

(2) identifies a change in the name, address, or phone number of any person identified in the permit;

(3) increases the frequency of monitoring or reporting requirements without changing any existing emission limitations or standards;

(4) changes the permit identification of ownership or operational control of a site where the executive director determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the old and new permit holder is maintained with the permit;

(5) removes a federally enforceable only designation and does not otherwise affect the permit; or

(6) is similar to those in paragraphs (1)-(5) of this section and approved by EPA.

§122.212. Applications for Administrative Permit Revisions.

(a) A complete application must include a record of any changes that took place over the previous 12 calendar months. The month in which the permit is issued shall be counted as the first calendar month; however, the reporting period will not begin until the day after permit issuance.

(b) A complete application must also include, at a minimum, the following:

(1) a description of each change;

(2) a description of the emission units affected;

(3) the provisional terms and conditions as defined in §122.10 of this title (relating to General Definitions) that codify the new applicable requirements or state only requirements;

(4) a statement that each change qualifies for an administrative permit revision; and

(5) a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official).

§122.213. Procedures for Administrative Permit Revisions

(a) If the following requirements are met, changes requiring an administrative permit revision may be operated before issuance of the revision:

(1) the permit holder complies with the following:

(A) Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(B) all applicable requirements;

(C) all state only requirements; and

(D) the provisional terms and conditions as defined in §122.10 of this title (relating to General Definitions);

(2) the permit holder records the information required in §122.212(b) of this title (relating to Applications for Administrative Permit Revisions) within two weeks of the end of the calendar month in which the change took place; and

(3) the permit holder maintains the information required by paragraph (2) of this subsection with the permit until the permit is revised.

(b) If the permit holder fails to comply with the provisional terms and conditions, the existing terms and conditions shall be the enforceable terms and conditions.

(c) After operation of a change and before issuance or denial of the requested permit revision, the permit holder need not comply with the existing permit terms and conditions affected by the change.

(d) The permit holder shall submit an application for a permit revision to the executive director no later than two weeks after the end of each 12 calendar month period after permit issuance or renewal.

(1) The application shall address all changes requiring permit revision that took place during the previous 12 calendar month period.

(2) The month in which the permit is issued shall be counted as the first calendar month; however, the reporting period will not begin until the day after permit issuance.

(e) An administrative permit revision may be issued by the executive director provided the following:

(1) the change meets the criteria for an administrative permit revision;

(2) the executive director has received a complete application; and

(3) the conditions of the permit provide for compliance with the requirements of this chapter.

§122.215. Minor Permit Revisions.

A change to a permit may qualify as a minor permit revision if the change satisfies one or more of the following:

(1) adds a new permit term or condition;

(2) removes one or more emission units from the permit that are no longer operated at the site;

(3) affects or adds a requirement designed to limit potential to emit;

(4) incorporates an approved alternative means of control;

(5) incorporates new applicable requirements that are promulgated or new state only requirements that are adopted; or

(6) does not meet the criteria for an administrative permit revision or significant permit revision.

§122.216. Applications for Minor Permit Revisions.

(a) A complete application must include a record of any changes that took place over the previous 12 calendar months. The month in which the permit is issued shall be counted as the first calendar month; however, the reporting period will not begin until the day after permit issuance.

(b) A complete application must also include, at a minimum, the following:

(1) a description of each change;

(2) a description of the emission units affected;

(3) the provisional terms and conditions as defined in §122.10 of this title (relating to General Definitions) that codify the new applicable requirements, state only requirements, or any new requirements designed to limit potential to emit;

(4) a statement that the change qualifies for a minor permit revision; and

(5) a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official).

§122.217. Procedures for Minor Permit Revisions.

(a) If the following requirements are met, changes requiring a minor permit revision may be operated before issuance of the revision:

(1) the permit holder complies with the following:

(A) Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(B) all applicable requirements;

(C) all state only requirements; and

(D) the provisional terms and conditions as defined in §122.10 of this title (relating to General Definitions);

(2) the permit holder submits to the executive director the information required in §122.216(b) of this title (relating to Applications for Minor Permit Revisions) within two weeks of the end of the calendar month in which the change took place;

(3) the permit holder maintains the information required by paragraph (2) of this subsection until the permit is revised.

(b) If the permit holder fails to comply with the provisional terms and conditions, the existing terms and conditions shall be the enforceable terms and conditions.

(c) After operation of a change and before issuance or denial of the requested permit revision, the permit holder need not comply with the existing permit terms and conditions affected by the change.

(d) The permit holder shall submit an application for a permit revision to the executive director no later than two weeks after the end of each 12 calendar month period after permit issuance or renewal.

(1) The application shall address all changes requiring permit revision that took place during the previous 12 calendar month period.

(2) The month in which the permit is issues shall be counted as the first calendar month; however, the reporting period will not begin until the day after permit issuance.

(e) A minor permit revision may be issued by the executive director provided the following:

(1) the changes meet the criteria for a minor permit revision;

(2) the executive director has received a complete application;

(3) the conditions of the permit provide for compliance with the requirements of this chapter; and

(4) the requirements of this chapter for public announcement and affected state review have been satisfied.

(f) The minor permit revision shall not be final until the public petition requirements of this chapter have been satisfied.

§122.219. Significant Permit Revisions.

A change to a permit shall qualify as a significant permit revision if the change satisfies one or more of the following:

(1) removes monitoring, recordkeeping, reporting, or testing terms and conditions for an emission unit remaining in operation and the applicable requirement or state only requirement remains in effect;

(2) removes a term or condition established through the permit for an emission unit remaining in operation and the applicable requirement or state only requirement remains in effect;

(3) changes a state only designation to an applicable requirement designation;

(4) affects an applicable requirement or state only requirement resulting from emissions averaging as allowed under an applicable requirement or state only requirement;

(5) affects an applicable requirement or state only requirement resulting from a request by the permit holder to eliminate duplicative, redundant, and/or contradicting requirements, under §122.148(c)(1)(B) of this title (relating to Permit Shield);

(6) affects an applicable emission limit or standard that requires, but does not specifically define monitoring, recordkeeping, reporting, or testing requirements;

(7) affects an applicable requirement resulting from early reductions under FCAA, §112(i)(5) (relating to Early Reductions);

(8) changes a term or condition or the basis thereof, that is subject to the permit shield and the permit holder has requested to retain the permit shield for emission units remaining in service;

(9) adds a term or condition for which the permit holder has requested a permit shield;

(10) affects an applicable requirement resulting from a determination established under FCAA, §112(g) (relating to Modifications) or §112(j) (relating to Equivalent Emission Limitation by Permit); or

(11) affects a term or condition established under FCAA, Title I, Parts C or D (relating to Prevention of Significant Deterioration of Air Quality or Plan Requirements for Nonattainment Areas).

§122.220. Applications for Significant Permit Revisions.

(a) A complete application must include a record of any changes that took place over the previous 12 calendar months. The month in which the permit is issued shall be counted as the first calendar month; however, the reporting period will not begin until the day after permit issuance.

(b) A complete application for changes identified in §122.219(1)-(4) of this title (relating to Significant Permit Revisions) must also include, at a minimum, the following:

(1) a description of each change;

(2) a description of the emission units affected;

(3) a description of the emissions affected by the change;

(4) the provisional terms and conditions as defined in §122.10 of this title (relating to General Definitions) that codify the new applicable requirements, state only requirements, or other new requirements;

(5) a statement that the change qualifies under §122.219(1)-(4) of this title; and

(6) a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official).

(c) A complete application for changes identified in §122.219(5)-(11) of this title must include, at a minimum, those requirements in subsection (b) of this section except paragraph (4).

§122.221. Procedures for Significant Permit Revisions.

(a) If the following requirements are met, changes identified in §122.219(1)-(4) of this title (relating to Significant Permit Revisions) may be operated before issuance of the revision:

(1) the permit holder complies with the following:

(A) Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(B) all applicable requirements;

(C) all state only requirements; and

(D) the provisional terms and conditions as defined in §122.10 of this title (relating to General Definitions);

(2) the permit holder submits to the executive director the information required in §122.220(b) of this title relating to (Applications for Significant Permit Revisions) within two weeks of the end of the calendar month in which the change took place; and

(3) maintains together with the permit the information required by paragraph (2) of this subsection until the permit is revised.

(b) If the permit holder fails to comply with the provisional terms and conditions, the existing terms and conditions shall be the enforceable terms and conditions.

(c) After operation of a change and before issuance or denial of the requested permit revision, the permit holder need not comply with the existing permit terms and conditions affected by the change.

(d) The permit holder shall submit an application for a permit revision to the executive director no later than two weeks after the end of each 12 calendar month period after permit issuance or renewal.

(1) The application shall address all changes requiring permit revision that took place during the previous 12 calendar month period.

(2) The month in which the permit is issues shall be counted as the first calendar month; however, the reporting period will not begin until the day after permit issuance.

(e) Changes identified in §122.219(5)-(11) of this title shall not be operated before the permit revision. For those changes, the permit holder shall do the following:

(1) comply with Chapter 116 of this title;

(2) submit to the executive director a request for a permit revision including the information required in §122.220(c) of this title.

(f) A significant permit revision may be issued by the executive director only if all of the following conditions have been satisfied:

(1) the changes meet the criteria for a significant permit revision;

(2) the permit holder has submitted a complete application;

(3) the conditions of the permit provide for compliance with the requirements of this chapter; and

(4) the requirements of this chapter for public notice, affected state review, notice and comment hearing, and EPA review have been satisfied.

(g) The significant permit revision shall not be final until the public petition requirements of this chapter have been satisfied.

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

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Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-1966

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30 TAC §122.231

The new sections are proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purpose of the TCAA.

The proposed new sections implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.231. Permit Reopenings.

(a) The executive director shall reopen a permit for cause. Cause shall be limited to one or more of the following:

(1) the promulgation of a new applicable requirement or adoption of a state only requirement affecting emission units at the permitted site, unless one of the following applies:

(A) the new requirement is incorporated in another permit which addresses the emission unit subject to the new requirement; or

(B) the effective date of the requirement is later than the permit expiration date;

(2) additional requirements become applicable to an affected unit under the acid rain program;

(3) the permit contains a material mistake;

(4) inaccurate statements were made in establishing the emissions standards or other terms and conditions of the permit;

(5) the executive director determines that the permit must be revised to assure compliance with the applicable requirements or state only requirements; or

(6) a phased application schedule in the permit requires a reopening.

(b) No later than 180 days after receipt of written notification by the EPA that cause, as defined in this section, exists to terminate, revise, or revoke and reissue a permit under this section, the executive director shall terminate, revise, or revoke and reissue the permit in accordance with EPA's direction.

(c) Reopenings shall be completed and the permit issued by the executive director not later than 18 months after promulgation of the applicable requirement or adoption of the state only requirement.

(d) For reopenings, the executive director shall provide 30 day's notice of intent to reopen, unless a shorter notice is authorized by the executive director due to an emergency.

(e) Reopenings shall be subject to the requirements of §122.201 of this title (relating to Initial Permit Issuance). These procedures shall affect only those parts of the permit for which cause to reopen exists.

(f) The permit holder shall provide any information requested by the executive director to complete the reopening.

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

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Director, Legal Division
Texas Natural Resource Conservation Commission
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Permit Renewals

30 TAC §122.241, §122.243

The new sections are proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purpose of the TCAA.

The proposed new sections implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.241. Permit Renewals.

(a) The permit shall expire no later than five years from initial issuance or renewal.

(b) The permit holder shall submit a timely and complete application under §122.133 and §122.134 of this title (relating to Timely Application and Complete Application) for renewal.

(c) The executive director shall provide written notice to the permit holder that the permit is scheduled for review.

(1) The notice will be provided by mail no later than 12 months before the expiration of the permit.

(2) The notice shall specify the procedure for submitting an application.

(3) Failure to receive notice does not affect the expiration date of the permit or the requirement to submit a timely and complete application.

(d) Any information under the phased application process, that is not included in the permit by the first permit renewal, shall be submitted to the executive director with the renewal application.

(e) The permit, when renewed, shall contain specific terms and conditions for each emission unit consistent with §122.142 of this title (relating to Permit Content Requirements).

(f) After the renewal application is submitted and before the permit is renewed, the permit holder may operate the changes at a site in accordance with this subchapter provided that the renewal application is updated to include any provisional terms and conditions. These changes shall be codified in the permit through the renewal process.

(g) Permit expiration terminates the owner's or operator's right to operate, unless a timely and complete renewal application has been submitted. After a timely and complete application submittal, the permit holder may continue to operate under the terms and conditions of the previously issued permit until final action is taken on the permit renewal application.

§122.243. Permit Renewal Procedures.

(a) A permit may be renewed by the executive director only if all of the following conditions have been satisfied:

(1) the executive director has received a complete permit application under §122.134 of this title (relating to Complete Application);

(2) the conditions of the permit will provide for compliance with all requirements of this chapter;

(3) the requirements of this chapter for public notice, affected state review, notice and comment hearing, and EPA review have been satisfied.

(b) Upon written request by the EPA, the executive director shall provide a copy of the renewal application, draft permit, and any required notices to the EPA.

(c) The renewed permit will not be final until the public petition requirements of this chapter have been satisfied.

(d) In determining whether and under what conditions a permit should be renewed, the executive director shall consider the following:

(1) whether the draft permit provides for compliance with all applicable requirements and an accurate listing of state only requirements; and

(2) the site's compliance status with this chapter and the terms and conditions of the existing permit.

(e) At the discretion of the executive director, during permit renewal, any permits at a site may be combined into a single permit which satisfies the requirements of this section.

(f) The executive director may not impose requirements less stringent than those of the existing permit unless a determination is made that the proposed changes will meet the requirements of this chapter.

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

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Subchapter D. Public Announcement, Public Notice, Affected State Review, Notice And Comment Hearing, Notice of Proposed Final Action, EPA Review, And Public Petition

Public Announcement

30 TAC §122.312

The new sections are proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purpose of the TCAA.

The proposed new sections implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.312. Public Announcement.

(a) Public announcement requirements apply to minor permit revisions.

(b) The executive director shall publish an announcement of a draft permit for a minor permit revision on the commission's publicly accessible electronic media. The announcement shall contain the following:

(1) permit application number;

(2) permit holder's name and address;

(3) description of the location of the site;

(4) name, address, and phone number of the commission office to be contacted for further information;

(5) the location and availability of the following:

(A) copies of the complete permit application;

(B) the draft permit;

(C) all other relevant supporting materials in the public files of the agency; and

(6) a description of the comment procedures, which include the duration of the public announcement comment period.

(c) Upon written request by the EPA, the executive director shall furnish a copy of the public announcement and date of publication to the EPA and all local air pollution control agencies with jurisdiction in the county in which the site is located.

(d) The executive director shall furnish a notice of the public announcement to the air pollution control agency of any affected state.

(e) The executive director shall make available for public inspection the draft permit and the complete revision application throughout the comment period during business hours at the commission's central office and at the commission's regional office where the site is located.

(f) The executive director shall receive public comment for 30 days after the announcement of the draft permit is published. During the comment period, any person may submit written comments on the draft permit.

(g) The draft permit may be changed based on comments pertaining to whether the permit provides for compliance with the requirements of this chapter.

(h) Public notice requirements satisfy public announcement requirements.

(i) The executive director shall respond to comments consistent with §122.345 of this title (relating to Notice of Proposed Final Action).

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

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Kevin McCalla
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Public Notice

30 TAC §122.320, §122.322

The new sections are proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purpose of the TCAA.

The proposed new sections implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.320. Public Notice.

(a) Public notice requirements apply to initial issuances, significant permit revisions, reopenings, and renewals.

(b) The executive director shall direct the applicant to publish a notice of a draft permit, at the applicant's expense, in the public notice section of one issue of a newspaper for general circulation in the municipality in which the site or proposed site is located, or in the municipality nearest to the location of the site or proposed site. The notice shall contain the following information:

(1) permit application number;

(2) applicant's or permit holder's name and address;

(3) description of the location of the site or proposed location of the site;

(4) description of the activity or activities involved in the permit application;

(5) for significant permit revisions, the air pollutants with emission changes;

(6) the location and availability of the following:

(A) the complete permit application;

(B) the draft permit;

(C) all other relevant supporting materials in the public files of the agency;

(7) description of the comment procedures, including the duration of the public notice comment period and a statement of procedures to request a hearing;

(8) notification that a person who may be affected by the emission of air pollutants from the site is entitled to request a hearing; and

(9) name, address, and phone number of the commission office to be contacted for further information.

(c) The applicant shall submit a copy of the public notice and date of publication to the executive director and all local air pollution control agencies with jurisdiction in the county in which the site is located.

(d) The applicant shall submit a statement to the executive director, with a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official), that the sign required by subsection (g) of this section has been posted consistent with the provisions of that subsection.

(e) Upon written request by the EPA, the executive director shall provide a copy of the permit application, the draft permit, and any required notices to the EPA.

(f) The executive director shall make available for public inspection the draft permit and the complete revision application throughout the comment period during business hours at the commission's central office and at the commission's regional office where the site is located.

(g) At the applicant's expense, a sign shall be placed at the site declaring the filing of an application for a permit and stating the manner in which the executive director may be contacted for further information.

(1) The sign shall meet the following requirements.

(A) The sign shall consist of dark lettering on a white background and shall be not smaller than 18 inches by 28 inches.

(B) The sign shall be headed by the words "Application FOR FEDERAL OPERATING PERMIT" in no less than two-inch bold face block printed capital lettering.

(C) The sign shall include the words "Application No." and the number of the permit application in no less than one-inch bold-face block printed capital lettering.

(D) The sign shall include the words "for further information contact" in no less than 1/2-inch lettering.

(E) The sign shall include the words "Texas Natural Resource Conservation Commission," and the address of the appropriate commission regional office in no less than one-inch bold-face capital lettering and 3/4-inch bold-face lower case lettering.

(F) The sign shall include the phone number of the appropriate commission regional office in no less than two-inch bold-face numbers.

(2) The sign shall be in place by the date of publication of the newspaper notice and shall remain in place and legible throughout the period of public comment.

(3) The sign placed at the site shall be located at or near the site main entrance, provided that the sign is legible from the public street. If the sign would not be legible from the public street, then the sign shall be placed within ten feet of a property line paralleling a public street.

(A) The executive director may approve variations if the applicant has demonstrated that it is not practical to comply with the specific sign-posting requirements.

(B) Alternative sign-posting plans proposed by the applicant must be at least as effective in providing notice to the public.

(C) The executive director must approve the variations before signs are posted.

(4) One sign may be posted for multiple permits at a site with the approval of the executive director.

(h) The executive director shall receive public comment for 30 days after the notice of the public comment period is published. During the comment period, any person may submit written comments on the draft permit.

(i) During the 30-day public notice comment period, any person who may be affected by emissions from a site regulated under this chapter may request in writing a notice and comment hearing on the draft permit.

(j) The draft permit may be changed based on comments pertaining to whether the permit provides for compliance with the requirements of this chapter.

(k) The executive director shall respond to comments consistent with §122.345 of this title (relating to Notice of Proposed Final Action).

§122.322. Bilingual Public Notice.

(a) The requirements of this subsection are applicable when either the elementary school or the middle school located nearest to the facility or proposed facility provides a bilingual education program as required by Education Code, §21.109, and 19 Texas Administrative Code (TAC) §89.2(a) (relating to Professional Development), or if either school has waived out of such a required bilingual education program under the provisions of 19 TAC §89.2(g). Schools not governed by the provisions of 19 TAC §89.2 shall not be considered in determining applicability of the requirements of this section. Each affected facility shall meet the following requirements.

(1) At the applicant's expense, an additional notice shall be published at least once in each alternate language in which the bilingual education program is taught. If the nearest elementary or middle school has waived out of the requirements of 19 TAC §89.2(a) under 19 TAC §89.2(g), the notice shall be published in the alternate languages in which the bilingual education program would have been taught had the school not waived out of the bilingual education program.

(2) Each notice under this section shall be published in a newspaper or publication that is published in the alternate language in which public notice is required.

(3) The newspaper or publication must be of general circulation in the municipality or county in which the facility is located or proposed to be located.

(4) The requirements of this section are waived for each language in which no publication exists, or if the publishers of all alternate language publications refuse to publish the notice.

(5) Notice under this subsection shall only be required to be published within the United States.

(6) If the alternate language publication is published once a week or more frequently, then notice shall be published in two successive issues. Otherwise, only one publication shall be required.

(7) If the alternate language publication is published less frequently than once a month, this notice requirement may be waived by the executive director on a case-by-case basis.

(8) Each alternate language publication shall follow the requirements of §122.320 of this title (relating to Public Notice) not otherwise inconsistent with this subsection.

(9) At the applicant's expense, an additional sign shall be posted in each alternate language in which the bilingual education program is taught. If the nearest elementary or middle school has waived out of the requirements of 19 TAC §89.2(a) under 19 TAC §89.2(g), the alternate language signs shall be posted in the alternate languages in which the bilingual education program would have been taught had the school not waived out of the bilingual education program.

(10) The alternate language signs shall be posted adjacent to each English language sign required in public notice.

(11) The alternate language signs shall meet all other requirements of §122.320 of this title.

(b) Elementary or middle schools that offer English as a second language under 19 TAC §89.2(d), and are not otherwise affected by 19 TAC §89.2(a), will not trigger the requirements of subsection (a) of this section.

(c) If the notices required by §122.320 of this title (relating to Public Notice) and §122.340 of this title (relating to Notice and Comment Hearing) are combined, the combined notice is subject to the requirements of this section.

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

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Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
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Affected State Review

30 TAC §122.330

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

The proposed new section implements the Texas Health and Safety Code, §382.017, concerning Rules.

§122.330. Affected State Review.

(a) Affected state review requirements apply to initial issuances, minor permit revisions, significant permit revisions, reopenings, and renewals.

(b) An affected state may be New Mexico, Oklahoma, Kansas, Colorado, Arkansas, or Louisiana if either of the following criteria are satisfied:

(1) the state's air quality may be affected by the issuance or denial of a federal operating permit, revision, or renewal; or

(2) that state is within 50 miles of the site or proposed site.

(c) The executive director shall provide notice of the draft permit to any affected state on or before the time notice is provided to the public through public announcement or public notice.

(d) Affected states shall have 30 days from date of notification to comment on the draft permit.

(e) The executive director shall notify the EPA and any affected state, in writing, of the refusal to incorporate any recommendations into the proposed permit that the affected state submitted during the affected state review period. The notice shall include the executive director's reasons for not accepting any of the recommendations.

(f) The draft permit may be changed based on comments pertaining to whether the permit provides for compliance with the requirements of this chapter.

(g) The executive director shall respond to comments consistent with §122.345 of this title (relating to Notice of Proposed Final Action).

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

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Public Petition

30 TAC §122.360

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

The proposed new section implements the Texas Health and Safety Code, §382.017, concerning Rules.

§122.360. Public Petition.

(a) Public petition requirements apply to initial issuances, significant permit revisions, minor permit revisions, reopenings, and renewals.

(b) Public petition requirements do not apply to state only requirements.

(c) If the EPA does not file an objection with the executive director, any person, including the applicant, affected by a decision of the commission under this chapter may petition the EPA to make an objection.

(1) For initial issuance, reopening, renewal, and significant permit revision, the petition must be filed with the EPA within 60 days after the expiration of EPA's 45-day review period.

(2) For minor permit revision, the petition must be filed with the EPA within 60 days of the close of public announcement comment period.

(d) A copy of the petition shall be provided to the executive director and the applicant by the petitioner.

(e) The petition does not limit the effectiveness of a permit issued by the executive director or the finality of the executive director's action for purposes of an appeal under Texas Health and Safety Code, §382.032.

(f) Petitions shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period, unless the petitioner demonstrates in the petition to the EPA that it was not possible to raise the objections within the public comment period, or that the grounds for the objection arose after the public comment period. The petition shall identify all objections.

(g) If the EPA objects to the permit as a result of a petition filed under this section before issuance of the permit, the executive director shall not issue the permit until EPA's objection has been resolved.

(h) If the executive director has issued a permit before receipt of an EPA objection based on a public petition, the permit remains effective and the executive director shall have 90 days from the receipt of an EPA objection to resolve any objection and to terminate, modify, or revoke and reissue the permit.

(1) In the event additional information is needed from the permit holder, the executive director may request from EPA a 90-day extension to resolve the objection.

(2) If the executive director fails to resolve the objection, EPA will revise, terminate, or revoke the permit, and the executive director may issue only a revised permit that satisfies EPA's objection.

(3) The permit holder will not be in violation of the requirement to have submitted a timely and complete application.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705908
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966

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Subchapter E. Acid Rain Permits

30 TAC §§122.410, 122.412, 122.414

The new sections are proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purpose of the TCAA.

The proposed new sections implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.410. Operating Permit Interface.

(a) The commission hereby adopts and incorporates by reference, except for this section, the provisions of 40 Code of Federal Regulations (CFR) Part 72 (with an effective date of July 17,1995), Part 74 (with an effective date of May 4, 1995), and Part 76 (with an effective date of February 17, 1997) for purposes of implementing an acid rain program that meets the requirements of Title IV of the Act.

(b) Applicants for sources subject to 40 CFR 72, 74, and 76 shall comply with those requirements.

(c) If the provisions of 40 CFR 72, 74, and 76 conflict with or are not included in this chapter, the provisions of 40 CFR 72, 74, and 76 shall apply and take precedence except for the following.

(1) References to 40 CFR 70 in 40 CFR 72, 74, and 76 shall be satisfied by the requirements of this chapter for the purposes of implementing the acid rain program.

(2) The procedural requirements for acid rain permit revisions in 40 CFR 72, Subpart H (relating to Acid Rain Permit Revisions) shall be satisfied by §122.414 of this title (relating to Acid Rain Permit Revisions).

§122.412. When Acid Rain Permit Applications Are Due.

The designated representative shall submit acid rain permit applications for affected units subject to 40 CFR 72, 74, or 76 to the executive director by the following dates.

(1) Sulfur dioxide.

(A) Applications for initial phase II acid rain permits with an existing unit under 40 CFR 72.6(a)(2) shall be submitted by January 1, 1996.

(B) Applications for phase II acid rain permits for new units shall be submitted at least 24 months before the later of January 1, 2000, or the date on which the unit commences operation.

(C) Applications for phase II acid rain permits for units under §72.6(a)(3)(ii) shall be submitted at least 24 months before the later of January 1, 2000, or the date on which the unit begins to serve a generator with a nameplate capacity greater than 25 megawatts of electricity;

(D) Applications for phase II acid rain permits for units under §72.6(a)(3)(iii) shall be submitted at least 24 months before the later of January 1, 2000, or the date on which the auxiliary firing commences operation.

(E) Applications for phase II acid rain permits with a unit under §72.6(a)(3)(iv)-(vii) shall be submitted before the later of January 1, 1998, or the March 1 of the year following the three-year calendar period in which the unit meets the subject acid rain program requirements defined in §72.30(b)(2)(v)-(viii).

(2) Nitrogen oxide. Applications for initial phase II acid rain permits for nitrogen dioxide for affected units subject to 40 CFR 76 shall be submitted by January 1, 1998, except for early election units.

(3) Opt-in sources. Applications for an acid rain permit for opt-in sources to the acid rain program shall be submitted in accordance with 40 CFR 74.

§122.414. Acid Rain Permit Revisions.

(a) For the purposes of implementing the procedural requirements of 40 CFR 72, Subpart H (relating to Acid Rain Permit Revisions Procedural Sections), the following sections of Subchapter C of Chapter 122 of this title (relating to Initial Permit Issuances, Revisions, Reopenings, and Renewals) shall be substituted.

(1) The provisions of §122.212 and §122.213 of this title (relating to Applications for Administrative Permit Revisions and Procedures for Administrative Permit Revisions) shall be used to satisfy the procedural requirements of 40 CFR 72.83(b) and 72.80(d) for acid rain permit administrative amendments, except that the executive director shall submit the revised portion of the acid rain permit to EPA within ten working days after the date of final action on the revision.

(2) The provisions of §122.216 and §122.217(e) and (f) of this title (relating to Applications for Minor Permit Revisions and Procedures for Minor Permit Revisions) shall be used to satisfy the procedural requirements of 40 CFR 72.82 for acid rain fast-track modifications with the following restrictions.

(A) The designated representative shall provide a copy of the complete application requesting a minor permit revision to the executive director, the EPA, and any person entitled to a written notice (as defined in 40 CFR 72.65(b)(1)(ii), (iii), and (iv)).

(B) Changes shall not be operated before the permit is revised.

(C) Provisional terms and conditions do not apply.

(D) The executive director shall initiate procedures for public announcement within five days of receipt of the application request.

(E) The executive director shall consider the permit application and comments received and provide approval, in whole or in part with changes or conditions as appropriate, or disapproval of the permit revision within 30 days of the close of the public announcement period.

(3) The provisions of §122.220 and §122.221(f) and (g) of this title (relating to Applications for Significant Permit Revisions and Procedures for Significant Permit Revisions) shall be used to satisfy the procedural requirements of 40 CFR 72.81(c) for acid rain permit modifications with the following restrictions.

(A) Changes shall not be operated before the permit is revised.

(B) Provisional terms and conditions do not apply.

(4) The provisions of §122.231 of this title (relating to Permit Reopenings) shall be used to satisfy the procedural requirements of 40 CFR 72.85 for acid rain permit reopenings.

(b) The following provisions shall be added to the procedural requirements for acid rain permit revisions.

(1) Changes qualifying as administrative permit revisions may be processed as minor or significant permit revisions at the option of the designated representative.

(2) Changes qualifying as minor permit revisions may be processed as significant permit revisions at the option of the designated representative.

(3) The designated representative may be subject to enforcement action if the change to the permit is later determined not to qualify for the type of permit revision submitted.

(4) Provisional terms and conditions are not eligible for a permit shield.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705907
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966

♦ ♦ ♦

Subchapter F. General Operating Permits

Procedural Requirements For General Operating Permits

30 TAC §§122.501-122.506, 122.508

The new sections are proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purpose of the TCAA.

The proposed new sections implement the Texas Health and Safety Code, §382.017, concerning Rules.

§122.501. General Operating Permits.

(a) The commission may adopt by rule a general operating permit for numerous similar stationary sources provided the following:

(1) the conditions of the general operating permit provide for compliance with all requirements of this chapter;

(2) the requirements under §122.506 of this title (relating to Public Notice for General Operating Permits) have been satisfied;

(3) the requirements under §122.330 of this title (relating to Affected State Review) have been satisfied;

(4) the requirements under §122.508 this title (relating to Notice and Comment Hearings for General Operating Permits) have been satisfied;

(5) the requirements under §122.350 of this title (relating to EPA Review) have been satisfied; and

(6) the adoption process is consistent with the Government Code, Administrative Procedure Act, Chapter 2001 or 2002.

(b) The general operating permits are subject to the requirements under §122.360 of this title (relating to Public Petition).

(c) Each general operating permit shall identify the terms and conditions with which the permit holder shall comply.

(d) The commission may amend or repeal any general operating permit under the Government Code, Administrative Procedure Act, Chapter 2001 or 2002.

(e) Upon written request by the EPA, the executive director shall provide a copy of the draft general operating permit to the EPA.

§122.502. Authorization to Operate.

(a) The executive director shall grant a request for authorization to operate under a general operating permit to applicants who submit a complete application under §122.134 of this title (relating to Complete Application) and who qualify for the general operating permit.

(b) Upon the granting of authorization to operate under a general operating permit, applicability determinations and the bases for the determinations in a general operating permit application become conditions under which the permit holder shall operate.

(c) The permit holder may be subject to enforcement action for operating without a permit if the permit holder, having been granted the authorization to operate under a general operating permit, is later determined not to qualify for the general operating permit.

(d) Authorizations to operate under general operating permits shall have terms not to exceed five years.

(e) More than one authorization to operate under a general operating permit may be granted for a site.

(f) A copy of the permit, the permit application, and the authorization to operate shall be maintained at the location specified in the authorization to operate.

(g) The granting of an authorization to operate under a general operating permit shall not be a final action by the executive director, and therefore, is not subject to judicial review.

(h) General operating permits shall not be authorized for affected units under the acid rain program.

(i) Upon written request by the EPA, the executive director shall provide a copy of the general operating permit application to the EPA.

§122.503. Application Revisions for Changes at a Site.

(a) The permit holder shall submit an updated application to the executive director for those activities at a site which change, add, or remove any applicability determinations or the basis of any determinations in the existing general operating permit application.

(1) The updated application for a general operating permit under this subsection shall contain at a minimum the following:

(A) a description of each change;

(B) a description of the emission unit affected;

(C) any changes in the applicability determinations;

(D) any changes in the bases of the applicability determinations;

(E) a statement that the emission units qualify for the general operating permit and;

(F) a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official).

(2) If the following requirements are met, the change may be operated before a new authorization to operate is granted by the executive director:

(A) the permit holder complies with the following:

(i) Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(ii) all applicable requirements; and

(ii) all state only requirements;

(B) the permit holder submits to the executive director the information required in paragraph (1) of this subsection within two weeks of the end of the calendar month in which the change took place;

(C) the permit holder maintains with the authorization to operate under the general operating permit, the information required by paragraph (1) of this subsection until the application is revised; and

(D) the permit holder operates under the representations in the application required by this subsection.

(b) After operation of a change and before the granting of the new authorization to operate, the permit holder need not comply with the representations in the existing application. However, if the permit holder fails to comply with the representations in the updated application, the representations in the existing application shall be enforceable.

(c) The executive director shall grant a request for authorization to operate under a general operating permit to applicants who qualify.

(d) If the emission units addressed in the authorization to operate no longer meet the requirements for a general operating

permit, the permit holder must submit a complete application for another operating permit.

(e) If it is later determined that the permit holder does not qualify for a revision applied for under this section, the permit holder may be subject to enforcement action for operation without a permit.

(f) Revisions to applications under this section, and the granting of authorizations to operate under a general operating permit, shall not be a final action by the executive director, and therefore, are not subject to judicial review.

§122.504. Application Revisions When a General Operating Permit is Amended or Repealed.

(a) This section applies if the permit holder's authority to operate under a general operating permit is affected by the amendment of a general operating permit, and the permit holder intends to operate under the amended general operating permit.

(1) The permit holder must submit an application for the general operating permit containing at a minimum the following information:

(A) a description of the emission unit affected;

(B) any changes, additions, or removals of applicability determinations;

(C) the basis of each determination identified under subparagraph (B) of this paragraph;

(D) a statement that the emission units qualify for the general operating permit; and

(E) a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official).

(2) The application must be submitted by the date specified in the general operating permit, but no later than six months after the date of adoption of the general operating permit.

(b) If the permit holder submits a timely and complete application under §122.133 and §122.134 of this title (relating to Timely Application and Complete Application), the permit holder may continue to operate under the terms and conditions of the previously adopted permit until the grant is issued or denied.

(c) The permit holder need not reapply for an amended general operating permit, provided the following:

(1) the emission units addressed in the authorization to operate qualify for the amended general operating permit;

(2) the applicability determinations remain unchanged; and

(3) basis for each applicability determination remain unchanged.

(d) If a general operating permit is repealed, the authorization to operate under the general operating permit is revoked.

(e) If a permit holder's authority to operate under a general operating permit is affected by the amendment or repeal of a general operating permit and the permit holder no longer qualifies for the general operating permit or no longer intends to operate under the general operating permit, the permit holder must apply for another operating permit.

§122.505. Renewal of the Authorization to Operate Under a General Operating Permit.

(a) Authorizations to operate under general operating permits shall expire no later than five years from the date of the initial authorization to operate or renewal of the authorization to operate.

(b) The executive director shall provide written notice to the permit holder that the authorization to operate under the general operating permit is scheduled for review.

(1) The notice will be provided by mail no later than 12 months before the expiration of the authorization to operate under the general operating permit.

(2) The notice shall specify the procedure for submitting an application.

(3) Failure to receive notice does not affect the requirements under subsections (c) and

(d) of this section.

(c) A renewal application shall be submitted by the permit holder to the executive director at least six months, but no earlier than 18 months, before the date of expiration of the authorization to operate under the general operating permit.

(d) Permit holders shall submit a timely and complete application under §122.133 and §122.134 of this title (relating to Timely Application and Complete Application) for renewal of the authorization to operate under a general operating permit.

(e) Expiration of the authorization to operate terminates the permit holder's right to operate unless a timely and complete renewal application has been submitted. After a timely and complete application submittal, the permit holder may continue to operate under the terms and conditions of the previous authorization to operate until the new authorization to operate is issued or denied.

(f) In determining whether and under what conditions an authorization to operate under a general operating permit should be renewed, the executive director shall consider the following:

(1) whether the general operating permit, in conjunction with the general operating permit application, provides for compliance with all applicable requirements and an accurate listing of state only requirements; and

(2) the site's compliance status with this chapter and the terms and conditions of the existing permit.

(g) Upon written request by the EPA, the executive director shall provide a copy of the renewal application, general operating permit, and any required notices to the EPA.

(h) The renewal of an authorization to operate under a general operating permit shall not be a final action by the executive director, and therefore, is not subject to judicial review.

§122.506. Public Notice for General Operating Permits.

(a) Before the adoption of any general operating permit, the executive director shall publish notice of the opportunity for public comment and hearing on the proposed draft general operating permit rule. In addition to the requirements of the Government Code, Administrative Procedure Act, Chapter 2001 or 2002, the notice shall contain the following information:

(1) a description of the activities involved in the proposed draft general operating permit rule;

(2) location and availability of copies of the proposed draft general operating permit rule;

(3) a description of the comment procedures, including the duration of the public notice comment period;

(4) the time, place, and nature of the hearing that will be held regarding the proposed draft general operating permit rule;

(5) a brief description of the purpose of the hearing that will be held regarding the proposed draft general operating permit rule; and

(6) name, address, and phone number of the commission office to be contacted for further information.

(b) Upon written request by the EPA, the executive director shall provide a copy of the proposed draft general operating permit rule and any required notices to the EPA.

(c) The executive director shall make the proposed draft general operating permit rule available for public inspection throughout the comment period during business hours at the commission's central office.

(d) The executive director shall receive public comment for 30 days after the notice of the public comment period is published. During the comment period, any person may submit written comments on the proposed draft general operating permit rule.

(e) The proposed draft general operating permit rule may be changed based on comments pertaining to whether the general operating permit provides for compliance with the requirements of this chapter.

(f) The executive director shall respond to comments consistent with §122.345 of this title (relating to Notice of Proposed Final Action) and the Government Code, Administrative Procedure Act, Chapter 2001 or 2002.

(g) The executive director shall provide 30 day's advance notice of the hearing.

§122.508. Notice and Comment Hearings for General Operating Permits.

(a) Before the adoption of any general operating permit, the executive director shall hold a notice and comment hearing regarding the proposed draft general operating permit rule.

(b) All hearings regarding general operating permits shall be conducted according to the Government Code, Administrative Procedure Act, Chapter 2001 or 2002.

(c) Any person may submit oral or written statements and data concerning the proposed draft general operating permit rule.

(1) Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required.

(2) The period for submitting written comments shall be automatically extended to the close of the hearing.

(3) At the hearing, the period for submitting written comments may be extended beyond the close of the hearing.

(d) A tape recording or written transcript of the hearing shall be made available to the public.

(e) Any person who believes that any condition of the proposed draft general operating permit rule is inappropriate or that the preliminary decision to adopt the general operating permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting that position by the end of the public comment period.

(f) Any supporting materials for comments submitted under subsection (c) of this section shall be included in full and may not be incorporated by reference, unless the materials are one of the following:

(1) already part of the administrative record in the same proceedings;

(2) state or federal statutes and regulations;

(3) EPA documents of general applicability; or

(4) other generally available reference materials.

(g) The executive director shall keep a record of all comments and also of the issues raised in the hearing. This record shall be available to the public.

(h) The proposed draft general operating permit rule may be changed based on comments pertaining to whether the proposed draft general operating permit rule provides for compliance with the requirements of this chapter.

(i) The executive director shall respond to comments consistent with §122.345 of this title (relating to Notice of Proposed Final Action) and the Government Code, Administrative Procedure Act, Chapter 2001 or 2002.

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705906
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date adoption: October 1, 1997
For further information, please call: (512) 239-1966

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part XI. Texas Juvenile Probation Commission

Chapter 343. Standards for Juvenile Pre-Adjudication Secure Detention Facility

37 TAC §§343.1-343.2, and 343.4–343.18

The Texas Juvenile Probation Commission proposes amendments to §§343.1, 343.2 and 343.4-343.18, of the Texas Juvenile Probation Standards concerning juvenile probation stan-

30 TAC §122.345

STATUTORY AUTHORITY. The new section is proposed under the Texas Health and Safety Code, the TCAA, §382.017, which provides the TNRCC with the authority to adopt rules consistent with the policy and purposes of the TCAA.

The proposed new section implements Health and Safety Code, §382.017.

§122.345. Notice of Proposed Final Action.

(a) After the public comment period or the conclusion of any notice and comment hearing, the executive director shall send notice by first-class mail of the proposed final action on the application to any person who commented during the public comment period or at the hearing, and to the applicant.

(b) The notice shall include the following:

(1) the response to any comments submitted during the public comment period;

(2) identification of any change in the conditions of the draft permit and the reasons for the change;

(3) a description and explanation of the process for public petitions to the EPA;

(4) the date by which the petition must be filed; and

(5) a statement that any person affected by the decision of the executive director may petition the Administrator.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt. Issued in Austin, Texas, on March 25, 1997.

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

Issued in Austin, Texas, on March 19, 1997.

TRD-9704139
Kevin McCalla
Director
Texas Natural Resource Conservation Commission
Proposed date of adoption: July 9, 1997
For further information, please call: (512) 239-1966

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EPA Review

30 TAC §122.350

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

The proposed new section implements the Texas Health and Safety Code, §382.017, concerning Rules.

§122.350. EPA Review.

(a) EPA review requirements apply to initial issuances, significant permit revisions, reopenings, and renewals.

(b) EPA review requirements do not apply to state only requirements.

(c) After the end of the public comment period, the executive director shall submit the proposed permit to the EPA.

(d) Upon receipt of the proposed permit, the EPA shall have 45 days to object, in writing, to the issuance of the proposed permit.

(e) The executive director may issue the permit provided the following:

(1) the EPA does not object to the issuance of the proposed permit;

(2) the EPA notifies the executive director that the EPA will not object to the issuance of the permit; or

(3) the executive director resolves any objections received.

(f) If the executive director fails, within 90 days of receipt of an objection, to revise the proposed permit and submit a revised permit in response to the objection, the EPA will issue or deny the permit in accordance with the requirements of the federal program promulgated under FCAA, Title V (relating to Permit).

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

Issued in Austin, Texas, on May 2, 1997.

TRD-9705909
Kevin McCalla

§122.340. Notice And Comment Hearing.

(a) Notice and comment hearing requirements apply to initial issuances, significant permit revisions, reopenings, and renewals.

(b) Any hearing regarding a permit will be conducted according to the following procedures and not under the Government Code, Administrative Procedure Act, Chapter 2001 or 2002.

(c) Any person who may be affected by emissions from a site regulated under this chapter may request the executive director to hold a hearing on the draft permit. The request must be made during the 30-day public comment period.

(d) The executive director shall decide whether to hold a hearing. The executive director is not required to hold a hearing if the basis of the request by a person who may be affected is determined to be unreasonable. If a hearing is requested by a person who may be affected by emissions from a site regulated under this chapter, and that request is reasonable, the executive director will hold a hearing. The executive director will send 30 days' advance notice of the hearing to all persons who have made timely written requests for a hearing, to the applicant, and to any person who submitted comments during the 30-day public comment period.

(e) At the applicant's expense, notice of a hearing on a draft permit shall be published in the public notice section of one issue of a newspaper of general circulation in the municipality in which the site or proposed site is located, or in the municipality nearest to the location of the site or proposed site. The notice shall be published not less than 30 days before the date set for the hearing. The notice shall include the following:

(1) the time, place, and nature of the hearing; and

(2) a brief description of the purpose of the hearing.

(f) At the executive director's discretion, the hearing notice may be combined with the notice of the draft permit required by this chapter.

(g) Any person, including the applicant, may submit oral or written statements and data concerning the draft permit.

(1) Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required.

(2) The period for submitting written comments shall be automatically extended to the close of any hearing.

(3) At the hearing, the period for submitting written comments may be extended beyond the close of the hearing.

(h) A tape recording or written transcript of the hearing shall be made available to the public.

(i) Any person, including the applicant, who believes that any condition of the draft permit is inappropriate or that the preliminary decision to issue or deny the permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting that position by the end of the public comment period.

(j) Any supporting materials for comments submitted under subsection (i) of this section shall be included in full and may not be incorporated by reference, unless the materials are one of the following:

(1) already part of the administrative record in the same proceedings;

(2) state or federal statutes and regulations;

(3) EPA documents of general applicability; or

(4) other generally available reference materials.

(k) The executive director shall keep a record of all comments in the hearing and also of the issues raised. This record shall be available to the public.

(l) The draft permit may be changed based on comments pertaining to whether the permit provides for compliance with the requirements of this chapter.

(m) The executive director shall respond to comments consistent with §122.345 of this title (relating to Notice of Proposed Final Action).

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

Issued in Austin, Texas, on March 19, 1997.

TRD-9704140
Kevin McCalla
Director
Texas Natural Resource Conservation Commission
Proposed date of adoption: July 9, 1997
For further information, please call: (512) 239–1966

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Notice of Proposal Final Action

Brad: This is the redline - keep or discard as you need. Page 5 IS dated 5/13/97, however.

PARTS 51 AND 70 REGULATIONS

MAY 14, 1997 DRAFT

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APPENDIX B - FEDERAL RULES ELIGIBLE FOR NOTICE-ONLY PROCEDURES B-1

DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS

Draft 5-13-96

NOTE: Shaded text (Wordperfect redline font) would be added; ~~struck out~~ text would be deleted; text in normal font is corrently in part 51 and would be retained.

Part 51 - REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

§ 51.160 Legally enforceable procedures.

* * * * *

(g) All terms used in §§ 51.160 through 51.164 of this part shall have the same meaning as set forth elsewhere in relevant sections of subpart I of this part, or in the Act, as appropriate.

§ 51.161 Public availability of information.

(a) The legally enforceable procedures in § 51.160 must also require the State or local agency to provide an adequate opportunity for public comment on information submitted by owners and operators. The public information must include the agency's analysis of the effect of construction or modification on ambient air quality, incuding the agency's proposed approval or disapproval.

(b) A 30-day opportunity for public comment shall be provided for:

(1) The construction or modification of any stationary source that is subject to permitting requirements as a major source or major modification under part C or part D of title I of the Act; and

(2) Any physical change or change in the method of operation associated with a project where the prospective emissions increases from such changes, considered by themselves plus any emissions increases due to an increase in production rates at other units that will result directly from the change, would equal or exceed the major source threshold for any pollutant subject to regulation under part C or D of title I of the Act.

(c) A 21-day opportunity for public comment shall be provided for the following three types of changes if they occur at sources subject to part 70 of this chapter:

(1) Any physical change or change in the method of operation associated with a project where the prospective emissions increases from such changes, considered by themselves plus any emissions increases due to an increase in production rates at other units that will result directly from the change, would exceed the significance level, but would be less than the major source

threshold for any pollutant subject to regulation under part C or D of title I of the Act;

(2) Limitations on the potential to emit of a facility to avoid major source requirements; and

(3) Any other change that is not designated as de minimis under paragraph (f) of this section.

(d) The opportunity for public comment shall include, as a minimum:

(1) ~~(1)~~ Availability for public inspection in at least one location in the area affected of the information submitted by the owner or operator and of the State or local agency's analysis of the effect on air quality;

(2) ~~(3)~~ A notice ~~by prominent advertisement~~ in the affected area ~~affected of the location of the source information and analysis specified in paragraph (b)(1) of this section~~ specifying the location of the relevant source information.

(e) ~~(c) Where the 30-day comment period required in paragraph (b) of this section would conflict with existing requirements for acting on requests for permission to construct or modify, the State may submit for aproval a comment period which is consistent with such existing requirements.~~ The program may vary the procedures for, and timing of, public review in light of the environmental significance of the change if:

(1) The activity is not among those listed in paragraphs (b) or (c) of this section; and

(2) The source is not subject to part 70 of this chapter.

(f) The permitting authority may designate, subject to EPA approval under this paragraph or in the State's part 70 operating permits program, certain categories of changes as de minimis. The permitting authority may exempt de minimis changes from public review requirements of this section. The permitting authority shall show that de minimis changes meet the following criteria:

(1) The establishment of preconstruction permit terms involves little or no judgment; or

(2) The change satisfies the criteria of § 70.7(e)(3)(iii)(B)(2) of this chapter.

(g) ~~(e) A copy of t~~The notice required by paragraph (b) of this section must also be provided ~~sent~~ to the Administrator through the appropriate Regional Office, and to all other State and local air pollution control agencies having jurisdiction in the region in which such new or modified installation will be located.

The notice also must be provided ~~sent~~ to any other agency in the region having responsibility for implementing the procedures required under this subpart. ~~For lead, a copy of the notice is reluired for all point sources. The definition of point for lead is given in § 51.100(k)(2).~~

DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS

Part 70 - STATE OPERATING PERMIT PROGRAMS

This document is prepared using the redline/strikeout method of showing changes intended to be promulgated using as the baseline the current version of part 70 as revised on June 20, 1996 (61 FR 31443). Material ~~struck through~~ would be deleted. Material shaded (WordPerfect redline font) would be added.

§70.1 Program overview.

(a) The regulations in this part provide for the establishment of comprehensive State ~~air quality~~ operating permit~~ting systems~~ programs consistent with the requirements of title V of the Clean Air Act (Act) (42 U.S.C. 7401, et seq.). These regulations define the minimum elements required by the Act for State operating permit programs and the corresponding standards and procedures by which the Administrator will approve, oversee, and withdraw approval of State operating permit programs.

(b) State operating permit programs shall provide that a~~A~~ll sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements. While title V does not impose substantive new requirements, it does require that fees be imposed on sources and that certain procedural measures be adopted especially with respect to compliance.

(c) Nothing in this part shall prevent a State, or interstate permitting authority, from establishing additional or more stringent requirements not inconsistent with the Act. The U.S. Environmental Protection Agency (EPA) will approve State program submittals to the extent that they are not inconsistent with the Act and these regulations. No permit, however, can be less stringent than necessary to meet all applicable requirements. In the case of Federal intervention in the permit process, the Administrator reserves the right to implement the State operating permit program, in whole or in part, or the Federal program contained in regulations promulgated under title V of the Act.

(d) The requirements of part 70, including provisions regarding schedules for submission and approval or disapproval of permit applications, shall apply to the permitting of affected sources under the acid rain program, except as provided herein or modified in regulations promulgated under title IV of the Act (acid rain program).

(e) Issuance of State permits under this part may be coordinated with issuance of permits under the Resource Conservation and Recovery Act and under the Clean Water Act, whether issued by the State, ~~the U.S. Environmental Protection Agency (~~EPA~~)~~, or the U.S. Army Corps of Engineers.

§70.2 Definitions.

The following definitions apply to part 70. Except as specifically provided in this section, terms used in this part retain the meaning accorded them under the applicable requirements of the Act.

Act means the Clean Air Act, as amended, 42 U.S.C. 7401, et seq.

Advance approval means terms or conditions in a part 70 permit setting forth, in advance, requirements applicable to new or modified units, so that such changes may be made as an alternative operating scenario rather than a revision to the part 70 permit. **[NOTE: EPA is considering regulatory language excluding major NSR.]**

Affected source shall have the meaning given to it in the regulations promulgated under title IV of the Act.

Affected States are all States:

(1) Whose air quality may be affected and that are contiguous to the State in which a part 70 permit, permit ~~modification~~ revision or permit renewal is being proposed; or

(2) That are within 50 miles of the permitted source.

Affected unit shall have the meaning given to it in the regulations promulgated under title IV of the Act.

Alternative operating scenarios means terms or conditions in a part 70 permit, including those resulting from advance approvals, which assure that different modes of operation comply with the applicable requirements relevant to each mode of operation.

Applicable requirement means all of the following as they apply to emissions units in a part 70 source (including requirements that have been promulgated or approved by EPA through rulemaking at the time of issuance but have future-effective compliance dates):

(1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter;

(2) Any requirement enforceable by the Administrator and by citizens under the Act that limits emissions for purposes of creating offset credits or for complying with or avoiding applicability of applicable requirements;

~~(2)~~ (3) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act;

~~(3)~~ (4) Any standard or other requirement under section 111 of the Act, including section 111(d);

~~(4)~~ (5) Any standard or other requirement under section 112 of the Act, including any requirement concerning accident prevention under section 112(r)(7) of the Act;

~~(5)~~ (6) Any standard or other requirement of the acid rain program under title IV of the Act or the regulations promulgated thereunder;

~~(6)~~ (7) Any requirements established pursuant to section 504(b) or section 114(a)(3) of the Act;

~~(7)~~ (8) Any standard or other requirement governing solid waste incineration, under section 129 of the Act;

~~(8)~~ (9) Any standard or other requirement for consumer and commercial products, under section 183(e) of the Act;

~~(9)~~ (10 Any standard or other requirement for tank vessels, under section 183(f) of the Act;

~~(10)~~ (11) Any standard or other requirement of the program to control air pollution from outer continental shelf sources, under section 328 of the Act;

~~(11)~~ (12) Any standard or other requirement of the regulations promulgated to protect stratospheric ozone sections 608 or 609 of under title VI of the Act, unless the Administrator has determined that such requirements need not be contained in a title V permit, and any standard or other requirement under any other section(s) of title VI of the Act that the Administrator determines should be contained in a part 70 permit; and

~~(12)~~ (13) Any national ambient air quality standard or increment or visibility requirement under part C of title I of the Act, but only as it would apply to temporary sources permitted pursuant to section 504(e) of the Act.

Designated representative shall have the meaning given to it in section 402(26) of the Act and the regulations promulgated thereunder.

Draft permit or draft permit revision means the version of ~~a~~ the permit or permit revision for which the permitting authority offers public participation as provided under §70.7~~(h) or affected State review under §70.8~~ of this part.

Eligible Indian Tribe means an Indian Tribe that EPA has determined to meet the requirements of section 301(d)(2) of the Act and 40 CFR part 49.

Emissions allowable under the permit means a federally enforceable permit term or condition determined at issuance to be required by an applicable requirement that establishes an emissions limit (including a work practice standard) or a federally enforceable emissions cap that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject.

Emissions unit means any part or activity of a stationary source that emits or has the potential to emit any regulated air pollutant or any pollutant listed under section 112(b) of the Act. This term is not meant to alter or affect the definition of the term "unit" for purposes of title IV of the Act.

Enforceable by the appropriate air pollution control agency means [Reserved].

The EPA or the Administrator means the Administrator of the EPA or his or her designee.

Final permit means the version of a part 70 permit issued by the permitting authority that has completed all review procedures required by §§70.7 and 70.8 of this part.

Fugitive emissions are those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening.

General permit means a part 70 permit that meets the requirements of §70.6(d) of this part.

Indian Tribe means any Indian Tribe, band, nation, or other organized group or community, including any Alaskan native village, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Major new source review (major NSR) means a title I program contained in an EPA-approved or promulgated implementation plan for the preconstruction review of changes which are subject to review as new major stationary sources or major modifications under EPA regulations implementing parts C or D of title I of the Act.

Major source means any stationary source or group of stationary sources as described in paragraphs (1), (2), or (3) of this definition. ~~(or,~~ For purposes of paragraphs (2) and (3), a major stationary source includes any group of stationary sources that are located on one or more contiguous or adjacent

properties, ~~and~~ that are under common control of the same person (or persons under common control), and that belong ~~belonging~~ to a single major industrial grouping. ~~and that are described in paragraphs (1), (2), or (3) of this definition. For the purposes of defining "major source," and that are described in paragraphs (1), (2), or (3) of this definition a~~ A stationary source or group of stationary sources shall be considered part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources on contiguous or adjacent properties belong to the same Major Group (i.e., all have the same two-digit code) as described in the Standard Industrial Classification Manual, 1987 except that research and development activities shall be treated as belonging to a separate industrial grouping. In addition, for purposes of paragraphs (2) and (3) of this definition, any stationary source (or group of stationary sources) that conveys, stores, or otherwise assists in the production of a principal product at another stationary source (or group of stationary sources), may be considered a support facility. A support facility shall be considered to be part of the same source as the stationary source (or group of stationary sources) which it supports regardless of the 2-digit SIC code for the support facility.

(1) A major source under section 112 of the Act, which is defined as:

(i) For pollutants other than radionuclides, any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, in the aggregate, 10 tons per year (tpy) or more of any hazardous air pollutant (HAP) (including any fugitive emissions of such pollutant) which has been listed pursuant to section 112(b) of the Act, 25 tpy or more of any combination of such hazardous air pollutants (including any fugitive emissions of such pollutants), or such lesser quantity as the Administrator may establish by rule. Notwithstanding the preceding sentence~~,~~:

(A) Emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources; ~~or~~ and

(B) Research and development activities may be considered separately and need not be aggregated with collocated stationary sources for purposes of determining major source status; however, the support facilities of a stand-alone research and development activity must be aggregated with the research and development activity for purposes of determining major source status.

(ii) For radionuclides, "major source" shall have the meaning specified by the Administrator by rule.

(2) A major stationary source of air pollutants or any group of stationary sources, as defined in section 302 of the Act, that directly emits or has the potential to emit, 100 tpy or more of any air pollutant (including any ~~major source of~~ fugitive emissions of any such pollutant, as determined by rule by the Administrator). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of section 302(j) of the Act or for the purposes of paragraph (3) of this definition, unless the source belongs to one of the following categories of stationary source:

(i) Coal cleaning plants (with thermal dryers);

(ii) Kraft pulp mills;

(iii) Portland cement plants;

(iv) Primary zinc smelters;

(v) Iron and steel mills;

(vi) Primary aluminum ore reduction plants;

(vii) Primary copper smelters;

(viii) Municipal incinerators (or combinations thereof) capable of charging more than ~~250~~ 50 tons of refuse per day;

(ix) Hydrofluoric, sulfuric, or nitric acid plants;

(x) Petroleum refineries;

(xi) Lime plants;

(xii) Phosphate rock processing plants;

(xiii) Coke oven batteries;

(xiv) Sulfur recovery plants;

(xv) Carbon black plants (furnace process);

(xvi) Primary lead smelters;

(xvii) Fuel conversion plant;

(xviii) Sintering plants;

(xix) Secondary metal production plants;

(xx) Chemical process plants;

(xxi) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(xxii) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) Taconite ore processing plants;

(xxiv) Glass fiber processing plants;

(xxv) Charcoal production plants;

(xxvi) Fossil-fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input; or

(xxvii) ~~All other stationary source categories regulated by a standard promulgated under section 111 or 112 of the Act, but only with respect to those air pollutants that have been regulated for that category~~ Any other stationary source category regulated under section 111 or 112 of the Act and for which the Administrator has made an affirmative determination under section 302(j) of the Act;

(3) A major stationary source as defined in part D of title I of the Act, including:

(i) For ozone nonattainment areas, sources with the potential to emit 100 tpy or more of volatile organic compounds or oxides of nitrogen in areas classified as "marginal" or "moderate," 50 tpy or more in areas classified as "serious," 25 tpy or more in areas classified as "severe," and 10 tpy or more in areas classified as "extreme"; except that the references in this paragraph to 100, 50, 25, and 10 tpy of nitrogen oxides shall not apply with respect to any source for which the Administrator has made a finding, under section 182(f)(1) or (2) of the Act, that requirements under section 182(f) of the Act do not apply;

(ii) For ozone transport regions established pursuant to section 184 of the Act, sources with the potential to emit 50 tpy or more of volatile organic compounds;

(iii) For carbon monoxide nonattainment areas (1) that are classified as "serious," and (2) in which stationary sources contribute significantly to carbon monoxide levels as determined under rules issued by the Administrator, sources with the potential to emit 50 tpy or more of carbon monoxide; and

(iv) For particulate matter (PM-10) nonattainment areas classified as "serious," sources with the potential to emit 70 tpy or more of PM-10.

Minor new source review (minor NSR) means a title I program approved by EPA into a State's implementation plan under EPA regulations implementing section 110(a)(2) of title I of the Act for the preconstruction review of changes which are subject to review as new or modified sources and which do not qualify as new major stationary sources or major modifications under EPA regulations implementing parts C or D of title I of the Act.

Part 70 permit or permit (unless the context suggests otherwise) means any permit or group of permits covering a part 70 source that is issued, renewed, amended, or revised pursuant to this part.

Part 70 program, ~~or~~ State program, permit program, or program ,unless otherwise specified, means a program approved by the Administrator under this part.

Part 70 source means any source subject to the permitting requirements of this part, as provided in §§70.3(a) and 70.3(b) of this part.

~~Permit modification means a revision to a part 70 permit that meets the requirements of §70.7(e) of this part.~~

Permit program costs means all reasonable (direct and indirect) costs required to develop and administer a permit program, as set forth in §70.9(b) of this part (whether such costs are incurred by the permitting authority or other State or local agencies that do not issue permits directly, but that support permit issuance or administration).

Permit revision means ~~any permit modification or administrative permit amendment.~~ either of the following:

(1) Revision to any term(s) or condition(s) of a part 70 permit, as required by § 70.7(d)(1) of this part; or

(2) Amendments to any term(s) or condition(s) of a part 70 permit initiated by the permittee or permitting authority, where eligible for incorporation as an administrative amendment under § 70.7(e)(1) of this part.

Permitting authority means either of the following:

(1) The Administrator, in the case of EPA-implemented programs; or

(2) The State air pollution control agency, local agency, other State agency, or other agency authorized by the Administrator to carry out a permit program under this part.

Potential to emit means the maximum capacity of a stationary source to emit any air pollutant under its physical and

operational design. Any physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the ~~Administrator~~ appropriate air pollution control agency. This term does not alter or affect the use of this term for any other purposes under the Act, or the term "capacity factor" as used in title IV of the Act or the regulations promulgated thereunder.

Proposed permit or proposed permit revision means the version of a permit or permit revision that the permitting authority proposes to issue and forwards to the Administrator for review in compliance with §70.8 of this part.

Regulated air pollutant means the following:

(1) Nitrogen oxides or any volatile organic compounds;

(2) Any pollutant for which a national ambient air quality standard has been promulgated;

(3) Any pollutant that is subject to any standard promulgated under section 111 of the Act;

(4) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act; or

(5) Except as provided in paragraph (6) of this definition, a~~A~~ny pollutant subject to a standard promulgated under section 112 or other requirements established under section 112 of the Act, including sections 112(g)~~,~~ and (j)~~, and (r)~~ of the Act, including the following:

(i) Any pollutant subject to requirements under section 112(j) of the Act. If the Administrator fails to promulgate a standard by the date established pursuant to section 112(e) of the Act, any pollutant for which a subject source would be major shall be considered to be regulated on the date 18 months after the applicable date established pursuant to section 112(e) of the Act; and

(ii) Any pollutant for which the requirements of section 112(g)(2) of the Act have been met, but only with respect to the individual source subject to the section 112(g)(2) requirement.

(6) Notwithstanding paragraph (5) of this definition, a pollutant shall not be classified as a regulated air pollutant solely because it is subject to standards or requirements promulgated pursuant to section 112(r) of the Act.

Regulated pollutant (for presumptive fee calculation), which is used only for purposes of §70.9(b)(2) of this part, means any "regulated air pollutant" except the following:

(1) Carbon monoxide; or

(2) Any pollutant that is a regulated air pollutant solely because it is a Class I or II substance subject to a standard promulgated under or established by title VI of the Act; or

~~(3) Any pollutant that is a regulated air pollutant solely because it is subject to a standard or regulation under section 112(r) of the Act~~.

Renewal means the process by which a permit is reissued at the end of its term.

Research and development activities means activities: (1) operated under the close supervision of technically trained personnel; (2) conducted for the primary purpose of theoretical research or research and development into new or improved processes and products; (3) that do not manufacture more than de minimis amounts of commercial products; and (4) that do not contribute to the manufacture of commercial products by collocated sources in more than a de minimis manner.

Responsible official means one of the following:

(1) For a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

(i) the facilities employ more than 250 persons or have gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars); or

(ii) the delegation of authority to such representative is approved in advance by the permitting authority;

(2) For a partnership or sole proprietorship: a general partner or the proprietor, respectively;

(3) For a municipality, State, Federal, or other public agency: either a principal executive officer or ranking elected official. For the purposes of this part, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal

geographic unit of the agency (e.g., a Regional Administrator of EPA); or

(4) For affected sources:

(i) The designated representative ~~in so far as~~ for all actions, standards, requirements, or prohibitions under title IV of the Act or the regulations promulgated thereunder ~~are concerned; and~~ ;or

(ii) The designated representative or a person meeting the provisions of (1), (2), or (3) of this definition for any other purposes under part 70.

~~Section 502(b)(10) changes are changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene federally enforceable permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.~~

State means any non-Federal permitting authority, including any local agency, interstate association, or statewide program. The term "State" also includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. Where such meaning is clear from the context, "State" shall have its conventional meaning. For purposes of the acid rain program, the term "State" shall be limited to authorities within the 48 contiguous States and the District of Columbia as provided in section 402(14) of the Act. Unless otherwise indicated, references to "State" and "Governor" shall include, as appropriate, "Tribal," "Indian tribes," and "Indian governing bodies."

Stationary source means any building, structure, facility, or installation that emits or may emit any regulated air pollutant or any pollutant listed under section 112(b) of the Act.

Title I modification or modification under any provision of title I of the Act means any modification under parts C and D of title I or sections 111(a)(4), 112(a)(5), or 112(g) of the Act; under regulations promulgated by EPA thereunder or in § 61.07 of part 61 of this chapter; or under State regulations approved by EPA to meet such requirements.

Whole program means a part 70 permit program, or any combination of partial programs, that meet all the requirements of these regulations and cover all the part 70 sources in the entire State. For the purposes of this definition, the term "State" does not include local permitting authorities, but refers only to the entire State, Commonwealth, or Territory.

§70.3 Applicability.

(a) Part 70 sources. A State program with whole or partial approval under this part must provide for permitting of at least the following sources:

(1) Any major source, except that a source is not required to obtain a permit if it would be classified as a major source solely because it has the potential to emit major amounts of a pollutant listed pursuant to section 112(r)(3) of the Act and is not otherwise required to obtain a permit under this part;

(2) Any source, including an area source (i.e., a nonmajor source), subject to a standard, limitation, or other requirement under section 111 of the Act;

(3) Any source, including an area source (i.e., a nonmajor source), subject to a standard or other requirement under section 112 of the Act, except that a source is not required to obtain a permit solely because it is subject to regulations or requirements under section 112(r) of this Act;

(4) Any source required to have a permit under parts C or D of title I of the Act,

~~(4)~~ (5) Any affected source; and

~~(5)~~ (6) Any source in a source category designated by the Administrator pursuant to this section.

(b) Source category exemptions.

(1) All sources listed in paragraph (a) of this section that are not major sources, affected sources, or solid waste incineration units required to obtain a permit pursuant to section 129(e) of the Act, may be exempted by the State from the obligation to obtain a part 70 permit until such time as the Administrator completes a rulemaking to determine how the program should be structured for non-major sources and the appropriateness of any permanent exemptions in addition to those provided for in paragraph (b)(4) of this section.

(2) In the case of nonmajor sources subject to a standard or other requirement under either section 111 or section 112 of the Act after [date of promulgation], the Administrator will determine whether to exempt any or all such applicable sources from the requirement to obtain a part 70 permit at the time that the new standard is promulgated.

(3) Any source listed in paragraph (a) of this section exempt from the requirement to obtain a permit under this section may opt to apply for a permit under a part 70 program.

(4) Unless otherwise required by the State to obtain a part 70 permit, the following source categories are exempted from the obligation to obtain a part 70 permit:

(i) All sources and source categories that would be required to obtain a permit solely because they are subject to part 60, Subpart AAA - Standards of Performance for New Residential Wood Heaters; and

(ii) All sources and source categories that would be required to obtain a permit solely because they are subject to part 61, Subpart M - National Emission Standard for Hazardous Air Pollutants for Asbestos, section 61.145, Standard for Demolition and Renovation.

(c) Emissions units and part 70 sources.

(1) For major sources, the permitting authority shall include in the permit all applicable requirements for all relevant emissions units in the major source.

(2) For any nonmajor source subject to the part 70 program under paragraphs (a) or (b) of this section, the permitting authority shall include in the permit all applicable requirements applicable to emissions units that cause the source to be subject to the part 70 program.

(d) Fugitive emissions. Fugitive emissions from a part 70 source shall be included in the permit application and the part 70 permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source.

§70.4 State and Tribal program submittals and transition.

Eligible Indian Tribes may administer programs meeting the requirements of this section.

(a) Date for submittal. Not later than November 15, 1993, the Governor of each State (including Indian Tribes) shall submit to the Administrator for approval a proposed part 70 program, under State law or under an interstate compact, meeting the requirements of this part. ~~If part 70 is subsequently revised such that the Administrator determines that it is necessary to require a change to an approved State program, the required revisions to the program shall be submitted within 12 months of the final changes to part 70 or within such other period as authorized by the Administrator.~~ **Indian Tribes are not required to submit part 70 programs to EPA for approval, but may elect to do so.**

(b) Elements of the initial program submission. Any State that seeks to administer a program under this part shall submit

to the Administrator a letter of submittal from the Governor or his or her designee requesting EPA approval of the program and at least three copies of a program submission. The submission shall contain the following:

(1) A complete program description describing how the State intends to carry out its responsibilities under this part.

(2) The regulations that comprise the permitting program, reasonably available evidence of their procedurally correct adoption, (including any notice of public comment and any significant comments received on the proposed part 70 program as requested by the Administrator), and copies of all applicable State or local statutes and regulations including those governing State administrative procedures that either authorize the part 70 program or restrict its implementation. The State shall include with the regulations any criteria used to determine insignificant activities or emission levels for purposes of determining complete applications consistent with §70.5(c) of this part.

(3) A legal opinion from the Attorney General for the State, the Tribal attorney, or the attorney for those State, local, or interstate air pollution control agencies that have independent legal counsel, stating that the laws of the State, locality, or interstate compact provide adequate authority to carry out all aspects of the program. This statement shall include citations to the specific statutes, administrative regulations, and, where appropriate, judicial decisions that demonstrate adequate authority. State statutes and regulations cited by the State Attorney General, Tribal attorney, or independent legal counsel shall be in the form of lawfully adopted State statutes and regulations at the time the statement is signed and shall be fully effective by the time the program is approved. To qualify as "independent legal counsel," the attorney signing the statement required by this section shall have full authority to independently represent the State agency in court on all matters pertaining to the State program. The legal opinion shall also include a demonstration of adequate legal authority to carry out the requirements of this part, including authority to carry out each of the following:

(i) Issue permits and assure compliance with each applicable requirement and requirement of this part by all part 70 sources.

(ii) Incorporate monitoring, recordkeeping, reporting, and compliance certification requirements into part 70 permits consistent with §70.6 of this part.

(iii) Issue permits for a fixed term of 5 years in the case of permits with acid rain provisions and issue all other permits for a period not to exceed 5 years, except for permits issued for

solid waste incineration units combusting municipal waste subject to standards under section 129(e) of the Act.

(iv) Issue permits for solid waste incineration units combusting municipal waste subject to standards under section 129(e) of the Act for a period not to exceed 12 years and review such permits at least every 5 years. No permit for a solid waste incineration unit may be issued by an agency, instrumentality or person that is also responsible, in whole or in part, for the design and construction or operation of the unit.

(v) Incorporate into permits all applicable requirements and requirements of this part.

(vi) Terminate, modify, or revoke and reissue permits for cause.

(vii) Enforce permits, permit fee requirements, and the requirement to obtain a permit, as specified in §70.11 of this part.

(viii) Make available to the public any permit application, compliance plan, permit, and monitoring and compliance certification report pursuant to section 503(e) of the Act, except for information entitled to confidential treatment pursuant to section 114(c) of the Act. The contents of a part 70 permit shall not be entitled to protection under section 114(c) of the Act.

(ix) Not issue a permit if the Administrator timely objects to its issuance pursuant to §70.8(c) of this part or, if the permit has not already been issued, to §70.8(d) of this part.

(x) Provide an opportunity for judicial review in State or Tribal court of the final permit action by the applicant, any person who participated in the applicable public participation process provided pursuant to §70.7~~(h)~~ of this part, and any other person who could obtain judicial review of such actions under State or Tribal laws.

(xi) Provide that, solely for the purposes of obtaining judicial review in State or Tribal court for failure to take final action, final permit action shall include the failure of the permitting authority to take final action on an application for a permit, permit renewal, or permit revision within the time specified in the State program. ~~If the State program allows sources to make changes subject to post hoc review [as set forth in §§70.7(e)(2) and (3) of this part], the permitting authority's failure to take final action within 90 days of receipt of an application requesting minor permit modification procedures (or 180 days for modifications subject to group processing requirements) must be subject to judicial review in State or Tribal court.~~

(xii) Provide that the opportunity for judicial review described in paragraph (b)(3)(x) of this section shall be the exclusive means for obtaining judicial review of the terms and conditions of permits, and require that such petitions for judicial review must be filed no later than ~~90~~ 125 days after the final permit action, or such shorter time as the State shall designate. Notwithstanding the preceding requirement, petitions for judicial review of final permit actions can be filed after the deadline designated by the State, only if they are based solely on grounds arising after the deadline for judicial review. Such petitions shall be filed no later than ~~90~~ 125 days after the new grounds for review arise or such shorter time as the State shall designate. If the final permit action being challenged is the permitting authority's failure to take final action, a petition for judicial review may be filed any time before the permitting authority denies the permit or issues the final permit.

(xiii) Ensure that the authority of the State/local permitting Agency is not used to modify the acid rain program requirements.

(4) Relevant permit~~ting~~ program documentation not contained in the State regulations, including the following:

(i) Copies of the permit form(s), application form(s), and reporting form(s) the State intends to employ in its program; and

(ii) Relevant guidance issued by the State to assist in the implementation of its permitting program, including criteria for monitoring source compliance (e.g., inspection strategies).

(5) A complete description of the State's compliance tracking and enforcement program or reference to any agreement the State has with EPA that provides this information.

(6) A showing of adequate authority and procedures to determine within 60 days of receipt whether applications (including renewal applications) are complete, to request such other information as needed to process the application, and to take final action on complete applications within 18 months of the date of their submittal, except for initial permit applications, for which the permitting authority may take up to 3 years, or up to 5 years for Tribal programs, from the effective date of the program to take final action on the application, as provided for in the transition plan.

(7) A demonstration, consistent with §70.9 of this part, that the permit fees required by the State program are sufficient to cover permit program costs.

(8) A statement that adequate personnel and funding have been made available to develop, administer, and enforce the program. This statement shall include the following:

(i) A description in narrative form of the scope, structure, coverage, and processes of the State program.

(ii) A description of the organization and structure of the agency or agencies that will have responsibility for administering the program, including the information specified in this paragraph. If more than one agency is responsible for administration of a program, the responsibilities of each agency must be delineated, their procedures for coordination must be set forth, and an agency shall be designated as a "lead agency" to facilitate communications between EPA and the other agencies having program responsibility.

(iii) A description of the agency staff who will carry out the State program, including the number, occupation, and general duties of the employees. The State need not submit complete job descriptions for every employee carrying out the State program.

(iv) A description of applicable State procedures, including permitting procedures and any State administrative or judicial review procedures.

(v) An estimate of the permit program costs for the first 4 years after approval, and a description of how the State plans to cover those costs.

(9) A commitment from the State to submit, at least annually to the Administrator, information regarding the State's enforcement activities including, but not limited to, the number of criminal and civil, judicial and administrative enforcement actions either commenced or concluded; the penalties, fines, and sentences obtained in those actions; and the number of administrative orders issued.

(10) A requirement under State law that, if a timely and complete application for a permit renewal is submitted, consistent with §70.5(a)(2) of this part, but the State has failed to issue or deny the renewal permit before the end of the term of the previous permit, then:

(i) The permit shall not expire until the renewal permit has been issued or denied and any permit shield that may be granted pursuant to §70.6(f) of this part may extend beyond the original permit term until renewal; or

(ii) All the terms and conditions of the permit including any permit shield that may be granted pursuant to §70.6(f) of this part shall remain in effect until the renewal permit has been issued or denied.

(11) A transition plan providing a schedule for submittal and final action on initial permit applications for all part 70 sources. This plan shall provide that:

(i) Submittal of permit applications by all part 70 sources (including any sources subject to a partial or interim program) shall occur within 1 year after the effective date of the permit program;

(ii) Final action shall be taken on at least one-third of such applications annually over a period not to exceed 3 years after such effective date, except for Tribal programs for which the transition period will be for a period agreed upon jointly by the Tribe and the appropriate EPA Regional Office not to exceed 5 years;

(iii) Any complete permit application containing an early reduction demonstration under section 112(i)(5) of the Act shall be acted on within ~~9~~ 12 months of receipt of the complete application; and

(iv) Submittal of permit applications and the permitting of affected sources shall occur in accordance with the deadlines in title IV of the Act and the regulations promulgated thereunder.

(12) Provisions, including provisions consistent with paragraphs (b)(12)(i) ~~through~~ and (~~i~~ii) of this section to allow changes within a permitted facility without requiring a permit revision, if the changes are not modifications under any provision of title I of the Act and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions): *Provided that* the facility provides the Administrator and the permitting authority with written notification as required below in advance of the proposed changes, which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different time frame for emergencies. Such changes shall not contravene or otherwise violate terms of the permit or any applicable requirement. The permit shield described in § 70.6(f) of this part shall not extend to any change made under this paragraph (b)(12), except as provided under paragraph (b)(12)(i)(B) of this section. The source, permitting authority, and EPA shall attach each such notice to their copy of the relevant permit. The following provisions implement this requirement of an approvable part 70 permit program:

~~(i) The program shall allow permitted sources to make section 502(b)(10) changes without requiring a permit revision, if the changes are not modifications under any provision of title I of the Act and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions).~~

~~(A) For each such change, the written notification required above shall include a brief description of the change within the permitted facility, the date on which the change will occur, any change in emissions, and any permit term or condition that is no longer applicable as a result of the change.~~

~~(B) The permit shield described in §70.6(f) of this part shall not apply to any change made pursuant to this paragraph (12)(i).~~

(ii) Trading under the implementation plan. The program may provide for permitted sources to trade increases and decreases in emissions in the permitted facility, where the applicable implementation plan provides for such emissions trades without requiring a permit revision and based on the 7-day notice prescribed in this paragraph (b)(12)(ii). This provision is available in those cases where the permit does not already provide for such emissions trading provided the permit identifies which permit terms may be replaced with the emissions trading provisions in the implementation plan.

(A) Under this paragraph (b)(12)(ii), the written notification required above shall include such information as may be required by the provision in the applicable implementation plan authorizing the emissions trade, including at a minimum, when the proposed change will occur, a description of each such change, any change in emissions, the permit requirements with which the source will comply using the emissions trading provisions of the applicable implementation plan, and the pollutants emitted subject to the emissions trade. The notice shall also refer to the provisions with which the source will comply in the applicable implementation plan and that provide for the emissions trade.

(B) The permit shield described in §70.6(f) of this part shall not extend to any change made under this paragraph (b)(12)(ii). Compliance with the permit requirements that the source will meet using the emissions trade shall be determined according to requirements of the applicable implementation plan authorizing the emissions trade.

~~(iii)~~ (i) Trading under permitted emissions caps. The program shall require the permitting authority to include in a permit an emissions cap, pursuant to a request submitted by the applicant, consistent with any specific emissions limits or restrictions otherwise required in the permit by any applicable requirements, and permit terms and conditions for emissions trading solely for the purposes of complying with that cap, provided that the permitting authority finds that the request contains adequate terms and conditions, including all terms required under §§ 70.6(a) and (c) of this part, to determine compliance with the cap and with any emissions trading provisions. The permit shall also contain terms and conditions

to assure compliance with all applicable requirements. ~~, if a permit applicant requests it, to issue permits that contain terms and conditions, including all terms required under §§70.6(a) and (c) of this part to determine compliance, allowing for the trading of emissions increases and decreases in the permitted facility solely for the purpose of complying with a federally-enforceable emissions cap that is established in the permit independent of otherwise applicable requirements.~~ The permit applicant shall include in its application proposed replicable procedures and permit terms that ensure the emissions cap is ~~enforceable and~~ trades pursuant to it are quantifiable and enforceable. Any permit terms and conditions establishing such a cap or allowing such trading may be established only in procedures for permit issuance, renewal, or permit revision pursuant to § 70.7(g). The permitting authority shall not be required to include in the cap or emissions trading provisions any emissions units where the permitting authority determines that the ~~for which~~ emissions are not quantifiable or where it determines that there ~~for which there~~ are no replicable procedures or practical means to enforce the cap. ~~emissions trades. The permit shall also require compliance with all applicable requirements.~~

(A) Under this paragraph (b)(12)(~~i~~ii) of this section, the written notification required by paragraph (b)(12) of this section ~~above~~ shall state when the change will occur and shall describe how increases and decreases ~~the changes~~ in emissions ~~that will result and how these increases and decreases in emissions~~ will comply with the terms and conditions of the permit.

(B) The permit shield described in §70.6(f) of this part may extend to terms and conditions that allow such increases and decreases in emissions.

(13) Provisions for adequate, streamlined, and reasonable procedures for expeditious review of permit revisions ~~or modifications~~. The program may meet this requirement by using procedures that meet the requirements of §70.7~~(e)~~ of this part or that are substantially equivalent to those provided therein ~~in §70.7(e) of this part~~.

~~(14) If a State allows changes that are not addressed or prohibited by the permit, other than those described in paragraph (b)(15) of this section, to be made without a permit revision, provisions meeting the requirements of (i) through (iii) of this paragraph. Although a State may, as a matter of State law, prohibit sources from making such changes without a permit revision, any such prohibition shall not be enforceable by the Administrator or by citizens under the Act unless the prohibition is required by an applicable requirement. Any State procedures implementing such a State law prohibition must include the requirements of (i) through (iii) of this paragraph.~~

~~(i) Each such change shall meet all applicable requirements and shall not violate any existing permit term or condition.~~

~~(ii) Sources must provide contemporaneous written notice to the permitting authority and EPA of each such change, except for changes that qualify as insignificant under the provisions adopted pursuant to §70.5(c) of this part. Such written notice shall describe each such change, including the date, any change in emissions, pollutants emitted, and any applicable requirement that would apply as a result of the change.~~

~~(iii) The change shall not qualify for the shield under §70.6(f) of this part.~~

~~(iv) The permittee shall keep a record describing changes made at the source that result in emissions of a regulated air pollutant subject to an applicable requirement, but not otherwise regulated under the permit, and the emissions resulting from those changes.~~

~~(15) Provisions prohibiting sources from making, without a permit revision, changes that are not addressed or prohibited by the part 70 permit, if such changes are subject to any requirements under title IV of the Act or are modifications under any provision of title I of the Act.~~

~~(16)~~ (14) Provisions requiring the permitting authority to implement the requirements of §§70.6 and 70.7 of this part.

(c) Partial programs.

(1) The EPA may approve a partial program that applies to all part 70 sources within a limited geographic area (e.g., a local agency program covering all sources within the agency's jurisdiction). To be approvable, any partial program must, at a minimum, ensure compliance with all of the following applicable requirements, as they apply to the sources covered by the partial program:

(i) All requirements of title V of the Act and of part 70;

(ii) All applicable requirements of title IV of the Act and regulations promulgated thereunder which apply to affected sources; and

(iii) All applicable requirements of title I of the Act, including those established under sections 111 and 112 of the Act.

(2) Any partial permitting program, such as that of a local air pollution control agency, providing for the issuance of permits by a permitting authority other than the State, shall be

consistent with all the elements required in paragraphs (b)(1) through (16) of this section.

(3) Approval of any partial program does not relieve the State (excluding Indian Tribes) from its obligation to submit a whole program or from application of any sanctions for failure to submit a fully-approvable whole program.

(4) Any partial program may obtain interim approval under paragraph (d) of this section if it substantially meets the requirements of this paragraph (c).

(d) Interim approval.

(1) If a program (including a partial permit program but not including Tribal programs) submitted under this part substantially meets the requirements of this part, but is not fully approvable, the Administrator may by rule grant the program interim approval.

(2) Interim approval shall expire on a date set by the Administrator (but not later than 2 years after such approval), and may not be renewed. Sources shall become subject to the program according to the schedule approved in the State program. Permits granted under an interim approval shall be fully effective and expire at the end of their fixed term, unless renewed under a part 70 program.

(3) The EPA may grant interim approval to any program if it meets each of the following minimum requirements and otherwise substantially meets the requirements of this part:

(i) Adequate fees. The program must provide for collecting permit fees adequate for it to meet the requirements of §70.9 of this part.

(ii) Applicable requirements.

(A) The program must provide for adequate authority to issue permits that assure compliance with the requirements of paragraph (c)(1) of this section for those major sources covered by the program.

(B) Notwithstanding paragraph (d)(3)(ii)(A) of this section, where a State or local permitting authority lacks adequate authority to issue or revise permits that assure compliance with applicable requirements established exclusively through an EPA-approved minor NSR program, EPA may grant interim approval to the program upon a showing by the permitting authority of compelling reasons which support the interim approval.

(C) Any part 70 permit issued during an interim approval granted under paragraph (d)(3)(ii)(B) of this section that does not incorporate minor NSR requirements shall:

(1) Note this fact in the permit;

(2) Indicate how citizens may obtain access to excluded minor NSR permits;

(3) Provide a cross reference, such as a listing of the permit number, for each minor NSR permit containing an excluded minor NSR term; and

(4) State that the minor NSR requirements which are excluded are not eligible for the permit shield under § 70.6(f).

(D) A program receiving interim approval for the reason specified in (d)(3)(ii)(B) of this section must, upon or before granting of full approval, institute proceedings to reopen part 70 permits to incorporate excluded minor NSR permits as terms of the part 70 permits, as required by § 70.7(f)(1)(iv). Such reopening need not follow full permit issuance procedures nor the notice requirement of § 70.7(f)(3), but may instead follow the permit revision procedure in effect under the State's approved part 70 program for incorporation of minor NSR permits.

(iii) Fixed term. The program must provide for fixed permit terms, consistent with paragraph (b)(3)(iii) and (iv) of this section.

(iv) Public participation. The program must provide for adequate public notice of and an opportunity for public participation ~~comment and a hearing~~ on draft permits, reopenings for cause, and revisions~~, except for modifications qualifying for minor permit modification procedures under~~ as required by §70.7~~(e)~~ of this part.

(v) EPA and affected State review. The program must allow EPA an opportunity to review each proposed permit, including permit revisions, and to object to its issuance consistent with §70.8(c) of this part. The program must provide for affected State review consistent with §70.8(b) of this part.

(vi) Permit issuance. The program must provide that the proposed permit will not be issued if EPA objects to its issuance.

(vii) Enforcement. The program must contain authority to enforce permits, including the authority to assess penalties against sources that do not comply with their permits or with the requirement to obtain a permit.

(viii) Operational flexibility. The program must allow changes within a permitted facility without requiring a permit revision, if the changes are not modifications under any provision of title I of the Act and the changes do not exceed the emissions allowable under the permit, consistent with paragraph (b)(12).

(ix) Streamlined procedures. The program must provide for streamlined procedures for issuing and revising permits and determining expeditiously after receipt of a permit application or application for a permit revision whether such application is complete.

(x) Permit application. The program submittal must include copies of the permit application and reporting form(s) that the State will use in implementing the interim program.

(xi) Alternative scenarios. The program submittal must include provisions to insure that alternate scenarios requested by the source are included in the part 70 permit pursuant to §70.6(a)(9) of this part.

(e) EPA review of permit program submittals. Within 1 year after receiving a program submittal, the Administrator shall approve or disapprove the program, in whole or in part, by publishing a notice in the FEDERAL REGISTER. Prior to such notice, the Administrator shall provide an opportunity for public comment on such approval or disapproval. Any EPA action disapproving a program, in whole or in part, shall include a statement of the revisions or modifications necessary to obtain full approval. The Administrator shall approve State programs that conform to the requirements of this part.

(1) Within 60 days of receipt by EPA of a State program submission, EPA will notify the State whether its submission is complete enough to warrant review by EPA for either full, partial, or interim approval, except that no Tribal program will be considered for interim approval. If EPA finds that a State's submission is complete, the 1-year review period (i.e., the period of time allotted for formal EPA review of a proposed State program) shall be deemed to have begun on the date of receipt of the State's submission. If EPA finds that a State's submission is incomplete, the 1-year review period shall not begin until all the necessary information is received by EPA.

(2) If the State's submission is materially changed during the 1-year review period, the Administrator may extend the review period for no more than 1 year following receipt of the revised submission.

(3) In any notice granting interim or partial approval, the Administrator shall specify the changes or additions that must be made before the program can receive full approval and the

conditions for implementation of the program until that time. In determining if program changes or additions submitted as a result of interim approval are adequate for the program to be granted full approval, EPA will review the submitted changes or additions on the basis of the criteria in part 70 as in effect at the time interim approval was granted. If part 70 has been revised since interim approval was granted, the State may, at its option, base some or all of the changes or additions submitted as a result of interim approval on the latest revised version of part 70, and the Administrator will consider such program revisions as appropriate corrections for purposes of granting full approval.

(f) State response to EPA review of program.

(1) Disapproval. The State (excluding Indian Tribes) shall submit to EPA program revisions or modifications required by the Administrator's action disapproving the program, or any part thereof, within 180 days of receiving notification of the disapproval.

(2) Interim approval. The State (excluding Indian Tribes) shall submit to EPA changes to the program addressing the deficiencies specified in the interim approval no later than 6 months prior to the expiration of the interim approval.

(g) Effective date. The effective date of a part 70 program, including any partial or interim program approved under this part, shall be the effective date of approval by the Administrator.

(h) Individual permit transition. Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program, except that the Administrator will continue to issue phase I acid rain permits and, to the extent provided in regulations promulgated pursuant to title IV of the Act, will issue phase II acid rain permits. After program approval, EPA shall retain jurisdiction over any permit (including any general permit) that it has issued unless arrangements have been made with the State to assume responsibility for these permits. Where EPA retains jurisdiction, it will continue to process permit appeals and ~~modification~~ revision requests, to conduct inspections, and to receive and review monitoring reports. If any permit appeal or ~~modification~~ revision request is not finally resolved when the federally-issued permit expires, EPA may, with the consent of the State, retain jurisdiction until the matter is resolved. Upon request by a State, the Administrator may delegate authority to implement all or part of a permit issued by EPA, if a part 70 program has been approved for the State. The delegation may include authorization for the State to collect appropriate fees, consistent with §70.9 of this part.

(i) Program revisions. Either EPA or a State with an approved program may initiate a program revision. Program revision may be necessary when the relevant Federal or State statutes or regulations, including part 70, are revised, modified, or supplemented. Until such time as the State revises its program, within the timeframes of paragraph (i)(1) of this section, and EPA approves the revisions into the program, the version of the relevant Federal or State statutes or regulations prior to being revised, modified, or supplemented shall govern the program. The State shall keep EPA apprised of any proposed modifications to its basic statutory or regulatory authority or procedures. ~~(1)~~ If the Administrator determines pursuant to §70.10 of this part that a State is not adequately administering the requirements of this part, or that the State's permit program is inadequate in any other way, the State shall revise the program or its means of implementation to correct the inadequacy. ~~The program shall be revised within 180 days, or such other period as the Administrator may specify, following notification by the Administrator, or within 2 years if the State demonstrates that additional legal authority is necessary to make the program revision.~~

(1) If the program or the means of implementing it must be revised, fully adopted program revisions shall be submitted to the Administrator in accordance with the following timeframes, which will commence upon promulgation of revised requirements under title V of the Act or upon a finding by the Administrator of inadequate program administration:

(i) Within 180 days if no new statutory authority or regulatory revisions are necessary;

(ii) Within 12 months if no new statutory authority is needed but regulatory revisions are necessary;

(iii) Within 2 years if new statutory authority is needed; or

(iv) Notwithstanding paragraphs (i)(1)(i)-(iii) of this section, any other time period that the Administrator determines is appropriate to allow for program revision.

(2) Revision of a State program shall be accomplished as follows:

(i) The State shall submit a modified program description, Attorney General's or Tribal attorney's statement, or such other documents as EPA determines to be necessary.

(ii) After EPA receives a proposed program revision, it will publish in the FEDERAL REGISTER a public notice summarizing the proposed change and provide a public comment period of at least 30 days.

(iii) The Administrator shall approve or disapprove program revisions based on the requirements of this part and of the Act.

(iv) A program revision shall become effective upon the approval of the Administrator. Notice of approval of any substantial revision shall be published in the FEDERAL REGISTER. Notice of approval of nonsubstantial program revisions may be given by a letter from the Administrator to the Governor or a designee.

(v) The Governor of any State with an approved part 70 program shall notify EPA whenever the Governor proposes to transfer all or part of the program to any other agency, and shall identify any new division of responsibilities among the agencies involved. The new agency is not authorized to administer the program until the revision has been approved by the Administrator under this paragraph.

(3) Whenever the Administrator has reason to believe that circumstances have changed with respect to a State program, ~~he~~ the Administrator may request, and the State shall provide, a supplemental Attorney General's statement, program description, or such other documents or information as ~~he~~ the Administrator determines are necessary.

(j) Savings provision. Any initial operating permits program developed and submitted to the Administrator for approval prior to [6 months from the date of publication] must meet the applicable criteria contained in part 70 as in effect on July 21, 1992 to receive EPA approval. Notwithstanding the preceding sentence, the Administrator may review portions or the entirety of such program submittals upon request of the permitting authority, and will review the entirety of all later submittals, on the basis of the criteria in part 70 as in effect at the time of the submittal.

~~(j)~~ (k) Sharing of information.

(1) Any information obtained or used in the administration of a State program shall be available to EPA upon request without restriction and in a form specified by the Administrator, including computer-readable files to the extent practicable. If the information has been submitted to the State under a claim of confidentiality, the State may require the source to submit this information to the Administrator directly. Where the State submits information to the Administrator under a claim of confidentiality, the State shall submit that claim to EPA when providing information to EPA under this section. Any information obtained from a State or part 70 source accompanied by a claim of confidentiality will be treated in accordance with the regulations in part 2 of this chapter.

(2) The EPA will furnish to States with approved programs the information in its files that the State needs to implement its approved program. Any such information submitted to EPA under a claim of confidentiality will be subject to the regulations in part 2 of this chapter.

~~(k)~~ (1) Administration and enforcement. Any State (excluding Indian Tribes) that fails to adopt a complete, approvable part 70 program, or that EPA determines is not adequately administering or enforcing such a program, shall be subject to certain Federal sanctions as set forth in §70.10 of this part.

§70.5 Permit applications.

(a) Duty to apply. For each part 70 source, the owner or operator shall submit a timely and complete permit application in accordance with this section.

(1) Timely application.

(i) A timely application for a source applying for a part 70 permit for the first time is one that is submitted within 12 months after the source becomes subject to the permit program or on or before such earlier date as the permitting authority may establish.

~~(ii) Part 70 sources required to meet the requirements under section 112(g) of the Act, or to have a permit under the preconstruction review program approved into the applicable implementation plan under part C or D of title I of the Act, shall file a complete application to obtain the part 70 permit or permit revision within 12 months after commencing operation or on or before such earlier date as the permitting authority may establish. Where an existing part 70 permit would prohibit such construction or change in operation, the source must obtain a permit revision before commencing operation.~~

~~(iii)~~ (ii) For purposes of permit renewal, a timely application is one that is submitted at least 6 months prior to the date of permit expiration, or such other longer time as may be approved by the Administrator that ensures that the term of the permit will not expire before the permit is renewed. In no event shall this time be greater than 18 months.

~~(iv)~~ (iii) Applications for initial phase II acid rain permits shall be submitted to the permitting authority by January 1, 1996 for sulfur dioxide, and by January 1, 1998 for nitrogen oxides or by such other deadlines established under title IV of the Act and the regulations promulgated thereunder.

(2) Complete application. The program shall provide criteria and procedures for determining in a timely fashion when

applications are complete. To be ~~deemed~~ found complete, an application must provide all information required pursuant to paragraph (c) of this section sufficient to allow the permitting authority to begin processing the application, except that applications for permit revision need supply such information only if it is related to the proposed change. Information required under paragraph (c) of this section must be sufficient to evaluate the subject source and its application and to determine all applicable requirements. The program shall require that a responsible official certify the submitted information consistent with paragraph (d) of this section. Unless the permitting authority determines that an application is not complete within 60 days of receipt of the application, such application shall be deemed to be complete~~, except as otherwise provided in §70.7(a)(4) of this part~~. If, while processing an application that has been determined or deemed to be complete, the permitting authority determines that additional information is necessary to evaluate or take final action on that application, it may request such information in writing and set a reasonable deadline for a response. The source's ability to operate without a permit, as set forth in §70.7(b) of this part, shall be in effect from the date the application is determined or deemed to be complete until the final permit is issued, provided that the applicant submits any requested additional information by the deadline specified by the permitting authority.

(3) Confidential information. In the case where a source has submitted information to the State under a claim of confidentiality, the permitting authority may also require the source to submit a copy of such information directly to the Administrator.

(b) Duty to supplement or correct application. Any applicant who fails to submit any relevant facts or who has submitted incorrect information in a permit application shall, upon becoming aware of such failure or incorrect submittal, promptly submit such supplementary facts or corrected information. In addition, an applicant shall provide additional information as necessary to address any requirements that become applicable to the source after the date it filed a complete application but prior to release of a draft permit.

(c) Standard application form and required information. The State program under this part shall provide for a standard application form or forms. Information as described below for each emissions unit at a part 70 source shall be included in the application. The Administrator may approve as part of a State program a list of insignificant activities and emissions levels which need not be included in permit applications. However, for insignificant activities which are exempted because of size or production rate, a list of such insignificant activities must be included in the application. An application may not omit information needed to determine the applicability of, or to

impose, any applicable requirement, including any applicable requirement that applies to an insignificant activity, or to evaluate the fee amount required under the schedule approved pursuant to §70.9 of this part. No emissions from any activity or emissions unit, including insignificant activities or insignificant emissions, may be exempted when determining whether a source is major. The permitting authority may use discretion in developing application forms that best meet program needs and administrative efficiency. The forms and attachments chosen, however, shall include the elements specified below:

(1) Identifying information, including company name and address (or plant name and address if different from the company name), owner's name and agent, and telephone number and names of plant site manager/contact.

(2) A description of the source's processes and products (by Standard Industrial Classification Code) including any associated with each alternate scenario identified by the source.

(3) The following emissions-related information:

(i) All emissions of pollutants for which the source is major, and all emissions of regulated air pollutants. A permit application shall describe all emissions of regulated air pollutants emitted from any emissions unit, except where such units are exempted under this paragraph (c). The permitting authority shall require additional information related to the emissions of air pollutants sufficient to verify which requirements are applicable to the source, and other information necessary to collect any permit fees owed under the fee schedule approved pursuant to §70.9(b) of this part.

(ii) Identification and description of all points of emissions described in paragraph (c)(3)(i) of this section in sufficient detail to establish the basis for fees and applicability of requirements of the Act.

(iii) Emissions rates in tpy and in such terms as are necessary to establish compliance consistent with the applicable standard reference test method.

(iv) The following information to the extent it is needed to determine or regulate emissions: fuels, fuel use, raw materials, production rates, and operating schedules.

(v) Identification and description of air pollution control equipment and compliance monitoring devices or activities.

(vi) Limitations on source operation affecting emissions or any work practice standards, where applicable, for all regulated pollutants at the part 70 source.

(vii) Other information required by any applicable requirement (including information related to stack height limitations developed pursuant to section 123 of the Act).

(viii) Calculations on which the information in items (i) through (vii) above is based.

(4) The following air pollution control requirements:

(i) Citation and description of all applicable requirements, and

(ii) Description of or reference to any applicable test method for determining compliance with each applicable requirement.

(5) Other specific information that may be necessary to implement and enforce other applicable requirements of the Act or of this part or to determine the applicability of such requirements.

(6) An explanation of any proposed exemptions from otherwise applicable requirements.

(7) Additional information as determined to be necessary by the permitting authority to define alternative operating scenarios identified by the source pursuant to §70.6(a)(9) of this part or to define permit terms and conditions implementing §70.4(b)(12) or §70.6(a)(10) of this part.

(8) Identification of those emissions units eligible for emissions trading under § 70.6(a)(10).

~~(8)~~ (9) A compliance plan for all part 70 sources that contains all the following:

(i) A description of the compliance status of the source with respect to all applicable requirements.

(ii) A description as follows:

(A) For applicable requirements with which the source is in compliance, a statement that the source will continue to comply with such requirements.

(B) For applicable requirements that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis.

(C) For requirements for which the source is not in compliance at the time of permit issuance, a narrative description of how the source will achieve compliance with such requirements.

(iii) A compliance schedule as follows:

(A) For applicable requirements with which the source is in compliance, a statement that the source will continue to comply with such requirements.

(B) For applicable requirements that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis. A statement that the source will meet in a timely manner applicable requirements that become effective during the permit term shall satisfy this provision, unless a more detailed schedule is expressly required by the applicable requirement.

(C) A schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance. Such a schedule shall include a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance. This compliance schedule shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject. Any such schedule of compliance shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based.

(iv) A schedule for submission of certified progress reports no less frequently than every 6 months for sources required to have a schedule of compliance to remedy a violation.

(v) The compliance plan content requirements specified in this paragraph shall apply and be included in the acid rain portion of a compliance plan for an affected source, except as specifically superseded by regulations promulgated under title IV of the Act with regard to the schedule and method(s) the source will use to achieve compliance with the acid rain emissions limitations.

~~(9)~~ (10) Requirements for compliance certification, including the following:

(i) A certification of compliance with all applicable requirements by a responsible official consistent with paragraph (d) of this section and section 114(a)(3) of the Act;

(ii) A statement of methods used for determining compliance, including a description of monitoring, recordkeeping, and reporting requirements and test methods;

(iii) A schedule for submission of compliance certifications during the permit term, to be submitted no less frequently than annually, or more frequently if specified by the

underlying applicable requirement or by the permitting authority; and

(iv) A statement indicating the source's compliance status with any applicable enhanced monitoring and compliance certification requirements of the Act.

~~(10)~~ (11) The use of nationally-standardized forms for acid rain portions of permit applications and compliance plans, as required by regulations promulgated under title IV of the Act.

(d) Any application form, report, or compliance certification submitted pursuant to these regulations shall contain certification by a responsible official of truth, accuracy, and completeness. ~~This certification and any other certification required under this part shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.~~ The responsible official shall certify, by his or her signature, the following statement: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision and in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of those individuals who manage the system, or those individuals directly responsible for gathering the information, I certify that the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment for knowing violations."

§70.6 Permit content.

(a) Standard permit requirements. Each permit issued under this part shall include the following elements:

(1) Emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance including, for MACT standards whose compliance date has not occurred, provisions as defined in § 70.7(e)(1)(iii)(A)-(E) of this part.

(i) The permit shall specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based.

(ii) The permit shall state that, where an applicable requirement of the Act is more stringent than an applicable requirement of regulations promulgated under title IV of the Act,

both provisions shall be incorporated into the permit and shall be enforceable by the Administrator.

(iii) If an applicable implementation plan allows a determination of an alternative emission limit at a part 70 source, equivalent to that contained in the plan, to be made in the permit issuance, renewal, or significant ~~modification~~ revision process, and the State elects to use such process, any permit containing such equivalency determination shall contain provisions to ensure that any resulting emissions limit has been demonstrated to be quantifiable, accountable, enforceable, and based on replicable procedures.

(iv) With respect to applicable requirements under section 112(r)(7) of the Act, the inclusion of permit conditions in accordance with regulations promulgated under section 112(r) shall satisfy the requirements of paragraph (a)(1) of this section.

(2) Permit duration. The permitting authority shall issue permits for a fixed term of 5 years in the case of affected sources, and for a term not to exceed 5 years in the case of all other sources. Notwithstanding this requirement, the permitting authority shall issue permits for solid waste incineration units combusting municipal waste subject to standards under section 129(e) of the Act for a period not to exceed 12 years and shall review such permits at least every 5 years.

(3) Monitoring and related recordkeeping and reporting requirements.

(i) Each permit shall contain the following requirements with respect to monitoring:

(A) All emissions monitoring and analysis procedures or test methods required under the applicable requirements, including any procedures and methods promulgated pursuant to sections 504(b) or 114(a)(3) of the Act;

(B) Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as reported pursuant to paragraph (a)(3)(iii) of this section. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement. Recordkeeping provisions may be sufficient to meet the requirements of this paragraph (a)(3)(i)(B); and

(C) As necessary, requirements concerning the use, maintenance, and, where appropriate, installation of monitoring equipment or methods.

(ii) With respect to recordkeeping, the permit shall incorporate all applicable recordkeeping requirements and require~~, where applicable,~~ the following:

(A) Records of required monitoring information that include the following:

(1) The date, place as defined in the permit, and time of sampling or measurements;

(2) The date(s) analyses were performed;

(3) The company or entity that performed the analyses;

(4) The analytical techniques or methods used;

(5) The results of such analyses; and

(6) The operating conditions as existing at the time of sampling or measurement;

(B) Retention of records of all required monitoring data and support information for a period of at least 5 years from the date of the monitoring sample, measurement, report, or application. Support information includes all calibration and maintenance records and all original strip-chart recordings for continuous monitoring instrumentation, and copies of all reports required by the permit.

(iii) With respect to reporting, the permit shall incorporate all applicable reporting requirements and require the following:

(A) Submittal of reports of any required monitoring at least every 6 months. All instances of deviations from permit requirements must be clearly identified in such reports. All required reports must be certified by a responsible official consistent with §70.5(d) of this part.

(B) Prompt reporting of deviations from permit requirements, including those attributable to upset conditions ~~as defined in the permit~~, the probable cause of such deviations, and any corrective actions or preventive measures taken. The permitting authority shall define "prompt" in its part 70 program regulations for each situation which is not already defined in the underlying applicable requirement, and do so in relation to the degree and type of deviation likely to occur and the applicable requirements. Upset conditions shall be defined in the permit.

(4) For affected sources, aA permit condition prohibiting ~~emissions exceeding~~ any affected unit from emitting SO2 in excess of any allowances that the ~~source~~ affected unit lawfully holds under title IV of the Act or the regulations promulgated thereunder.

(i) No permit revision shall be required for increases in emissions that are authorized by allowances acquired pursuant to the acid rain program, provided that such increases do not require a permit revision under any other applicable requirement.

(ii) No limit shall be placed on the number of allowances held by the ~~source~~ unit. The ~~source~~ unit may not, however, use allowances as a defense to noncompliance with any other applicable requirement.

(iii) Any such allowance shall be accounted for according to the procedures established in regulations promulgated under title IV of the Act.

(5) A severability clause to ensure the continued validity of the various permit requirements in the event of a challenge to any portions of the permit.

(6) Provisions stating the following:

(i) The permittee must comply with all conditions of the part 70 permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or ~~modification~~ revision; or for denial of a permit renewal application.

(ii) Need to halt or reduce activity not a defense. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

(iii) The permit may be modified, revoked, reopened, and reissued, or terminated for cause. The filing of a request by the permittee for a permit ~~modification~~ revision, revocation and reissuance, or termination, or of a notification of planned changes or anticipated noncompliance does not stay any permit condition.

(iv) The permit does not convey any property rights of any sort, or any exclusive privilege.

(v) The permittee shall furnish to the permitting authority, within a reasonable time, any information that the permitting authority may request in writing to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit or to determine compliance with the

permit. Upon request, the permittee shall also furnish to the permitting authority copies of records required to be kept by the permit or, for information claimed to be confidential, the permittee may furnish such records directly to the Administrator along with a claim of confidentiality.

(7) A provision to ensure that a part 70 source pays fees to the permitting authority consistent with the fee schedule approved pursuant to §70.9 of this part.

(8) Emissions trading. A provision stating that no permit revision shall be required, under any approved economic incentives, marketable permits, emissions trading and other similar programs or processes approved in an implementation plan or other applicable requirement authorizing such changes to be ~~for changes that are~~ provided for in the permit and where the permit provides for such changes.

(9) Terms and conditions for reasonably anticipated alternative operating scenarios, including terms and conditions resulting from advance approvals, identified by the source in its application as approved by the permitting authority. Such terms and conditions:

(i) Shall require the source, contemporaneously with making a change from one operating scenario to another, to record in a log at the permitted facility a record of the scenario under which it is operating;

(ii) May extend the permit shield described in paragraph (f) of this section to all terms and conditions under each such operating scenario; and

(iii) Must ensure that the terms and conditions of each such alternative scenario meet all applicable requirements and the requirements of this part.

(10) Terms and conditions, if the permit applicant requests them, for the trading of emissions increases and decreases in the permitted facility, to the extent that the applicable requirements provide for trading such increases and decreases without a case-by-case approval of ~~each~~ any emissions trade. Such terms and conditions:

(i) Shall include all terms required under §§70.6(a) and (c) of this part to determine compliance;

(ii) May extend the permit shield described in paragraph (f) of this section to all terms and conditions that allow such increases and decreases in emissions; and

(iii) Must meet all applicable requirements and requirements of this part.

(b) Federally-enforceable requirements.

(1) All terms and conditions in a part 70 permit, including any provisions designed to limit a source's potential to emit, are enforceable by the Administrator and citizens under the Act.

(2) Notwithstanding paragraph (b)(1) of this section, the permitting authority shall specifically designate as not being federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements. Terms and conditions so designated are not subject to the requirements of §§70.6, 70.7, or 70.8 of this part, other than those contained in paragraph (b) of this section.

(c) Compliance requirements. All part 70 permits shall contain the following elements with respect to compliance:

(1) Consistent with paragraph (a)(3) of this section, ~~compliance certification,~~ testing, monitoring, ~~recordkeeping,~~ reporting, and ~~recordkeeping~~ compliance certification requirements sufficient to assure compliance with the terms and conditions of the permit. Any document (including reports) required ~~to be submitted~~ by a part 70 permit shall contain a certification by a responsible official that meets the requirements of §70.5(d) of this part.

(2) Inspection and entry requirements that require that, upon presentation of credentials and other documents as may be required by law, the permittee shall allow the permitting authority or an authorized representative to perform the following:

(i) Enter upon the permittee's premises where a part 70 source is located or emissions-related activity is conducted, or where records must be kept under the conditions of the permit;

(ii) Have access to and copy, at reasonable times, any records that must be kept under the conditions of the permit;

(iii) Inspect at reasonable times any facilities, equipment (including monitoring and air pollution control equipment), practices, or operations regulated or required under the permit; and

(iv) As authorized by the Act, sample or monitor at reasonable times substances or parameters for the purpose of assuring compliance with the permit or applicable requirements.

(3) A schedule of compliance consistent with §70.5(c)~~(8)~~(9) of this part.

(4) Progress reports consistent with an applicable schedule of compliance and §70.5(c)~~(8)~~(9) of this part to be submitted at least semiannually, or at a more frequent period if specified in the applicable requirement or by the permitting authority. Such progress reports shall contain the following:

(i) Dates for achieving the activities, milestones, or compliance required in the schedule of compliance, and dates when such activities, milestones or compliance were achieved; and

(ii) An explanation of why any dates in the schedule of compliance were not or will not be met, and any preventive or corrective measures adopted.

(5) Requirements for compliance certification with terms and conditions contained in the permit, including emission limitations, standards, or work practices. Permits shall include each of the following:

(i) The frequency (not less than annually or such more frequent periods as specified in the applicable requirement or by the permitting authority) of submissions of compliance certifications;

(ii) In accordance with §70.6(a)(3) of this part, a means for monitoring the compliance of the source with its emissions limitations, standards, and work practices;

(iii) A requirement that the compliance certification include the following:

(A) The identification of each term or condition of the permit that is the basis of the certification;

(B) The compliance status;

(C) Whether compliance was continuous or intermittent;

(D) The method(s) used for determining the compliance status of the source, currently and over the reporting period consistent with paragraph (a)(3) of this section; and

(E) Such other facts as the permitting authority may require to determine the compliance status of the source;

(iv) A requirement that all compliance certifications be submitted to the Administrator as well as to the permitting authority; and

(v) Such additional requirements as may be specified pursuant to sections 114(a)(3) and 504(b) of the Act.

(6) Such other provisions as the permitting authority may require.

(d) General permits.

(1) The permitting authority may, after notice and opportunity for public participation provided under §70.7~~(h)~~ (k) of this part, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to other part 70 permits and shall identify criteria by which sources may qualify for the general permit. To sources that qualify, the permitting authority shall grant the conditions and terms of the general permit. Notwithstanding the shield provisions of paragraph (f) of this section, the source shall be subject to enforcement action for operation without a part 70 permit if the source is later determined not to qualify for the conditions and terms of the general permit. General permits shall not be authorized for affected sources under the acid rain program unless otherwise provided in regulations promulgated under title IV of the Act.

(2) Part 70 sources that would qualify for a general permit must apply to the permitting authority for coverage under the terms of the general permit or must apply for a part 70 permit consistent with §70.5 of this part. The permitting authority may, in the general permit, provide for applications which deviate from the requirements of §70.5 of this part, provided that such applications meet the requirements of title V of the Act, and include all information necessary to determine qualification for, and to assure compliance with, the general permit. Without repeating the public participation procedures required under §70.7~~(h)~~ (k) of this part, the permitting authority may grant a source's request for authorization to operate under a general permit, ~~but~~ and such a grant shall ~~not~~ be a final permit action for purposes of judicial review.

(3) The permitting authority shall provide timely notice to the public of any authorization given to a source to operate under the terms of a general permit. Such notice may be made on a monthly, summarized basis covering all sources receiving authorization since the time of the last notice.

(e) Temporary sources. The permitting authority may issue a single permit authorizing emissions from similar operations by the same source owner or operator at multiple temporary locations. The operation must be temporary and involve at least one change of location during the term of the permit. No affected source shall be permitted as a temporary source. Permits for temporary sources shall include the following:

(1) Conditions that will assure compliance with all applicable requirements at all authorized locations;

(2) Requirements that the owner or operator notify the permitting authority at least 10 days in advance of each change in location; and

(3) Conditions that assure compliance with all other provisions of this section.

(f) Permit shield.

(1) Except as provided in this part, the permitting authority may expressly include in a part 70 permit a provision stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance, provided that:

(i) Such applicable requirements are included and are specifically identified in the permit; or

(ii) The permitting authority, in acting on the permit application or revision, determines in writing that other requirements specifically identified are not applicable to the source, and the permit includes the determination or a concise summary thereof.

(2) A part 70 permit that does not expressly state that a permit shield exists shall be presumed not to provide such a shield.

(3) Nothing in this paragraph or in any part 70 permit shall alter or affect the following:

(i) The provisions of sections 112(r)(9) and 303 of the Act (emergency orders), including the authority of the Administrator under ~~that~~ those sections;

(ii) The liability of an owner or operator of a source for any violation of applicable requirements prior to or at the time of permit issuance;

(iii) The applicable requirements of the acid rain program, consistent with section 408(a) of the Act; or

(iv) The ability of EPA to obtain information from a source pursuant to section 114 of the Act.

(g) Emergency provision.

(1) Definition. An "emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in

emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.

(2) ~~Effect of an emergency.~~ ~~An emergency constitutes~~ A State may provide for an affirmative defense ~~to~~ available in an action brought for noncompliance with ~~such~~ technology-based emission limitations other than federally-promulgated requirements. Such an affirmative defense may be available only if the conditions of paragraph (g)(3) of this section are met.

(3) The affirmative defense of emergency shall be demonstrated through properly signed, contemporaneous operating +logs, or other relevant evidence that:

(i) An emergency occurred and that the permittee can identify the cause(s) of the emergency;

(ii) The permitted facility was at the time being properly operated;

(iii) During the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements in the permit; and

(iv) The permittee submitted notice of the emergency to the permitting authority within 2 working days of the time when emission limitations were exceeded due to the emergency. This notice fulfills the requirement of paragraph (a)(3)(iv)(B) of this section. This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.

(4) In any enforcement proceeding, the permittee seeking to establish the occurrence of an emergency has the burden of proof.

(5) This provision is in addition to any emergency or upset provision contained in any applicable requirement.

§70.7 Permit issuance, renewal, reopenings, and revisions.

(a) Action on application.

(1) The program shall provide that a ~~A~~ permit, permit ~~modification~~ revision, or renewal may be issued only if all of the following conditions have been met:

(i) The permitting authority has received a complete application for a permit, permit ~~modification~~ revision, or permit renewal, except that a complete application need not be received before issuance of a general permit under §70.6(d) of this part;

(ii) ~~Except for modifications qualifying for minor permit modification procedures under §§70.7(e)(2) and (3) of this part, t~~ The permitting authority has complied with the applicable requirements for public participation under paragraph (1) ~~(h)~~ of this section;

(iii) The permitting authority has complied with the requirements for notifying and responding to affected States under §70.8(b) of this part;

(iv) Except as provided in paragraph (a)(7) of this section, t~~T~~he conditions of the permit provide for compliance with all applicable requirements and the requirements of this part; and

(v) Except for the provisions of paragraph (e) of this section regarding expedited permit revisions, t~~T~~he Administrator has received a copy of the proposed permit and any notices required under §§70.8(a) and 70.8(b) of this part, and has not objected to issuance of the permit under §70.8(c) of this part within the time period specified therein.

(2) Except as provided under the initial transition plan provided for under §70.4(b)(11) of this part or under regulations promulgated under title IV or title V of the Act for the permitting of affected sources under the acid rain program, the program shall provide that the permitting authority take final action on each permit application (including a request for permit ~~modification~~ revision or renewal) within 18 months, or such lesser time approved by the Administrator, after receiving a complete application. However, the program shall provide that the permitting authority shall take final action within 12 months on any complete permit application containing an early reductions demonstration.

(3) The program shall also contain reasonable procedures to ensure priority is given to taking action on applications for construction or modification under title I, parts C and D of the Act.

(4) For permit issuance and renewals, the program shall provide that t~~T~~he permitting authority ~~shall~~ promptly ~~provide notice to~~ notify the applicant of whether the application is complete. Unless the permitting authority requests additional information or ~~otherwise~~ notifies the applicant of incompleteness within 60 days of receipt of an application for permit issuance or renewal, the application shall be deemed complete. ~~For modifications processed through minor permit modification procedures, such as those in paragraphs (e)(2) and (3) of this section, the State program need not require a completeness determination.~~ For significant, minor, or de minimis permit revisions, the program shall provide that the permitting

authority promptly notify the applicant if the application is incomplete.

(5) Except for expedited permit revisions processed under paragraph (e) of this section, the program shall provide that for each draft permit t~~T~~he permitting authority shall provide a statement that sets forth the legal and factual basis for draft permit conditions (including references to the applicable statutory or regulatory provisions). The permitting authority shall send this statement to EPA and to any other person who requests it.

(6) The program shall provide that the submittal of a complete application shall not affect the requirement that any source have a preconstruction permit under title I of the Act.

(7) The program shall provide that any new applicable requirement approved or promulgated by EPA that becomes applicable to a source prior to issuance of a draft permit (whether during issuance or renewal) shall be included in the draft permit. If any new applicable requirement becomes applicable after issuance of a draft permit, and the requirement is not reflected in the draft permit, the permit may be issued without incorporating the new applicable requirement, provided that the permitting authority institutes proceedings no later that ~~t~~the date of permit issuance to reopen the permit consistent with paragraph (i) of this section to incorporate the new applicable requirement and that the permit contains a statement that it is being reopened for this purpose.

(b) Requirement for a permit. Except as provided in the following sentence, ~~§70.4(b)(12)(i) of this part, and paragraph and (3)(v) of this section,~~ no part 70 source may operate after the time that it is required to submit a timely and complete application under an approved permit program, except in compliance with a permit issued under a part 70 program. The program shall provide that, if a part 70 source submits a timely and complete application for permit issuance (including for renewal), the source's failure to have a part 70 permit is not a violation of this part until the permitting authority takes final action on the permit application, except as noted in this section. This protection shall cease to apply if, subsequent to the completeness determination made pursuant to paragraph (a)(4) of this section, and as required by §70.5(a)(2) of this part, the applicant fails to submit by the deadline specified in writing by the permitting authority any additional information identified as being needed to process the application.

(c) Permit renewal and expiration.

(1) The program shall provide that:

(i) Permits being renewed are subject to the same procedural requirements, including those for public participation, affected State and EPA review, that apply to initial permit issuance; and

(ii) Permit expiration terminates the source's right to operate unless a timely and complete renewal application has been submitted consistent with paragraph (b) of this section and §70.5(a)(1)(iii) of this part.

(2) If the permitting authority fails to act in a timely way on a permit renewal, EPA may invoke its authority under section 505(e) of the Act to terminate or revoke and reissue the permit.

~~(d) Administrative permit amendments.~~

~~(1) An "administrative permit amendment" is a permit revision that:~~

~~(i) Corrects typographical errors;~~

~~(ii) Identifies a change in the name, address, or phone number of any person identified in the permit, or provides a similar minor administrative change at the source;~~

~~(iii) Requires more frequent monitoring or reporting by the permittee;~~

~~(iv) Allows for a change in ownership or operational control of a source where the permitting authority determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittee has been submitted to the permitting authority;~~

~~(v) Incorporates into the part 70 permit the requirements from preconstruction review permits authorized under an EPA-approved program, provided that such a program meets procedural requirements substantially equivalent to the requirements of §§70.7 and 70.8 of this part that would be applicable to the change if it were subject to review as a permit modification, and compliance requirements substantially equivalent to those contained in §70.6 of this part; or~~

~~(vi) Incorporates any other type of change which the Administrator has determined as part of the approved part 70 program to be similar to those in paragraphs (d)(1)(i) through (iv) of this section.~~

~~(2) Administrative permit amendments for purposes of the acid rain portion of the permit shall be governed by regulations promulgated under title IV of the Act.~~

~~(3) Administrative permit amendment procedures. An administrative permit amendment may be made by the permitting authority consistent with the following:~~

~~(i) The permitting authority shall take no more than 60 days from receipt of a request for an administrative permit amendment to take final action on such request, and may incorporate such changes without providing notice to the public or affected States provided that it designates any such permit revisions as having been made pursuant to this paragraph.~~

~~(ii) The permitting authority shall submit a copy of the revised permit to the Administrator.~~

~~(iii) The source may implement the changes addressed in the request for an administrative amendment immediately upon submittal of the request.~~

~~(4) The permitting authority may, upon taking final action granting a request for an administrative permit amendment, allow coverage by the permit shield in §70.6(f) of this part for administrative permit amendments made pursuant to paragraph (d)(1)(v) of this section which meet the relevant requirements of §§70.6, 70.7, and 70.8 of this part for significant permit modifications.~~

~~(e) Permit modification. A permit modification is any revision to a part 70 permit that cannot be accomplished under the program's provisions for administrative permit amendments under paragraph (d) of this section. A permit modification for purposes of the acid rain portion of the permit shall be governed by regulations promulgated under title IV of the Act.~~

~~(1) Program description. The State shall provide adequate, streamlined, and reasonable procedures for expeditiously processing permit modifications. The State may meet this obligation by adopting the procedures set forth below or ones substantially equivalent. The State may also develop different procedures for different types of modifications depending on the significance and complexity of the requested modification, but EPA will not approve a part 70 program that has modification procedures that provide for less permitting authority, EPA, or affected State review or public participation than is provided for in this part.~~

~~(2) Minor permit modification procedures.~~

~~(i) Criteria.~~

~~(A) Minor permit modification procedures may be used only for those permit modifications that:~~

~~(1) Do not violate any applicable requirement;~~

~~(2) Do not involve significant changes to existing monitoring, reporting, or recordkeeping requirements in the permit;~~

~~(3) Do not require or change a case-by-case determination of an emission limitation or other standard, or a source-specific determination for temporary sources of ambient impacts, or a visibility or increment analysis;~~

~~(4) Do not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject. Such terms and conditions include:~~

~~(A) A federally enforceable emissions cap assumed to avoid classification as a modification under any provision of title I; and~~

~~(B) An alternative emissions limit approved pursuant to regulations promulgated under section 112(i)(5) of the Act;~~

~~(5) Are not modifications under any provision of title I of the Act; and~~

~~(6) Are not required by the State program to be processed as a significant modification.~~

~~(B) Notwithstanding paragraphs (e)(2)(i)(A) and (e)(3)(i) of this section, minor permit modification procedures may be used for permit modifications involving the use of economic incentives, marketable permits, emissions trading, and other similar approaches, to the extent that such minor permit modification procedures are explicitly provided for in an applicable implementation plan or in applicable requirements promulgated by EPA.~~

~~(ii) Application. An application requesting the use of minor permit modification procedures shall meet the requirements of §70.5(c) of this part and shall include the following:~~

~~(A) A description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs;~~

~~(B) The source's suggested draft permit;~~

~~(C) Certification by a responsible official, consistent with §70.5(d) of this part, that the proposed modification meets the criteria for use of minor permit modification procedures and a request that such procedures be used; and~~

~~(D) Completed forms for the permitting authority to use to notify the Administrator and affected States as required under §70.8 of this part.~~

~~(iii) EPA and affected State notification. Within 5 working days of receipt of a complete permit modification application, the permitting authority shall meet its obligation under §§70.8(a)(1) and (b)(1) of this part to notify the Administrator and affected States of the requested permit modification. The permitting authority promptly shall send any notice required under §70.8(b)(2) of this part to the Administrator.~~

~~(iv) Timetable for issuance. The permitting authority may not issue a final permit modification until after EPA's 45-day review period or until EPA has notified the permitting authority that EPA will not object to issuance of the permit modification, whichever is first, although the permitting authority can approve the permit modification prior to that time. Within 90 days of the permitting authority's receipt of an application under minor permit modification procedures or 15 days after the end of the Administrator's 45-day review period under §70.8(c) of this part, whichever is later, the permitting authority shall:~~

~~(A) Issue the permit modification as proposed;~~

~~(B) Deny the permit modification application;~~

~~(C) Determine that the requested modification does not meet the minor permit modification criteria and should be reviewed under the significant modification procedures; or~~

~~(D) Revise the draft permit modification and transmit to the Administrator the new proposed permit modification as required by §70.8(a) of this part.~~

~~(v) Source's ability to make change.~~

~~The State program may allow the source to make the change proposed in its minor permit modification application immediately after it files such application. After the source makes the change allowed by the preceding sentence, and until the permitting authority takes any of the actions specified in paragraphs (c)(2)(v)(A) through (C) of this section, the source must comply with both the applicable requirements governing the change and the proposed permit terms and conditions. During this time period, the source need not comply with the existing permit terms and conditions it seeks to modify. However, if the source~~

~~fails to comply with its proposed permit terms and conditions during this time period, the existing permit terms and conditions it seeks to modify may be enforced against it.~~

~~(vi) Permit shield. The permit shield under §70.6(f) of this part may not extend to minor permit modifications.~~

~~(3) Group processing of minor permit modifications. Consistent with this paragraph, the permitting authority may modify the procedure outlined in paragraph (e)(2) of this section to process groups of a source's applications for certain modifications eligible for minor permit modification processing.~~

~~(i) Criteria. Group processing of modifications may be used only for those permit modifications:~~

~~(A) That meet the criteria for minor permit modification procedures under paragraph (e)(2)(i)(A) of this section; and~~

~~(B) That collectively are below the threshold level approved by the Administrator as part of the approved program. Unless the State sets an alternative threshold consistent with the criteria set forth in paragraphs (1) and (2), this threshold shall be 10 percent of the emissions allowed by the permit for the emissions unit for which the change is requested, 20 percent of the applicable definition of major source in §70.2 of this part, or 5 tons per year, whichever is least. In establishing any alternative threshold, the State shall consider:~~

~~(1) Whether group processing of amounts below the threshold levels reasonably alleviates severe administrative burdens that would be imposed by immediate permit modification review, and~~

~~(2) Whether individual processing of changes below the threshold levels would result in trivial environmental benefits.~~

~~(ii) Application. An application requesting the use of group processing procedures shall meet the requirements of §70.5(c) of this part and shall include the following:~~

~~(A) A description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs.~~

~~(B) The source's suggested draft permit.~~

~~(C) Certification by a responsible official, consistent with §70.5(d) of this part, that the proposed modification meets the criteria for use of group processing procedures and a request that such procedures be used.~~

~~(D) A list of the source's other pending applications awaiting group processing, and a determination of whether the~~

~~requested modification, aggregated with these other applications, equals or exceeds the threshold set under paragraph (e)(3)(i)(B) of this section.~~

~~(E) Certification, consistent with §70.5(d) of this part, that the source has notified EPA of the proposed modification. Such notification need only contain a brief description of the requested modification.~~

~~(F) Completed forms for the permitting authority to use to notify the Administrator and affected States as required under §70.8 of this part.~~

~~(iii) EPA and affected State notification. On a quarterly basis or within 5 business days of receipt of an application demonstrating that the aggregate of a source's pending applications equals or exceeds the threshold level set under paragraph (e)(3)(i)(B) of this section, whichever is earlier, the permitting authority promptly shall meet its obligation under paragraphs (a)(1) and (b)(1) of §70.8 of this part to notify the Administrator and affected States of the requested permit modifications. The permitting authority shall send any notice required under §70.8(b)(2) of this part to the Administrator.~~

~~(iv) Timetable for issuance. The provisions of paragraph (e)(2)(iv) of this section shall apply to modifications eligible for group processing, except that the permitting authority shall take one of the actions specified in paragraphs (e)(2)(iv)(A) through (D) of this section within 180 days of receipt of the application or 15 days after the end of the Administrator's 45-day review period under §70.8(c) of this part, whichever is later.~~

~~(v) Source's ability to make change. The provisions of paragraph (e)(2)(v) of this section shall apply to modifications eligible for group processing.~~

~~(vi) Permit shield. The provisions of paragraph (e)(2)(vi) of this section shall also apply to modifications eligible for group processing.~~

~~(4) Significant modification procedures.~~

~~(i) Criteria. Significant modification procedures shall be used for applications requesting permit modifications that do not qualify as minor permit modifications or as administrative amendments. The State program shall contain criteria for determining whether a change is significant. At a minimum, every significant change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms or conditions shall be considered significant. Nothing herein shall be construed to preclude the permittee from~~

~~making changes consistent with this part that would render existing permit compliance terms and conditions irrelevant.~~

~~(ii) The State program shall provide that significant permit modifications shall meet all requirements of this part, including those for applications, public participation, review by affected States, and review by EPA, as they apply to permit issuance and permit renewal. The permitting authority shall design and implement this review process to complete review on the majority of significant permit modifications within 9 months after receipt of a complete application.~~

(d) General Requirements For Permit Revisions.

(1) Changes requiring permit revision. Changes at a source requiring a revision of a part 70 permit are those that:

(i) Could not be operated without violating an existing permit term; or

(ii) Render the source subject to an applicable requirement to which the source has not been previously subject.

(2) Program provisions. The program shall provide for adequate, streamlined, and reasonable procedures for expeditiously processing permit revisions. The State may meet this obligation by adopting the procedures set forth in §§ 70.7(e)(1)(ii), (e)(1)(iii), (e)(2)(ii), (e)(3)(ii), (f)(2), (g)(2), and (h)(2) of this part or ones that are approved by EPA as substantially equivalent.

(3) Exemption for acid rain. A permit revision, including an administrative amendment, for purposes of the acid rain portion of the permit shall be governed by regulations promulgated under title IV of the Act.

(4) Application requirements. Any application for a permit revision, or a notice required by paragraphs (e)(1)(ii)(B) or (e)(2)(ii)(A) of this section, shall contain the following.

(i) A description of the change and the emissions resulting from the change.

(ii) Terms and conditions necessary to assure compliance with the permit content requirements of §§ 70.6(a) and (c) of this part. For notice-only permit revisions the permit application need only contain an identification of the applicable requirements to which the source is newly subject as a result of the change, including the applicable emission limits and standards, applicable monitoring and test methods, and applicable recordkeeping and reporting requirements.

(iii) A schedule of compliance, if applicable.

(iv) A certification consistent with § 70.5(c)(9)(i) of this part that the source is in compliance with all applicable requirements affected by the change, and with the requirements of this part.

(5) The source may not operate the change until the permitting authority has revised the part 70 permit.

(e) Expedited permit revisions. Other than for the periodic notification provisions of paragraph (1) of this section, the following permit revisions may be made without opportunity for review by the public, EPA, or affected States and without opportunity for citizen petitions until permit renewal.

(1) Administrative permit amendments. The permitting authority may designate in its program, subject to approval by the Administrator as part of the approved part 70 program, certain categories of changes, other than those described in paragraph (g)(1) of this section, as changes that may be processed as administrative amendments.

(i) Scope. An administrative permit amendment is a permit revision that:

(A) Corrects typographical errors;

(B) Makes a minor administrative change, such as a change in the name, address, or phone number of any person identified in the permit;

(C) Requires more frequent monitoring or reporting than already required in the permit;

(D) Allows for a change in ownership or operational control of a source where the permitting authority determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittee has been submitted to the permitting authority;

(E) Incorporates a federally-promulgated standard pursuant to section 112 of the Act promulgated after permit issuance, or incorporates a MACT determination made under regulations implementing section 112(l) of the Act; or

(F) Incorporates any other type of change which the State determines, and the Administrator approves as part of the approved part 70 program, to be similar to those in paragraphs (e)(1)(i)(A) through (D) of this section.

(ii) General administrative permit amendment procedures. The program shall provide that, other than for incorporating

requirements of section 112 of the Act, administrative permit amendments are made consistent with the following.

(A) The permittee or the permitting authority may initiate the administrative incorporation of a change into the permit by issuing a notice describing what information in the part 70 permit is affected by such a change and sending the notice to the permitting authority or the permittee as appropriate.

(B) Where the source issues a notice, the permit shall be revised upon mailing by certified mail, delivery by hand or express service, or transmission by other equally reliable means of a notice by the source to the permitting authority. To the extent applicable, the notice shall meet the requirements of paragraph (d)(5) of this section.

(C) Where the permitting authority issues a notice, the permit shall be revised upon attachment of the notice to the permit.

(iii) Administrative amendment procedures for incorporating requirements of section 112 of the Act. An administrative amendment as described in paragraph (e)(1)(i)(E) of this section shall be made using the following procedures.

(A) After receipt of the initial notification required under the section 112 standard, the permitting authority shall prepare a proposed addendum to the source's part 70 permit. The addendum shall contain the following:

(1) A statement that the section 112 standard is an applicable requirement for the permitted source.

(2) A schedule of compliance, consistent with § 70.5(c)(9) of this part.

(3) A requirement to submit any implementation plan or report required under the standard.

(4) A requirement to apply for a de minimis or minor permit revision, as appropriate, in accordance with paragraph (j)(2)(ii) of this section by the deadline for the compliance statement required by the section 112 standard, unless the source is exempted from this requirement by the rulemaking promulgating the applicable section 112 standard. If the compliance statement deadline is within 6 months of the end of the permit term, the source may incorporate its application for the minor permit revision into its application for permit renewal in lieu of applying for a revision by the compliance statement deadline.

(B) The permitting authority shall make available for public review and comment for at least 30 days a list of sources whose permits are reopened under this paragraph. Notice of the

availability of the list shall be given by such time as to assure that any additional administrative amendments for sources subject to the standard and not on the list take effect within 18 months after promulgation of the section 112 standard. If after considering public comment, the permitting authority determines that permits for other sources must be reopened to incorporate section 112 standards, it shall notify such sources of its intent to do so at least 30 days before reopening the permit, and may use the provisions of this paragraph.

(C) The proposed addendum shall become effective not later than 18 months after promulgation of the section 112 standard. The permitting authority shall attach a copy of the addendum to the existing part 70 permit and shall provide the Administrator with a copy.

(D) The permit shield under §70.6(f) of this part may not extend to administrative amendments processed under paragraph (e)(1)(iii) of this section.

(2) Notice-only permit revisions. The permitting authority may designate in its program, subject to approval by the Administrator as part of the approved part 70 program, certain categories of changes, other than those described in paragraph (g)(1) of this section, as changes that may be processed as notice-only permit revisions. Notice-only permit revisions may be made without prior permitting authority approval as provided in paragraph (e)(2)(ii)(B) of this section.

(i) Scope. A change may be designated as eligible for a notice-only revision if the change is not subject to a prior State review program and, if an applicable requirement newly applies, all the requirements to which the source is subject as a result of the change are taken directly from an applicable requirement without the creation of any source-specific requirements. Notwithstanding the provisions of § 70.7(g)(1)(i)(G) of this section, the following monitoring changes may be made through notice-only procedures.

(A) Incorporation of alternative testing or compliance monitoring requirements that have received EPA approval under parts 60, 61, or 63 of this chapter.

(B) Incorporation into the permit of newly-applicable monitoring or testing requirements specified in parts 60, 61, or 63 of this chapter that apply as the result of a change in applicability of those parts to the facility, including removal from the permit of monitoring or testing requirements that no longer apply as a result of the change in applicability, provided the change of requirements meets the criteria for notice-only procedures under § 70.7(e)(2)(i)(A) of this section.

(C) Incorporation into the permit of test methods or monitoring requirements specified in an applicable requirement which the source may use under the applicable requirement in lieu of the testing or monitoring requirements contained in the permit.

(ii) Notice-only permit revision procedures. For notice-only permit revisions, the program shall provide the following.

(A) The source shall submit a notice consistent with paragraph (d)(5) of this section to the permitting authority upon operating the change.

(B) Mailing of the notice by certified mail, delivery by hand or express service, or transmission by other equally reliable means, shall revise the permit.

(3) De minimis permit revisions. (i) Scope. The permitting authority may designate in its program, subject to approval by the Administrator as part of the approved part 70 program, certain categories of changes that may be processed as de minimis permit revisions. Programs that establish a de minimis class of changes shall contain a determination that meets the requirements of paragraphs (3)(iii) and (iv) of this section. Notwithstanding the requirements of § 70.7(g)(1)(i)(G) of this section, the following monitoring changes may be made using de minimis procedures.

(A) Changes to a parameter range required to be used for compliance monitoring of a standard or limitation under part 63 of this chapter, provided the new range has been established using performance tests based on EPA-approved test methods specified in the relevant applicable requirement.

(B) Changes to compliance monitoring requirements for units or modifications which the program has established, and EPA has approved, as de minimis under this section.

(ii) De minimis permit revision procedures. For de minimis permit revisions, the program shall provide for the following.

(A) The source shall submit an application to the permitting authority consistent with paragraph (d)(5) of this section.

(B) The permit shall be revised by attaching an addendum to the permit. The addendum may consist of a separate part 70 permit revision or the relevant portions of a minor NSR permit. The permitting authority shall make any changes it deems appropriate to the addendum to make it consistent with § 70.6 of this part prior to attaching it to the permit. The permitting authority shall provide notice to the permittee upon attachment of the addendum to the permit.

(iii) De minimis determination. The de minimis determination required by paragraph (e)(3)(i) of this section shall contain the following information:

(A) A description of the changes proposed for a de minimis category.

(B) A demonstration that providing public review, EPA review, and/or citizen petition for de minimis changes would yield a benefit of trivial value based on one or more of the following criteria:

(1) Monitoring or other part 70 permit terms needed to assure compliance involve little or no judgment; or

(2) The changes are below one or more defined cutoff levels that the permitting authority has shown to be de minimis based on both of the following criteria:

(A) The de minimis cutoff level is substantially below the applicable major source thresholds and is well below the applicable significance levels at which PSD or nonattainment NSR for major sources or major modifications applies; and

(B) The ambient environmental impact from the changes is trivial with respect to all of the following considerations that are relevant:

(i) The effect of de minimis changes on the ability of attainment areas to remain attainment and the ability of nonattainment areas to achieve attainment status;

(ii) The effect on consumption of increments for PSD;

(iii) The effect of VOC or NOx emissions from de minimis changes on downwind ozone transport regions;

(iv) The impact of de minimis changes on class I areas, and;

(v) The impact of de minimis changes on areas of special concern such as schools, hospitals, or areas with a history of environmental problems or public concern.

(iv) Changes that may not be included in a de minimis category. The permitting authority may not include in a de minimis category the following types of changes:

(A) Changes subject to the significant permit revision procedures of § 70.7(g) of this part;

(B) Limitations on the potential to emit of a facility to avoid major source requirements; or

(C) Any physical change or change in the method of operation where the prospective emission increases, along with other emission increases elsewhere at the source that result from the changes, would be a significant emissions increase of a pollutant subject to regulation under part C or D of title I of the Act.

(f) Minor permit revisions. (1) Scope. The permitting authority shall designate in its program, subject to approval by the Administrator as part of the approved part 70 program, all categories of changes, other than those changes described in paragraph (g)(1) of this section or those changes eligible under the approved State program for expedited permit revision procedures under paragraph (e) of this section, as changes that must be processed as minor permit revisions.

(2) Minor permit revision procedures. For minor permit revisions, the program must provide the following.

(i) A requirement that the source submit an application to the permitting authority consistent with paragraph (d)(5) of this section.

(ii) A public comment period of at least 21 days prior to issuance of the revised permit.

(iii) A period of 45 days for EPA to review the proposed permit revision prior to issuance of the revised permit, except as provided in paragraph (f)(2)(iv) of this section. The EPA review period must begin at the start of the public comment period referred to in the previous paragraph.

(iv) If neither the public nor EPA has submitted written adverse comments by the end of the public comment period referred to in paragraph (f)(2)(ii) of this section, the remainder of the EPA review period will be deemed to be waived, and the 60-day period for citizens to petition EPA under § 70.8(d)(1) of this part will begin the day following the end of the public comment period. The notice to the public requesting comment must state that the EPA review period may be shortened and the citizen petition period will begin as described in the preceding sentence.

(v) If the public or EPA has submitted written adverse comments by the end of the public comment period, the EPA review period shall remain 45 days, except that EPA may end its review period before the end of the 45-day review period by notifying in writing the permitting authority and anyone who commented on the permit revision that it does not object to the proposed permit, in which case, the 60-day period for citizens to petition EPA under § 70.8(d)(1) of this part shall begin when the permitting authority provides notice to the public under paragraph

(f)(2)(vi) of this section or after the expiration of the Administrator's 45-day review period, whichever is earlier.

(vi) The permitting authority must provide notice to the public through an adequate means, such as a telephone hotline or computer bulletin board, as to whether the EPA review period has been reduced from 45 days and whether the 60-day period for filing a citizen petition has been advanced under paragraphs (f)(2)(iv) or (v) of this section.

(vii) The existing part 70 permit may be revised by attaching to it an addendum, which may consist of a separate part 70 permit revision or the relevant portions of a minor NSR permit. The permitting authority may make any changes it deems appropriate to the addendum to make it consistent with § 70.6 of this part prior to attaching it to the permit. The permitting authority must notify the permittee when it has attached the addendum to the permit.

(g) Significant permit revisions. The permitting authority shall designate in its program changes subject to significant permit revision procedures.

(1) Scope. (i) Changes subject to significant permit revisions shall include at a minimum the following:

(A) Any change subject to major NSR, including the establishment or revision of plantwide applicability limits under major NSR.

(B) Any physical change or change in the method of operation of a part 70 source associated with a project where the prospective emissions increases from such changes, considered by themselves plus any emissions increases due to an increase in production rates at other units that will result directly from the change, would exceed the major source cutoff level for any pollutant subject to regulation under part C or D or section 112 of the Act.

(C) Any change under regulations implementing section 112(g) of the Act.

(D) Establishment or revision of a MACT determination made under regulations implementing section 112(j) of the Act.

(E) Establishment or revision of alternative emission limits established under regulations implementing section 112(i)(5) of the Act.

(F) Establishment or revision of alternative requirements established under § 70.6(a)(1)(iii) of this part, or establishment or revision of substitute section 112 standards, if accomplished solely through a part 70 revision process,

established pursuant to a program approved by EPA for such purpose under section 112(l) of the Act.

(G) The following changes to monitoring or testing requirements.

(1) Removal or alteration of a compliance monitoring requirement.

(2) Any adoption of an alternative test method or any change to a test method.

(3) Any change involving monitoring a different parameter where monitoring of a parameter is used to demonstrate compliance.

(4) Adoption of alternative compliance monitoring requirements for the purpose of streamlining multiple requirements into a single requirement for which an equivalency demonstration must be reviewed by the Administrator.

(H) (reserved for source-specific SIP revisions).

(I) Establishment of a new applicable requirement with which to demonstrate compliance in lieu of demonstrating compliance with other equally or less stringent applicable requirements (e.g., streamlining of multiple requirements into a single requirement).

(J) Any other category of changes the permitting authority determines in its program to have a similarly significant environmental impact.

(ii) Notwithstanding the provisions of paragraph (g)(1)(i)(G) of this section, the following changes do not have to be subject to significant permit revisions.

(A) Any change to a monitoring requirement for a case-by-case emission limit established in a minor NSR permit, except that this provision shall not apply to changes made in the NSR process to monitoring requirements established under applicable requirements other than NSR.

(B) Alternative testing or monitoring requirements that have received EPA approval pursuant to regulations implementing section 111 or 112 of the Act.

(C) Any change to an existing monitoring requirement in the permit which is necessary to comply with a standard under section 111 or 112 of the Act.

(D) Any change to a monitoring requirement that is preauthorized in the existing part 70 permit for that emissions unit.

(E) Adoption of an alternative test method or monitoring requirement already authorized for that pollutant and source category in an applicable requirement.

(F) Any change to a different parameter that is derived from results based upon performance testing required by an applicable requirement.

(2) Significant permit revision procedures. For significant permit revisions, the program shall provide the following.

(i) The source shall submit a permit application to the permitting authority consistent with paragraph (d)(5) of this section.

(ii) Significant permit revisions shall be issued pursuant to procedural requirements applicable to initial permit issuance in paragraph (a)(1) of this section, except that, notwithstanding the provisions of paragraph (a)(2) of this section, the permitting authority shall complete issuance of the majority of these changes within 6 months after receipt of a complete application.

(h) Streamlined permit revision procedures - merged programs. (1) For a change at a source for which a part 70 permit revision will be required and that is also subject to a State review program, the part 70 permit revision process may be combined with, or run concurrently with, the State review program. Such a combining of programs shall be termed a "merged" process. State review programs include major or minor NSR, any source-specific SIP revision, actions subject to public and EPA review under regulations implementing section 112(g) of the Act, or any other category of changes subject to public and EPA review.

(2) Merged process procedures. For each change at a source for which a part 70 permit revision will be required and that is also subject to a State review program, the program may provide for the following.

(i) The source shall submit to the permitting authority an application for a part 70 permit revision, consistent with paragraph (d)(5) of this section, along with the application for the change under the State review program.

(ii) An adequate opportunity is afforded for review by the public and affected States of any significant or minor permit

revision during the public review opportunity of the State review program.

(iii) An adequate opportunity is afforded for EPA review and objection of any significant or minor permit revision. Such review may begin on or after the beginning of the public comment period and shall end prior to revision of the part 70 permit.

(iv) Upon conclusion of the merged process for a change, the permitting authority shall revise the part 70 permit by immediately attaching to the part 70 permit an addendum which contains the revisions to the part 70 permit. The addendum may consist of any minor or major NSR permit, any source specific SIP revision, or any action subject to prior public and EPA review taken under regulations implementing section 112(g) of the Act that was acted on under the merged process.

(3) Single permits. The provisions of paragraph (h)(2)(iv) of this section do not apply with respect to a permit program which produces a single permit that contains all terms and conditions needed to meet the requirements of part 70 and the requirements of major or minor NSR or regulations implementing section 112(g) of the Act and needed to assure compliance with all other new or different applicable requirements to which the change is subject.

(4) Program provisions. The program may provide that the merged process procedures in paragraph (h)(2) of this section may be pursuant to regulations implementing either title V or title I of the Act.

(i) Permit shield. The permit shield under § 70.6(f) of this part may be granted by the permitting authority only for:

(1) Permits that followed the permit issuance, reopening, or renewal process;

(2) Any significant permit revision; or

(3) Any minor permit revision.

~~(f)~~ (j) Reopening for cause.

(1) Each issued permit shall include provisions specifying the conditions under which the permit will be reopened prior to the expiration of the permit. A permit shall be reopened and revised under any of the following circumstances:

(i) Additional applicable requirements under the Act become applicable to a major part 70 source with a remaining permit term of 3 or more years. Such a reopening shall be completed not later than 18 months after promulgation of the applicable requirement. No such reopening is required if the effective date

of the requirement is later than the date on which the permit is due to expire, unless the original permit or any of its terms and conditions has been extended pursuant to §§70.4(b)(10)(i) or (ii) of this part.

(ii) Additional requirements (including excess emissions requirements) become applicable to an affected source under the acid rain program. Upon approval by the Administrator, excess emissions offset plans shall be deemed to be incorporated into the permit.

(iii) The permitting authority or EPA determines that the permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit.

(iv) The Administrator or the permitting authority determines that the permit must be revised or revoked to assure compliance with the applicable requirements.

(2) Proceedings to reopen and issue a permit shall follow the same procedures as apply to initial permit issuance, ~~and~~ shall affect only those parts of the permit for which cause to reopen exists, ~~and. Such reopening~~ shall be made as expeditiously as practicable. Notwithstanding the preceding sentence, proceedings to reopen for section 112 standards may use the following procedures:

(i) Where the section 112 standard is promulgated after permit issuance, administrative amendment procedures under §70.7(e)(1)(iii) may be used.

(ii) The source shall apply for a de minimis or minor permit revision, as appropriate, by the compliance statement deadline to incorporate requirements as specified by the compliance statement necessary to assure compliance with the standard and to incorporate any other provisions required to be incorporated into the permit by the section 112 standard, unless the source is exempted from this requirement under paragraph (iii) of this section or under the rulemaking promulgating the section 112 standard.

(iii) Sources subject to the following section 112 standards promulgated as of [DATE OF PUBLICATION] are exempt from the requirements in paragraph (j)(2)(ii) of this section to apply for a minor permit revision: NESHAP for Industrial Process Cooling Towers.

(3) Reopenings under paragraph ~~(f)~~(j)(1) of this section shall not be initiated before a notice of such intent is provided to the part 70 source by the permitting authority at least 30 days in advance of the date that the permit is to be reopened, except that the permitting authority may provide a shorter time

period in the case of an emergency. Where reopening for section 112 standards requires initial notification by the source, and where the source has provided such notification to the permitting authority by the applicable date, the permitting authority need not provide the notice required by the preceding sentence.

~~(g)~~ (k) Reopenings for cause by EPA.

(1) If the Administrator finds that cause exists to terminate, modify, or revoke and reissue a permit pursuant to paragraph ~~(f)~~(j) of this section, the Administrator will notify the permitting authority and the permittee of such finding in writing.

(2) The permitting authority shall, within 90 days after receipt of such notification, forward to EPA a proposed determination of termination, modification, or revocation and reissuance, as appropriate. The Administrator may extend this 90-day period for an additional 90 days if he or she finds that a new or revised permit application is necessary or that the permitting authority must require the permittee to submit additional information.

(3) The Administrator will review the proposed determination from the permitting authority within 90 days of receipt.

(4) The permitting authority shall have 90 days from receipt of an EPA objection to resolve any objection that EPA makes and to terminate, modify, or revoke and reissue the permit in accordance with the Administrator's objection.

(5) If the permitting authority fails to submit a proposed determination pursuant to paragraph ~~(g)~~(k)(2) of this section or fails to resolve any objection pursuant to paragraph ~~(g)~~(k)(4) of this section, the Administrator will terminate, modify, or revoke and reissue the permit after taking the following actions:

(i) Providing at least 30 days' notice to the permittee in writing of the reasons for any such action. This notice may be given during the procedures in paragraphs ~~(g)~~(k)(1) through (4) of this section.

(ii) Providing the permittee an opportunity for comment on the Administrator's proposed action and an opportunity for a hearing.

~~(h)~~ (l) Public participation. For all de minimis and notice-only permit revisions, the program shall provide in a general manner for periodic notification to the public of the revisions on at least a quarterly basis and for public access to the records regarding such revisions. Except for modifications qualifying ~~for minor permit modification procedures~~ as expedited

permit revisions, all permit proceedings, including initial permit issuance, minor permit revisions, significant ~~modifications~~ permit revisions, and renewals, shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit. These procedures shall include the following:

(1) Notice shall be given: by publication in a newspaper of general circulation in the area where the source is located or in a State publication designed to give general public notice; to persons on a mailing list developed by the permitting authority, including those who request in writing to be on the list; and by other means if necessary to assure adequate notice to the affected public;

(2) The notice shall identify the affected facility; the name and address of the permittee; the name and address of the permitting authority processing the permit; the activity or activities involved in the permit action; the emissions change involved in any permit ~~modification~~ revision; the name, address, and telephone number of a person from whom interested persons may obtain additional information, including copies of the permit draft, the application, all relevant supporting materials, including those set forth in §70.4(b)(3)(viii) of this part, and all other materials available to the permitting authority that are relevant to the permit decision; a brief description of the comment procedures required by this part; and the time and place of any hearing that may be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled);

(3) The permitting authority shall provide such notice and opportunity for participation by affected States as is provided for by §70.8 of this part;

(4) ~~Timing.~~ Except for the provisions of paragraph (f)(2) of this section, t~~T~~he permitting authority shall provide at least 30 days for public comment and shall give notice of any public hearing at least 30 days in advance of the hearing.

(5) The permitting authority shall keep a record of the commenters and also of the issues raised during the public participation process so that the Administrator may fulfill his or her obligation under section 505(b)(2) of the Act to determine whether a citizen petition may be granted, and such records shall be available to the public.

§70.8 Permit review by EPA and affected States.

(a) Transmission of information to the Administrator.

(1) ~~The permit~~ (i) For permits and permit renewals, the part 70 program shall require that the permitting authority

provide to the Administrator a copy of each permit application ~~(including any application for permit modification)~~, each proposed permit, and each final part 70 permit. ~~The applicant may be required by the permitting authority to provide a copy of the permit application (including the compliance plan) directly to the Administrator. Upon agreement with the Administrator, the permitting authority may submit to the Administrator a permit application summary form and any relevant portion of the permit application and compliance plan, in place of the complete permit application and compliance plan. To the extent practicable, the preceding information shall be provided in computer-readable format compatible with EPA's national database management system.~~

(ii) For minor or significant permit revisions, the part 70 program shall require that the permitting authority provide to the Administrator a copy of each permit revision application, and each proposed and final permit revision.

(iii) For expedited permit revisions, no permit applications or permit revisions are required to be submitted to the Administrator.

(iv) For any permit or permit revision, upon agreement with the Administrator, the permitting authority may submit to the Administrator an application summary form and any relevant portion of the application and compliance plan, in place of the complete application and compliance plan. To the extent practicable, information submitted to the Administrator shall be provided in computer readable format compatible with EPA's national database management system.

(2) The Administrator may waive the requirements of paragraphs (a)(1) and (b)(1) of this section for any category of sources (including any class, type, or size within such category) other than major sources according to the following:

(i) By regulation for a category of sources nationwide, or

(ii) At the time of approval of a State program for a category of sources covered by an individual permitting program.

(3) Each State permitting authority shall keep for 5 years such records and submit to the Administrator such information as the Administrator may reasonably require to ascertain whether the State program complies with the requirements of the Act or of this part.

(b) Review by affected States. Eligible Indian Tribes may be considered affected States under this paragraph. Indian Tribes are not required to submit a part 70 program for the limited purpose of being considered an affected State under this paragraph.

(1) For purposes of paragraph (b) of this section, an eligible Indian Tribe will be considered an affected State if it administers a tribal program, which may consist solely of reviewing permit actions of neighboring jurisdictions as an affected State, and meets the criteria of paragraphs (1) and (2) of the definition of "affected State" set forth in § 70.2 of this part.

~~(1)~~ (2) The permit program shall provide that the permitting authority give notice of each draft permit or draft permit revision (including any proposed action pursuant to a prior State review program, as relevant) to any affected State on or before the time that the permitting authority provides this notice to the public under §70.7~~(h)~~ of this part.~~, except to the extent §70.7(e)(2) or (3) of this part requires the timing of the notice to be different.~~ Where § 70.7 does not require prior public notice of a permit revision, the permitting authority shall give notice to the affected State of the final permit revision on or before the time that the permitting authority provides this notice to the public under § 70.7.

~~(2)~~ (3) The permit program shall provide that the permitting authority, as part of the submittal of ~~the~~ any proposed permit or proposed permit revision to the Administrator ~~(or as soon as possible after the submittal for minor permit modification procedures allowed under §70.7(e)(2) or (3) of this part),~~ shall notify the Administrator and any affected State in writing of any refusal by the permitting authority to accept all recommendations for the proposed permit that the affected State submitted during the public ~~or~~ and affected State review period. The notice shall include the permitting authority's reasons for not accepting any such recommendation. The permitting authority is not required to accept recommendations that are not based on applicable requirements or the requirements of this part.

(c) EPA objection. For purposes of State programs approved under part 70 as promulgated on July 21, 1992, § 70.8(c) of this part as promulgated on July 21, 1992 shall apply. For purposes of State programs approved under part 70 as revised on [date of final rulemaking], § 70.8(c) of this part as promulgated on [date of final rulemaking] shall apply.

(1) Except as provided by paragraphs (c)(5) through (c)(7) of this section, t~~T~~he Administrator will object to the issuance of any proposed permit or any permit revision determined by the Administrator not to be in compliance with applicable requirements or requirements under this part. No permit or permit revision for which an application must be transmitted to the Administrator under paragraph (a) of this section shall be issued if the Administrator objects to its issuance in writing ~~within~~ during a 45-day~~s of receipt of the proposed permit and all necessary supporting in formation.~~ EPA review period. The Administrator may indicate that he or she will not object to the

permit or permit revision prior to the end of the 45-day review period. The review period shall commence upon:

(i) In the case of initial permit issuance, permit renewals, and minor or significant permit revisions, receipt of the proposed permit or proposed permit revision and all necessary supporting information; or

(ii) In the case of permit revisions processed under the merged program provisions of § 70.7(h) of this part, the beginning of the public comment period for such revisions (although the Administrator may object within 45 days of receipt of the final permit revision for defects that were not reasonably apparent in the draft permit submitted for public review).

(2) Any EPA objection under ~~paragraph (c)(1) of~~ this section shall include a statement of the Administrator's reasons for objection and a description of the terms and conditions that the permit must include to respond to the objections. The Administrator will provide the permit applicant a copy of the objection.

(3) Failure of the permitting authority to do any of the following also shall constitute grounds for an objection:

(i) Comply with paragraphs (a) or (b) of this section;

(ii) Submit any information necessary to review adequately the proposed permit; or

(iii) Process the permit or permit revision under the procedures approved to meet the requirements of §70.7~~(h)~~ of this part ~~except for minor permit modifications~~.

(4) If the permitting authority fails, within 90 days after the date of an objection under paragraph (c)(1) of this section, to revise and submit a proposed permit in response to the objection, the Administrator will issue or deny the permit in accordance with the requirements of the Federal program promulgated under title V of this Act.

(5) The Administrator shall not object to any expedited permit revision for a change approved by EPA in a part 70 program as eligible for processing as an expedited permit revision.

(6) The Administrator will not object to case-by-case technology determinations made in State preconstruction permits that meet the following criteria:

(i) The permit contains all applicable requirements and part 70 requirements to which the source is subject as a result of the change;

(ii) The new or revised permit terms and conditions are enforceable as a practical matter;

(iii) Substantive and procedural requirements of the State implementation plan have been met; and

(iv) The Administrator does not find the determination to be arbitrary and capricious.

(7) The Administrator will not object to a proposed permit or permit revision on grounds that procedural requirements were not followed unless the Administrator determines that the failure to follow procedures was so serious and of central relevance that it is very likely that the permit would have been significantly changed if procedures had been followed.

(d) Public petitions to the Administrator. (1) The program shall provide that, if the Administrator does not object in writing by the expiration of the applicable review period specified in ~~under~~ paragraph (c) of this section, any person may petition the Administrator to make such objection within 60 days after the expiration of the applicable ~~Administrator's 45-day~~ review period ~~to make such objection~~. The program shall also provide that the public have access to information concerning the beginning and expiration of EPA's review period as required for permit issuance, revisions, reopenings, and renewals pursuant to § 70.7 of this part.

(2) Any ~~such~~ petition shall be based only on objections to the permit that were raised with reasonable specificity during ~~the~~ any public comment period provided for in §70.7~~(h)~~ of this part, unless the petitioner demonstrates that it was impracticable to raise such objections within such period or ~~unless~~ the grounds for such objection arose after such period.

(3) If the Administrator objects to the permit as a result of a petition filed under this paragraph, the permitting authority shall not issue the permit until EPA's objection has been resolved, except that a petition for review does not stay the effectiveness of a permit or its requirements if the permit was issued after the end of the ~~45-day~~ review period specified in paragraph (c) of this section and prior to an EPA objection.

(4) If the permitting authority has issued a permit or a minor or significant permit revision prior to receipt of an EPA objection under this paragraph, the Administrator will modify, terminate, or revoke such permit, and shall do so consistent with the procedures for permit issuance or for permit revisions in §§70.7(f)(2) or (g)(2)~~(g)(4) or (5)(i) and (ii)~~ of this part as appropriate except in unusual circumstances, and the permitting authority may thereafter issue only a revised permit that satisfies EPA's objection. In any case, the source will not be

in violation of the requirement to have submitted a timely and complete application.

(e) Prohibition on default issuance. Consistent with §70.4(b)(3)(ix) of this part, for the purposes of Federal law and title V of the Act, no State program may provide that a part 70 permit or a minor or significant permit revision ~~(including a permit renewal or modification)~~ will issue until affected States and EPA have had an opportunity to review the ~~proposed~~ permit or permit revision as required under this section unless the procedures for minor permit revisions as part of the approved part 70 program do not provide for affected State review prior to permit issuance. When the program is submitted for EPA review, the State Attorney General or independent legal counsel shall certify that no applicable provision of State law requires that a part 70 permit or renewal be issued after a certain time if the permitting authority has failed to take action on the application (or includes any other similar provision providing for default issuance of a permit), unless EPA has waived such review for EPA and affected States. Notwithstanding this prohibition on default permit issuance, permits may be revised on a default basis consistent with the procedures in § 70.7(e).

§70.9 Fee determination and certification.

(a) Fee Requirement. The State program shall require that the owners or operators of part 70 sources pay annual fees, or the equivalent over some other period, that are sufficient to cover the permit program costs and shall ensure that any fee required by this section will be used solely for permit program costs.

(b) Fee schedule adequacy.

(1) The State program shall establish a fee schedule that results in the collection and retention of revenues sufficient to cover the permit program costs. These costs include, but are not limited to, the costs of the following activities as they relate to the operating permit program for stationary sources:

(i) Preparing generally applicable regulations or guidance regarding the permit program or its implementation or enforcement;

(ii) Reviewing and acting on any application for a permit, permit revision, or permit renewal, including the development of an applicable requirement as part of the processing of a permit, or permit revision or renewal;

(iii) General administrative costs of running the permit program, including the supporting and tracking of permit applications, compliance certification, and related data entry;

(iv) Implementing and enforcing the terms of any part 70 permit (not including any court costs or other costs associated with an enforcement action), including adequate resources to determine which sources are subject to the program;

(v) Emissions and ambient monitoring;

(vi) Modeling, analyses, or demonstrations;

(vii) Preparing inventories and tracking emissions; and

(viii) Providing direct and indirect support to sources under the Small Business Stationary Source Technical and Environmental Compliance Assistance Program contained in section 507 of the Act in determining and meeting their obligations under this part.

(2)(i) The Administrator will presume that the fee schedule meets the requirements of paragraph (b)(1) of this section if it would result in the collection and retention of an amount not less than $25 per year (as adjusted pursuant to the criteria set forth in paragraph (b)(2)(iv) of this section) times the total tons of the actual emissions of each regulated pollutant (for presumptive fee calculation) emitted from part 70 sources.

(ii) The State may exclude from such calculation:

(A) The actual emissions of sources for which no fee is required under paragraph (b)(4) of this section;

(B) The amount of a part 70 source's actual emissions of each regulated pollutant (for presumptive fee calculation) that the source emits in excess of four thousand (4,000) tpy;

(C) A part 70 source's actual emissions of any regulated pollutant (for presumptive fee calculation), the emissions of which are already included in the minimum fees calculation; or

(D) The insignificant quantities of actual emissions not required in a permit application pursuant to §70.5(c) of this part.

(iii) "Actual emissions" means the actual rate of emissions in tons per year of any regulated pollutant (for presumptive fee calculation) emitted from a part 70 source over the preceding calendar year or any other period determined by the permitting authority to be representative of normal source operation and consistent with the fee schedule approved pursuant to this section. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and in-place control equipment, types of materials processed, stored, or combusted during the preceding calendar year or such other time period

established by the permitting authority pursuant to the preceding sentence.

(iv) The program shall provide that the $25 per ton per year used to calculate the presumptive minimum amount to be collected by the fee schedule, as described in paragraph (b)(2)(i) of this section, shall be increased each year by the percentage, if any, by which the Consumer Price Index for the most recent calendar year ending before the beginning of such year exceeds the Consumer Price Index for the calendar year 1989.

(A) The Consumer Price Index for any calendar year is the average of the Consumer Price Index for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year.

(B) The revision of the Consumer Price Index which is most consistent with the Consumer Price Index for the calendar year 1989 shall be used.

(3) The State program's fee schedule may include emissions fees, application fees, service-based fees or other types of fees, or any combination thereof, to meet the requirements of paragraph (b)(1) or (b)(2) of this section. Nothing in the provisions of this section shall require a permitting authority to calculate fees on any particular basis or in the same manner for all part 70 sources, all classes or categories of part 70 sources, or all regulated air pollutants, provided that the permitting authority collects a total amount of fees sufficient to meet the program support requirements of paragraph (b)(1) of this section.

(4) Notwithstanding any other provision of this section, during the years 1995 through 1999 inclusive, no fee for purposes of title V shall be required to be paid with respect to emissions from any affected unit under section 404 of the Act.

(5) The State shall provide a detailed accounting that its fee schedule meets the requirements of paragraph (b)(1) of this section if:

(i) The State sets a fee schedule that would result in the collection and retention of an amount less than that presumed to be adequate under paragraph (b)(2) of this section; or

(ii) The Administrator determines, based on comments rebutting the presumption in paragraph (b)(2) of this section or on his own initiative, that there are serious questions regarding whether the fee schedule is sufficient to cover the permit program costs.

(c) Fee demonstration. The permitting authority shall provide a demonstration (and periodic updates as required by the

Administrator) that the fee schedule selected will result in the collection and retention of fees in an amount sufficient to meet the requirements of this section.

(d) Use of Required Fee Revenue. The Administrator will not approve a demonstration as meeting the requirements of this section, unless it contains an initial accounting (and periodic updates as required by the Administrator) of how required fee revenues are used solely to cover the costs of meeting the various functions of the permitting program.

§70.10 Federal oversight and sanctions.

(a) Failure to submit an approvable program.

(1) If a State fails to submit a ~~fully-approvable whole~~ complete part 70 program in a timely manner, or a required revision thereto (including revisions to correct deficiencies of a program that the Administrator had granted interim approval), in conformance with the provisions of §70.4 of this part, or if ~~an interim approval expires and the Administrator has not approved a whole part 70 program~~ the Administrator disapproves a submitted program:

(i) ~~At any time t~~The Administrator may, prior to the expiration of the 18-month period referred to in paragraph (a)(1)(ii) of this section, apply any one of the sanctions specified in section 179(b) of the Act; and

(ii) Eighteen months after the date required for submittal or 18 months after the date of disapproval ~~by the Administrator~~, whichever is applicable the Administrator will apply ~~such~~ sanctions under section 179(b) of the Act in the same manner and subject to the same deadlines and other ~~with the same~~ conditions as are applicable in the case of a determination, disapproval, or finding under section 179(a) of the Act.

(2) The sanctions under section 179(b)(2) of the Act shall not apply pursuant to paragraph (1) of this section in any area unless the area has been designated a nonattainment area under part D of title I of the Act.

~~(2)~~ (3) ~~If full approval of a whole part 70 program has not taken place within 2 years after the date required for such submission, t~~The Administrator will promulgate, administer, and enforce a whole program or a partial program as appropriate for such State~~.~~ when:

(i) Full approval of a whole part 70 program has not been granted by November 15, 1995, except for programs granted interim approval; or

(ii) For programs granted interim approval, that approval has expired after November 15, 1995 and EPA has not granted full approval of a whole part 70 program.

(4) The requirements of paragraphs (a)(1) and (a)(3) of this section shall not apply to Indian Tribes and Tribal programs.

(b) State failure to administer or enforce. Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part and of any agreement between the State and the Administrator concerning operation of the program.

(1) Whenever the Administrator makes a determination that a permitting authority is not adequately administering or enforcing a part 70 program, or any portion thereof, the Administrator will notify the permitting authority of the determination and the reasons therefore. The Administrator will publish such notice in the FEDERAL REGISTER.

(2) If, 90 days after issuing the notice under paragraph ~~(c)~~ (b)(1) of this section, the permitting authority fails to take significant action to assure adequate administration and enforcement of the program, the Administrator may take one or more of the following actions:

(i) Withdraw approval of the program or portion thereof using procedures consistent with §70.4(e) of this part;

(ii) Apply any of the sanctions specified in section 179(b) of the Act;

(iii) Promulgate, administer, or enforce a Federal program under title V of the Act.

(3) Whenever the Administrator has made the finding and issued the notice under paragraph ~~(c)~~ (b)(1) of this section, the Administrator will apply the sanctions under section 179(b) of the Act 18 months after that notice. These sanctions will be applied in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 179(a) of the Act.

(4) Whenever the Administrator has made the finding and issued the notice under paragraph ~~(c)~~ (b)(1) of this section, the Administrator will, unless the State has corrected such deficiency within 18 months after the date of such finding, promulgate, administer, and enforce, a whole or partial program 2 years after the date of such finding.

(5) Nothing in this section shall limit the Administrator's authority to take any enforcement action against a source for violations of the Act or of a permit issued under rules adopted pursuant to this section in a State that has been delegated responsibility by EPA to implement a Federal program promulgated under title V of the Act.

(6) Where a whole State program consists of an aggregate of partial programs, and one or more partial programs fails to be fully approved or implemented, the Administrator may apply sanctions only in those areas for which the State (excluding Indian Tribes) failed to submit or implement an approvable program.

(c) Criteria for withdrawal of State programs.

(1) The Administrator may~~, in accordance with the procedures of paragraph (c) of this section,~~ withdraw program approval in whole or in part whenever the approved program no longer complies with the requirements of this part, and the permitting authority fails to take corrective action. Such circumstances, in whole or in part, include any of the following:

(i) Where the permitting authority's legal authority no longer meets the requirements of this part, including the following:

(A) The permitting authority fails to promulgate or enact new authorities when necessary; or

(B) The State legislature or a court strikes down or limits State authorities to administer or enforce the State program.

(ii) Where the operation of the State program fails to comply with the requirements of this part, including the following:

(A) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;

(B) Repeated issuance of permits that do not conform to the requirements of this part;

(C) Failure to comply with the public participation requirements of §70.7~~(h)~~ of this part;

(D) Failure to collect, retain, or allocate fee revenue consistent with §70.9 of this part; or

(E) Failure in a timely way to act on any applications for permits including renewals and revisions.

(iii) Where the State fails to enforce the part 70 program consistent with the requirements of this part, including the following:

(A) Failure to act on violations of permits or other program requirements;

(B) Failure to seek adequate enforcement penalties and fines and collect all assessed penalties and fines; or

(C) Failure to inspect and monitor activities subject to regulation.

(d) Federal collection of fees. If the Administrator determines that the fee provisions of a part 70 program do not meet the requirements of §70.9 of this part, or if the Administrator makes a determination under paragraph (c)(1) of this section that the permitting authority is not adequately administering or enforcing an approved fee program, the Administrator may, in addition to taking any other action authorized under title V of the Act, collect reasonable fees to cover the Administrator's costs of administering the provisions of the permitting program promulgated by the Administrator, without regard to the requirements of §70.9 of this part.

§70.11 Requirements for enforcement authority.

Except for Tribal programs, with respect to criminal enforcement matters only, under which the Tribe shall enter into a formal Memorandum of Agreement with EPA to provide for the timely referral of criminal enforcement matters to the appropriate EPA Regional Administrator, aAll programs to be approved under this part must contain the following provisions:

(a) Enforcement authority. Any agency administering a program shall have the following enforcement authority to address violations of program requirements by part 70 sources:

(1) To restrain or enjoin immediately and effectively any person by order or by suit in court from engaging in any activity in violation of a permit that is presenting an imminent and substantial endangerment to the public health or welfare, or the environment.

(2) To seek injunctive relief in court to enjoin any violation of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit.

(3) To assess or sue to recover in court civil penalties and to seek criminal remedies, including fines, according to the following:

(i) Civil penalties shall be recoverable for the violation of any applicable requirement; any permit condition; any fee or filing requirement; any duty to allow or carry out inspection, entry or monitoring activities or, any regulation or orders issued by the permitting authority. These penalties shall be recoverable in a maximum amount of not less than $10,000 per day per violation. State law shall not include mental state as an element of proof for civil violations for which penalties up to $10,000 per day per violation are recoverable.

(ii) Criminal fines shall be recoverable against any person who knowingly violates any applicable requirement; any permit condition; or any fee or filing requirement. These fines shall be recoverable in a maximum amount of not less than $10,000 per day per violation.

(iii) Criminal fines shall be recoverable against any person who knowingly makes any false material statement, representation or certification in any form, in any notice or report required by a permit, or who knowingly renders inaccurate any required monitoring device or method. These fines shall be recoverable in a maximum amount of not less than $10,000 per day per violation.

(b) Burden of proof. The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section shall be no greater than the burden of proof or degree of knowledge or intent required under the Act.

(c) Appropriateness of penalties and fines. A civil penalty or criminal fine assessed, sought, or agreed upon by the permitting authority under paragraph (a)(3) of this section shall be appropriate to the violation.

APPENDIX B - FEDERAL RULES ELIGIBLE FOR NOTICE-ONLY PROCEDURES

Use this appendix to determine if a change you make at your facility that is subject to federally-promulgated NSPS or NESHAP requirements is eligible for the notice-only procedures of § 70.7 (e)(2). For nonfederal requirements, contact your State or local permit authority.

Use this appendix only if all of the following 4 things apply:

1) you install a new unit or modify an existing unit,
2) you are allowed to install or modify the unit without prior approval by the State or local permit authority,
3) the change is not required to use significant or minor permit revision procedures, and
4) the new or modified unit is subject to federally-promulgated NSPS or NESHAP requirements.

Then, if the NSPS or NESHAP requirements are included in the following tables, you may use notice-only procedures.

IMPORTANT: EPA has made no effort to determine if the facilities included below are subject to preconstruction review requirements. Check with your permitting authority to determine if a preconstruction permit is needed prior to construction.

NEW SOURCE PERFORMANCE STANDARDS (NSPS), 40 CFR Part 60

SUBPART	DESCRIPTION	UNITS AFFECTED
K	Storage vessels for petroleum liquids constructed between 6/11/73 and 5/18/78	
Ka	Storage vessels for petroleum liquids constructed between 5/19/78 and 7/23/84	
R	Primary lead smelters	Blast furnace, reverberatory furnace, sintering machines, electric melt furnace, converter
S	Primary aluminum reduction plants	Potroom groups, anode bake plants

SUBPART	DESCRIPTION	UNITS AFFECTED
V	Phosphate fertilizer industry; triple superphosphate plants	Reactors, granulators, dryers, coolers, screens, mills
XX	Bulk gasoline terminals	Loading racks
DDD	VOC emissions from polymer industry	
FFF	Flexible vinyl and urethane coating and printing	Printing lines
GGG	Equipment leaks of VOC in petroleum refineries	
HHH	Synthetic fiber production facilities	Fiber processing
III	SOCMI air oxidation unit processes, VOC emissions	Reactors and recovery systems
KKK	Equipment leaks of VOC from onshore natural gas processing	Compressors and other equipment
LLL	Onshore natural gas processing; SO2 emissions	Sweetening units
NNN	VOC emissions from SOCMI distillation operations	Distillation units
OOO	Nonmetallic minerals processing plants	Crushers, grinders, screens, conveyors, other material handling operations
PPP	Wool fiberglass insulation manufacturing operations	Rotary spin wool fiberglass lines
TTT	Surface coating of plastic parts for business machines	Spray booths

SUBPART	DESCRIPTION	UNITS AFFECTED
UUU	Calciners and dryers in mineral industries	

NATIONAL EMISSIONS STANDARDS FOR HAZARDOUS AIR POLLUTANTS (NESHAP), 40 CFR PART 61

F	Vinyl chloride	Ethylene dichloride plants, vinyl chloride plants, polyvinyl chloride plants
J	Equipment leaks of benzene	
K	Radionuclide emissions from elemental phosphorous plants	Calciners and nodulizing kilns
N	Inorganic arsenic from glass manufacturing plants	Copper converters with charge rate > 75 kg/hr, copper smelters
R	Radon emissions from phosphogypsum stacks	Phosphogypsum stacks
T	Radon from disposal of uranium mill tailings	Uranium mill tailings disposal sites
W	Radon from operating mill tailings	Facilities licensed to manage uranium byproduct materials

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The following NSPS standards are eligible for notice-only procedures if you state in the notice that you will use the monitoring methods specified in the NSPS to demonstrate compliance with the applicable standard. If you are subject to the following NSPS and intend to demonstrate compliance using methods other than those in the applicable NSPS, you are not eligible for notice-only procedures.

NEW SOURCE PERFORMANCE STANDARDS (NSPS), 40 CFR PART 60

D	Fossil fuel steam generators	Fossil fuel steam generators

SUBPART	DESCRIPTION	UNITS AFFECTED
Da	Electric steam generating units	Electric steam generating units
Db	Industrial, commercial and institutional steam generating units	Steam generating units
Dc	Small industrial, commercial and institutional steam generating units	Steam generating units
E	Incinerators	Incinerators
G	Nitric acid plants	Nitric acid plants
H	Sulfuric acid plants	Sulfuric acid plants
J	Petroleum refineries	PCCU regenerators flue gas regenerators Claus sulfur recovery plant
Kb	VOL storage vessels constructed after 7/23/84	Vessels >151m^3 with TVP >5.2kPa or vessels 75m3 to 151m^3 with TVP 27.6 to 76.6kPa
N	Basic oxygen process furnaces	
Na	Basic oxygen process furnaces steelmaking facilities	Top blow BOPF's, hot metal transfer and skimming
O	Sewage treatment plants	Incinerators, all Multiple hearth, fluidized bed or electric incinerators
P	Primary copper smelters	Dryer Roaster, furnace, converter
Q	Primary zinc smelters	Sintering machines Roaster
T	Phosphate fertilizer industry; wet process phosporic acid plants	Reactors, fillers, evaporators, hot wells

SUBPART	DESCRIPTION	UNITS AFFECTED
U	Phosphate fertilizer industry; superphosporic acid plants	Evaporators, hot wells, acid sumps, cooling tanks
W	Phosphate fertilizer industry; superphosporic acid plants	Mixers, curing belts, reactors, granulators, dryers, cookers, screens, mills
X	Phosphate fertilizer industry; granular triple superphosphate storage facilities	Curing piles, conveyors, elevators, screens, mills
Y	Coal preparation plants >200 tons/day	Dryers, pneumatic coal cleaning equipment, and coal processing, conveying and handling systems
AA	Steel plants: EAF's and oxygen decarburization vessels before August 17, 1983	EAFs, oxygen decarb vessels, dust handling systems
AAa	Steel plants: EAF's and oxygen decarburization vessels after August 17, 1983	EAFs, oxygen decarb vessels, dust handling systems
BB	Kraft pulp mills	PM and KRS from recovery furnaces, smelt dissolving tanks, lime kilns KRS from digesters, brown stock washers, evaporators, condensate strippers
CC	Glass manufacturing plants	Glass melting units
EE	Surface coating of metal furniture	Coating operations
GG	Stationary gas turbines	

SUBPART	DESCRIPTION	UNITS AFFECTED
HH	Lime manufacturing plants	Rotary lime kilns
KK	Lead acid battery plants	Any lead emitting operation
LL	Metallic mineral processing plants	Crushers, screens, conveyors, dryers, packaging operations, loading, storage, etc.
MM	Automobile and light duty truck surface coating operations	Coating operations
NN	Phosphate rock plants with production capacity> 4 ton/hr	Dryers, calciners, grinders
QQ	Graphic arts industry: publication rotogravure printing	Printing presses
RR	Pressure sensitive tape and label surface coating operations	Coating lines
SS	Industrial surface coating: large appliances	Coating lines
TT	Metal coil surface coating	Coating operations
WW	Beverage can surface coating industry	Coating operations
BBB	Rubber tire manufacturing industry	Michelin-B operation, cementing, green tire spraying operations
JJJ	Petroleum dry cleaning	

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 2 9 1997

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: INTERIM POLICY AND GUIDANCE ON THE USE OF "CREDIBLE EVIDENCE" IN AIR ENFORCEMENT ACTIVITIES

FROM: STEVEN A. HERMAN
ASSISTANT ADMINISTRATOR

TO: Regional Administrator (EPA Regions I-X)
Regional Counsel (EPA Regions I-X)
Regional Enforcement Division Directors (EPA Regions I, VI and III)
Air Division Directors (EPA Regions I-X)

The Agency recently revised its regulations and reaffirmed its authority to use any credible evidence to enforce continuing compliance with applicable requirements under the Clean Air Act, as amended. 62 Fed. Reg. 8314 (February 24,1997) (commonly and hereinafter referred to as the "credible evidence rule"). For clarity of policy, consistency in application and guidance on the use of "credible evidence" in the Agency's clean air enforcement program[1], the following will serve as interim implementing measures:

Withdrawal of Prior Agency Policy and Guidance - Previous policy guidance concerning the use of continuous emission monitoring (CEM) data indicated that this data would be used for direct enforcement of applicable emissions limitations only when specified as the compliance test method in Agency rules, state implementation plans (SIPs), source permits, orders or consent decrees. These policies, along with any other Agency-imposed restrictions on its longstanding statutory authority to use "credible evidence", were superseded by the 1990 amendments to the Clean Air Act. Since enactment of these

[1] In every enforcement action taken by the Agency we rely on credible evidence of the violation. As used in this Policy and Guidance, however, the term "credible evidence" refers specifically to the kinds of evidence discussed in the credible evidence rule (e.g., non-reference test method data and other information that are relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test procedures or methods had been performed). *See* 62 Fed. Reg. 8314 (Feb. 24, 1997).

amendments, there has been no limit on EPA's pre-existing statutory authority to use credible evidence to establish violations. With the credible evidence rule, however, the Agency has formally confirmed and acknowledged its authority, ability and intention to continue to rely upon any credible evidence, including CEM data (as appropriate), to establish a violation and seek appropriate relief. Accordingly, credible evidence can be used to establish any violation, regardless of whether the violation occurred before or after promulgation of that rule.

Certain Agency policy and other memoranda have in the past suggested a distinction between information sufficient to support issuing a notice of violation and information necessary to prove a violation or determine compliance. The 1990 amendments to the Clean Air Act and the credible evidence rule eliminated any perceived need or basis for recognizing such an artificial distinction. To avoid possible confusion in the future by those required to comply with emissions limitations and misapplication by those involved in enforcing such limitations, all such prior Agency policy and guidance are hereby expressly withdrawn to the extent they imply any limitation on the use of CEM data (or any other data generated/developed by methods not specified by regulation) in the Agency's enforcement activities[2]. Moreover and to the extent that prior statements of policy or position may be affected by or inconsistent with the credible evidence rule, the credible evidence rule and this policy/guidance control.

Interim Enforcement Response Policy - The credible evidence rule does not affect prior Agency guidance on the "Timely and Appropriate Enforcement Response to Significant Air Pollution Violators", issued by John S. Seitz, Director, Office of Air Quality Planning & Standards, and Robert Van Heuvelen, Director of Civil Enforcement, under memorandum dated February 7, 1992, as subsequently clarified and amended, or other

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[2] The following guidance is expressly included in this withdrawal:

Memorandum, Guidance Concerning EPA's Use of Continuous Emission Monitoring Data, from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, August 12, 1982.

Memorandum, Guidance: Enforcement Applications of Continuous Emission Monitoring System Data, Edward E. Reich, Director, Station Source Compliance Division, and Michael S. Alushin, Associate Enforcement Counsel, Air Enforcement Division, April 22, 1986.

Policy Statement, CEMS Policy, Gerald A. Emison, Director, Office of Air Quality Planning and Standards (OAQPS), March 31, 1988 (reissued). *See also* Policy Statement, CEMS Policy and FY 1988 Guidance, Gerald A. Emison, Director, OAQPS, July 28, 1987.

Memorandum, Transmittal of SO2 Continuous Compliance Strategy, John S. Seitz, Director, Stationary Source Compliance Division (OAQPS), July 5, 1988.

guidance of general applicability. Agency enforcement resources and activities should continue to focus on addressing significant violations and in causing sources to return to continuous compliance with applicable requirements. Enforcement activities (particularly judicial enforcement proceedings) should generally be directed at 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 economic benefit. *See* Credible Evidence White Paper, "The Use of Information other Than Reference Test Results for Determining Compliance with the Clean Air Act", March 21, 1996.

Minor violations generally should continue to be a lower judicial enforcement priority because other tools can typically be used to address these violations without resort to federal court (e.g., occasional exceedences of short duration that are quickly and adequately resolved can typically be handled administratively without the use of more formal, judicial enforcement proceedings). Agency enforcement personnel should look at all the facts and circumstances of a case (e.g., extent and duration of noncompliance, environmental consequences and economic benefits of noncompliance), including consideration of the full range of types of violations and all available enforcement tools, in deciding whether and, if so, what enforcement response is warranted to address sporadic, infrequent violations identified or determined through the use of credible evidence.

The Agency has and should maintain a balanced enforcement program that seeks to assure compliance through using a mix of the compliance and enforcement tools available to it. Common sense and reasoned enforcement discretion must continue to guide the Agency in assessing and determining whether available information should be proffered or otherwise used as credible evidence of a violation[3].

SIP Revisions Concerning Credible Evidence - Numerous states have submitted or will soon submit revisions to their SIPs to expressly permit the use of "credible evidence" to enforce applicable requirements. *See* 40 CFR 51.212(c), as recently promulgated. Some revisions have been approved, but many others are still pending (due in part to the pendency of the now concluded credible evidence rule) or are yet to be submitted. As reflected in the credible evidence rule, EPA (and the states) have had the authority and ability to use credible evidence to enforce Clean Air Act requirements. Nonetheless and to ensure clarity at the earliest practicable date, action on these SIP revisions should be expedited, consistent with necessary legal requirements and in consideration of other pending policy matters (e.g., state audit immunity policies).

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[3] For example, the Clean Air Act Stationary Source Civil Penalty Policy (October 25, 1991) recommends that recoupment of economic benefit due to delayed and avoided compliance costs be calculated from the "first provable date of violation." Agency enforcement personnel should utilize their common sense and experience to assess and evaluate all available information in determining what constitutes a "provable" date of violation under that policy.

Proceedings Involving the Use of Credible Evidence in FY 97 are "Nationally Significant" - In redelegating concurrence authority for the settlement of enforcement actions to Regional Counsel, an exception was made for cases raising issues of national significance. Memorandum, Redelegation of the Assistant Administrator for OECA's Concurrence Authority in Settlement of Certain Civil Judicial and Administrative Enforcement Actions, Steven A. Herman, Assistant Administrator, July 8, 1994. Guidelines for identifying nationally significant cases/issues were contemporaneously issued, with subsequent guidance further clarifying the matter. Memorandum, OECA/Regional Procedures for Civil Judicial and Administrative Enforcement Case Redelegation, Robert Van Heuvelen, Director, Office of Regulatory Enforcement, November 8, 1994. Consistent with such redelegation, guidelines and guidance, the initiation, litigation and resolution of civil proceedings involving the use or anticipated use of non-reference test data to establish/refute the existence or duration of a violation under SIPs, NSPS, or NESHAPs are to be identified and treated as cases involving "nationally significant issues" for at least the next year.

Regional Counsel should review their current cases (regardless of redelegated authority) to determine whether credible evidence issues have been or are likely to be raised. In all future referrals and enforcement actions, Regional Counsel, Enforcement Division Directors and Air Division Directors should consider whether non-reference test method data and/or other information are available and can be used to enforce compliance with applicable Clean Air Act requirements.

Future Guidance/Work Group Formation - Since the evaluation and use of credible evidence plays an important part in ensuring continuous compliance with emission limitations and requirements, the Regions are encouraged to use non-reference test data where appropriate. Such use could be aided, and consistency enhanced, by the issuance of additional guidance and direction on the evaluation and use of all forms of non-reference test data as credible evidence.

With this memorandum I am also announcing the creation of a Credible Evidence Work Group, to be chaired by ORE's Air Enforcement Division. This work group is charged with developing additional guidance on the use of credible evidence and other, related materials. This activity will undoubtedly benefit greatly from the perspectives and expertise resident in the Agency's regions, offices and program activities. Please submit nominations of persons with both legal and technical experience in clean air enforcement matters to Bruce Buckheit, Director, Air Enforcement Division, Office of Regulatory Enforcement, not later than June 1, 1997.

The measures identified and described in this document are intended solely for the guidance of government personnel (e.g., the Interim Enforcement Response Policy). They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the United States or the Environmental Protection Agency. EPA reserves the right to act at variance with these measures and to change them at any time without public notice.

BRADLEY I. RAFFLE

Bradley I. Raffle is a partner in the environmental section of Hutcheson & Grundy, L.L.P. in Houston. Mr. Raffle has devoted his practice to environmental law for the past twenty years on behalf of numerous industrial corporations. He is recognized nationally as an authority on the Clean Air Act and has spoken and published extensively on air pollution control law. Mr. Raffle was retained in 1980 as a special consultant to the National Commission on Air Quality.

Prior to joining Hutcheson & Grundy, L.L.P., Mr. Raffle was with Fulbright & Jaworski, L.L.P., in their Houston office. He served as Supervising/Senior Counsel for Conoco Inc. in Houston from 1981-1990 where he was responsible for a broad array of environmental law matters involving hazardous wastes, superfund, toxic torts, air and water pollution control and wetlands regulation.

In 1985, Mr. Raffle was elected to Houston Independent School District Board of Education and served as Board President in 1988.

Mr. Raffle received a law degree from the University of Miami and, prior to that, a Masters Degree in Environmental Engineering from the University of Florida.

CAA NEW SOURCE REVIEW

"Something Special in the Air"

DAVID CABE

MINOR NEW SOURCE REVIEW
"SOMETHING SPECIAL IN THE AIR"

9th Annual Texas Environmental Superconference
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by

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INTRODUCTION - *The First Whiff*

Tools available to environmental consultants and attorneys for keeping up with regulatory information have improved markedly in the last five years. Not too long ago, the monthly trip to the Texas Air Control Board to collect new forms and updated copies of regulations was normal. Now, with widespread Internet access and other means of rapid communication, up-to-date regulatory information is available almost instantaneously. In particular, the Texas Natural Resource Conservation Commission (TNRCC) web site (www.tnrcc.tx.gov) has supplanted the TNRCC "forms room" as the comprehensive source of published regulations, program descriptions, policy guidance, and tables and forms to the regulated community in Texas.

With this abundance of easily-accessible information, what can the consulting engineer offer as "Something Special in the Air" to a gathering of environmental professionals generally conversant with the rules and policies governing minor New Source Review (mNSR) in Texas? And what can the engineer explain to the legal community about the intent and meaning of TNRCC policies and regulations? -- In this arena, the lawyer wins hands-down.

Refraining from the temptation to exhaust stale information about TNRCC requirements and procedures, I have attempted to create a fresh zephyr, carrying to you the consulting engineer's perspective on meeting the unique challenges of mNSR in Texas. Following a brief historical overview of the Texas mNSR program and recent regulatory initiatives, the evolving and complementary roles of the environmental consultant and attorney in the air permitting process are discussed. These roles are described in the context of identifying and addressing, in timely and cost-effective ways, those issues which could prevent meeting the applicant's primary permitting goals.

TNRCC PROGRAM OVERVIEW - *A Complex Bouquet*

The TNRCC is generally recognized as one of the most proactive state air pollution regulatory agencies in terms of minor New Source Review permitting. The TNRCC initiated its mNSR program is 1971, six years before EPA's first Major New Source Review rules for preventing significant deterioration of air quality were promulgated. And long before Congress modified the federal Clean Air Act and EPA implemented programs for controlling air toxics emissions under Title III of the Act, the TNRCC was routinely considering the effects of emissions of air toxics in its review of permit applications and amendments. Through steady growth and changes, TNRCC's mNSR program has developed into a comprehensive tool for protecting health and the environment through pre-construction or pre-modification permitting (or exemption from permitting) of "non-major" air-contaminant emitting activities and sources. The TNRCC efforts have resulted in the development of a program that offers a variety of mNSR permitting avenues including permits, standard permits, flexible permits, and permit exemptions. In addition, permits can be changed through amendments, alterations, and changes to qualified facilities.

In recent years, the TNRCC, through its guiding principles, policies, and rule changes, has made substantial progress toward more flexible, "common-sense" approaches to minor new source review (mNSR) air permitting in Texas. Coupled with recent laws enacted by the Texas Legislature, The TNRCC's regulatory initiatives and changes have begun to transform the mNSR program into an even more results-oriented system for protecting public health and the environment.

Changes to Qualified Facilities

The recent addition of 30 TAC §116.116 (e) in response to Senate Bill 1126, enacted by the 74th Legislature, is an example of recent innovation. The new rule provides an expedient means to authorize many changes that will have no net effect on plant-wide allowable emissions. Specifically, a physical or operational change may be made to a qualified facility without pre-notification to the TNRCC in many cases if the change does not result in a net increase in allowable emissions of any air contaminant and does not result in the emission of any air contaminant not previously emitted. When pre-change notification is not required under the rule, post-change notification or description of the changes in an annual report must be provided to the TNRCC. Since its March 3, 1996, effectiveness date, a variety of industries have used this new rule to quickly implement physical and operational modifications.

Regulatory Flexibility

A second, and perhaps more innovative change in the concept of regulating the emissions of new air pollution sources, is described in Senate Bill 1591 of the 75th Legislature. Signed by the Governor on June 20, 1997, this bill exempts a permit applicant from an

emissions control requirement in a statute or rule if the applicant abates pollution by an alternative method or standard that is at least as protective of the environment and public health. As long as the proposed alternative is not inconsistent with federal law, permit applicants in Texas will potentially have greater flexibility in the means of ensuring protection of the environment and public health. For example, with this concept it might be possible for a new emissions unit to be constructed without Best Available Control Technology (BACT) if steps are taken to reduce emissions in other parts of the plant (for example, at grandfathered units).

Control of Grandfathered Sources

HB 3019 was passed during the 75th legislative session authorizing the TNRCC to continue to grant standard exemptions to qualifying facilities of "certain types" if such facilities will not make a significant contribution of air contaminants to the atmosphere. In addition, this amendment to the Texas Health and Safety Code requires that the TNRCC develop, by December 1, 1998, a "voluntary emissions reduction plan" for the permitting of significant sources of air contaminants (including grandfathered facilities). The TNRCC and the Grandfathered Facilities Workgroup continue to work to on a plan for registering grandfathered facilities, controlling emissions of the more significant emitters, and creating some type of permitting system for grandfathered facilities. Although the final outcome of this effort is not certain, this TNRCC initiative reflects the Commission's concern about the potential for environmental problems due to emissions from grandfathered facilities and a desire to strengthen the regulatory framework for addressing these potential problems. Regardless of how the intent of HB 3019 is incorporated into future rulemaking, owners of grandfathered facilities throughout Texas should be preparing for changes in how their sources are regulated by the TNRCC.

Lingering Permitting Challenges

In spite of regulatory clarity and innovation introduced by the TNRCC, applicants still face many hurdles in the pursuit of usable and timely NSR permits. Differences with the TNRCC over emission calculations methods, emission control technologies, dispersion modeling approaches, effects evaluations, and application review schedules can delay permit issuance and diminish the permit's ultimate value. And public opposition to the permit, especially opposition that leads to a public hearing or a civil suit, can result in delays and compromises that mortally wound the project being permitted.

WORKING WITH THE CONSULTANT AND LAWYER - *Taking the Odor Out of Being Close*

Years ago, industry managers frequently viewed the environmental consultant as a source of arcane information about the air quality permitting process. In many states, the consultant still serves industry in this role. However, in Texas, there is no veil of secrecy about mNSR procedures; the TNRCC goes out of its way to provide comprehensive and detailed information to the applicant. Coupling this increase in useful information with the maturing of environmental engineering and management as professions, corporate environmental staffs are more knowledgeable and experienced than ever before. Often faced with inadequate in-house resources due to "downsizing" and "re-engineering", the corporate environmental manager may perceive that the most important service that consultants and attorneys can provide is simply extra hands to handle overflow work. Although this is a legitimate need, it does not tap into the greatest value that the experienced environmental consultants and attorneys offer -- the ability to consult and advise. Faced with threats of litigation, tight construction schedules, and profitability demands, corporate managers rely ever more heavily on their environmental staff to optimize the permitting process. It is in this context that the experienced environmental consultant and attorney, working as team, can provide the greatest benefit.

Clearly Defining the Objectives

The environmental professional can provide significant value to the applicant from the very beginning by helping to clarify overall objectives of the permitting effort. As a consultant, the engineer or lawyer often must help the client think through nebulous objectives or even develop objectives for the first time. This involves more than just stating the obvious: "By June my company wants a permit to produce 15,000 widgets per month." A more appropriate objective might be this: "My company must be able to increase production to at least 10,000 widgets per month by June to stay competitive; otherwise, we will have to shut the plant down. What is the optimum path to obtaining regulatory approval for this?" By reframing the objective in terms of the larger goals of the company's management and production groups, the applicant is better able to tap into the experience of the environmental consultant and lawyer. At this point, the consultant is not given marching orders to "get a permit", but is given authority to evaluate viable alternatives to meeting the objective and to provide recommendations to the applicant.

In the previous example, the applicant is planning to increase production in a city where public opposition to air permits and resulting permit delays are the rule. Rather than pursuing a permit for producing 13,000 widgets per month and opening the door to a public hearing, the applicant accepts the consultant's advice to obtain a standard exemption with an enforceable production limit -- 10,000 widgets per month -- that the company can live with for at least three years. Although expansion of the operation above 10,000 widgets per month is prohibited under the exemption, the applicant has greater certainty

that the June production increase date, and the primary objective of his company, will be met.

While the cost of consulting services is usually important to the applicant, extra money spent for consulting advice early in the project often can be recovered many times over if this advice enables the applicant to meet a project schedule or even start production earlier than planned.

Addressing Crucial Issues Early

One of the most important services the consultant can provide to the applicant is to address "deal killer" issues in the very earliest stages of the permitting project and recommend solutions to problems, even before the first pre-permit meeting with the TNRCC. Recognizing the value of this service, many large companies considering acquisitions or relocations in Texas enlist the aid of environmental consultants and attorneys in the due diligence process. In particular, such companies seek the advice of environmental professionals about New Source Review considerations during this site selection process, examining factors related to the permit review and approval process such as public environmental attitudes, the potential for public opposition, and non-attainment and prevention of significant deterioration requirements.

In a recent example, a company considering relocation in El Paso sought the advise of an environmental consultant. The company president asked the question: "What do I have to do to get an air permit for a plant to be built at a certain site in El Paso?" It turned out, however, that building a plant at the particular El Paso site was not of primary importance to the president. Rather, it was imperative that the company build the plant near a supply of the proper grade of silica in the El Paso area, and that the plant be constructed quickly to meet market demands. Realizing this, the consultant pointed out the environmental sensitivity of citizens living near the candidate site and described the requirements and time frame for receiving TNRCC permit approval. In contrast, the consultant described the permitting requirements in Dona Ana County, New Mexico -- an area near El Paso with a ready supply of the proper grade of silica. Since the company's project, because of its very low emissions and minimal potential impacts, would be exempt under New Mexico rules from air permitting and the requirement to notify the New Mexico Environmental Department, the president is now reconsidering the original site location.

More commonly, the environmental consultant and attorney do not join the project team until the site is selected and some preliminary project design has been completed. At this point, options for optimizing the permit application process are more limited, and a different set of issues is relevant. Instead, the consultant is most effectively used in helping the applicant and the TNRCC reach a "win-win" outcome, given a set of project constraints. Sometimes, this task is more like pounding a square peg into a round hole, changing the shapes of both the peg and the hole in the process.

To ensure a successful "win-win" outcome, key issues must be addressed and resolved early in the permitting process, preferably before the application is submitted. In fact, it is important that this task be started long before the company makes its first contact with the TNRCC.

Issues related to the effects of emissions on health and welfare are usually the most troublesome to resolve, generally creating the greatest frustration for both the applicant and the TNRCC throughout the permit application process. In particular, issues related to the TNRCC health effects review and compliance with the National Ambient Air Quality Standards (NAAQS) in non-attainment areas can be especially difficult to resolve. Although the TNRCC may not request air quality impact demonstrations until after the application has been submitted, air quality impact issues are usually the first that should be addressed by the applicant.

Dispersion modeling is the default tool typically used by most applicants to determine if projects have the potential to cause or contribute to a condition of air pollution. Although dispersion models can provide realistic estimates of ambient concentrations due to elevated stack emissions, they frequently overstate ambient concentrations that result from complex industrial operations with widespread fugitive emissions and other sources located at or near ground-level. This conservatism, if accepted at face value, can result in severe and unrealistic restrictions on facility operations -- even to the point of affecting the viability of new projects. The effects of dispersion model conservatism can be especially apparent when the applicant is required to model grandfathered and other existing sources in the health effects review for new facilities to be permitted. If existing sources are being modeled for the first time, concentrations unacceptable to the TNRCC are often calculated.

The consultant can offer a number of options to deal with unrealistically high modeled concentrations. One of the most useful is the calibration of dispersion modeling results with ambient air quality monitoring data or the sole reliance on monitoring data in air quality impacts demonstrations. Dispersion models only simulate atmospheric dispersion of pollutants, relying on the physical characteristics of the atmosphere measured at a limited number of locations and for a limited number of periods. In addition, emission rates and other plant operating parameters input to the models often are not directly measured, but calculated or estimated using published factors, material balance information, or other indirect techniques. Ambient air quality monitors, on the other hand, directly account for actual plant operations and dispersion conditions, determining, to the accuracy of the measurement method, the concentrations in the air at a particular location and at a particular time. As such, representative data from an ambient monitor network often can bypass the inherent conservatism of dispersion models, providing more realistic estimates of actual ambient air quality.

Before recommending the use of ambient monitoring data in lieu of modeling, the consultant should advise the applicant to request TNRCC concurrence. In discussions with the Agency, the applicant should be prepared to defend 1) the monitoring method, 2) the

monitoring network operating and maintenance procedures. 3) the data reduction procedures, 4) the siting of the monitors, and 5) the duration of the data collection program. If the applicant can demonstrate that concentrations measured at a certain location and for a certain time period are representative of maximum levels in the area, it is often possible to make a defensible case to the TNRCC for using monitoring data in lieu of modeling. In addition, the Agency will sometimes accept the use of monitoring data collected at sites not located within the maximum impact zone of a facility if such data can be used to develop a factor for scaling or calibrating dispersion modeling results.

Although the EPA *Guideline on Air Quality Models* and the *TNRCC Air Quality Modeling Guidelines* proscribe many modeling procedures and changes to models, the applicant still has options for reducing the level of conservatism of the modeling results. Stepping beyond the role of a modeling technician, the consultant can recommend to the applicant and the TNRCC a variety of non-traditional modeling techniques including modification of input parameters for calculating plume rise from non-traditional sources, innovative treatment of fugitive emission sources, consideration of diurnal (day/night) variations in emission rates, and consideration of atmospheric conversion and removal of pollutants. Use of such techniques can have dramatic effects on modeled concentrations, driving modeling results from the realm of overconservatism to realism.

Emission calculation and Best Available Control Technology (BACT) requirements for new sources are less frequent "deal killers"; however, by establishing a clear understanding of TNRCC expectations concerning emissions calculations and BACT early in the permitting process, unpleasant surprises can be prevented later. Frequently, the applicant will have preconceived notions concerning what levels of emissions and emissions control, if any, are appropriate for new sources. By addressing these misconceptions, the consultant can provide a value-added service and help the applicant understand and accept technically-sound methodologies and Agency policies.

The TNRCC provides emissions calculation and control technology guidance and requirements for many industrial categories in the form of its regulations, policy memoranda, and technical documents. However, some of this guidance can become a moving target during a protracted permit application process as the TNRCC permit engineer becomes aware of new information. Occasionally, the permit engineer will revise his or her technical recommendations near the end of the preparation phase of the permit application, normally an inopportune time for the applicant to revise project designs and budgets.

To prevent these surprises, or at least minimize their adverse consequences, the consultant should attempt to obtain Agency concurrence of acceptable emissions calculation and BACT approaches before preparation of the application begins. In addition, the consultant should play the role of his or her TNRCC counterpart and continue to track regulatory and technical developments throughout the permit application process. Most important, the consultant should maintain close and frequent contact with the permit engineer to ensure

that early decisions concerning calculation methods and control requirements are carefully considered and not reversed later.

In the project planning phase, the single question most often asked by the Corporate project manager is "When will I get my permit?" Time is money, and the timing of approval of the permit application is almost always important to the applicant. The environmental consultant can recommend several actions, begun early in the permit application process, to minimize the time it takes for the TNRCC to review the application. High on this list is to encourage the applicant to agree to a specific date for freezing the project design to be permitted. Significant changes in the design late in the permit application process can cause delays -- directly, because it takes the consultant longer to complete the application and indirectly, because the consultant is more likely to make errors in the application which will be discovered and require correction later.

By adhering to the project design "snapshot" strictly for the purposes of the permit application, the applicant can expedite the entire permit approval process and often can start construction earlier, reserving the option to "clean-up" the permit later through alterations or amendments. To help the applicant accept the leap of faith involved with permitting the "snapshot" design, the consultant should offer to evaluate the NSR permitting implications of evolving design changes, completing this review as soon as possible after the application is submitted. Then, absolutely essential revisions to the application can be made with minimal disruption to the construction schedule.

Interacting Effectively with the TNRCC

The quick and efficient processing of a mNSR permit application is as much a function of the TNRCC's commitment to the project as it is to the applicant's efforts. Not surprisingly, the TNRCC staff respond best when they are fully informed about the project and when they are treated with respect. A pre-permit meeting attended by the applicant, the applicant's representatives, and the Agency staff is the first step in establishing a good working relationship. Typically, Company technical or environmental managers should take the dominant role at this meeting with consultants and lawyers in the back seat. By taking pains to create and deliver a comprehensive presentation about project details, timing requirements, and the commitment to working cooperatively with the Agency, the Company will start off on the right foot with the TNRCC.

The best way to help the TNRCC stay on a fast review track is to submit an accurate and technically complete application at the beginning. Inadequate applications are often hurriedly prepared and submitted without proper technical review simply to conform the applications to corporate project time lines. Invariably, such applications slow down the permit review process through the exchange of deficiency letters and responses between the TNRCC and the applicant. Also, the submittal of inadequate applications can erode the TNRCC permit engineer's confidence in the applicant's veracity, technical competence,

and understanding of his or her own project -- a situation that can hamper communication and negotiation during the application review process.

Finally, frequent and productive communication with the permit engineer through the progress of the permit review is essential. Showing a continual interest in the progress of the review and responding quickly to Agency questions can prevent interruptions and minimize delays. In particular, providing an unsolicited draft of permit conditions and a Maximum Allowable Emission Rate Table to the TNRCC permit engineer can shave days off the time required for the Agency to create the draft permit and for the applicant to review the draft and provide comments.

Avoiding Overkill

To reiterate, a technically correct and clearly communicated application is one of the keys to the expedited and successful approval of the permit. However, many lawyers and engineering consultants believe that the same level of effort should be applied to all projects they tackle. In minor mNSR permitting efforts, the consultant may feel wedded to certain methods of performing calculations, preparing graphics, and presenting results. However, a Cadillac is not always needed when a bicycle will do the job just as well.

Corporate environmental budgets are usually limited and construction schedules are often tight; consequently, the client usually appreciates a streamlined application approach that accomplishes his or her objectives. This begins with the proper decision about which mNSR permitting tool to use. For instance, can the project be authorized under standard exemption and permit review be avoided entirely? Can the project be made to fit the definition of a qualified facility under §116.116(e) or is the more time consuming general permit application procedure of §116.111 required?

The attorney and environmental consultant show respect for the client's budget and schedule restraints by recognizing when their efforts are approaching the point of diminishing returns. Although the consultant and attorney may desire to produce a "Cadillac" application, this type of work product may not be required by the permit engineer, much less by the client. In the absence of public opposition to the project, it may not be necessary to provide the level of detail needed to prove the applicant's case in a contested case hearing. In addition, less rigorous technical approaches may be appropriate if the applicant can demonstrate to the TNRCC permit engineer that they are conservative (e.g., use of emissions calculation techniques or assumptions that may overstate emissions and their impacts). Capable engineering consultants and lawyers working closely with the applicant and the TNRCC permit engineer throughout the application process can produce the optimum work product, mindful of additional documentation that might be needed in the event of a hearing.

Dealing with Public Opposition

Strategies for dealing with public opposition to a permit are primarily the domain of the environmental attorney. However, participation of the environmental consultant in the process before and after the submittal of the application can significantly affect public reaction to the project.

The best way to deal with opposition is to avoid it entirely. As discussed in the El Paso example, the applicant should be encouraged to weigh environmental factors in the site selection process. To borrow an axiom from the real estate industry, the three most important factors to consider are location, location, and location. The wrong location can deal a death blow to a short-fuse project even before the permit application is submitted. Also, many applicants mistakenly overlook another avenue for avoiding a public hearing and construction delays -- the standard exemption. Many projects, which first seem to require a permit, upon closer examination qualify for a standard exemption. By downsizing or modifying the original project scenario to ensure that it qualifies for a standard exemption, considerable headaches and delays associated with a hearing can be avoided.

Perhaps the most baffling question for environmental consultants and environmental lawyers alike is how to demonstrate the environmental acceptability of the project to suspicious citizens before skepticism turns into outright opposition. Often, by the time the neighborhood has decided or has been convinced to oppose a project, it is too late.

Opinions differ on how to effectively deal with the public. Some advocate pre-application meetings and dissemination of information to publicize the project, obtain public support, and address issues ahead of time. Others advocate keeping a lid on the project to avoid stirring up the pot. Both approaches have their pros and cons and both succeed or fail, often due to circumstances far beyond the control of the applicant and his or her advisors. For these reasons, the decision about how to communicate the project must be based on an awareness of the potential for opposition and an understanding of public concerns, before they are ever voiced.

Most effective, however, in communicating the company's intentions to the public is communication through action. A consistent history of trustworthy and visible environmental stewardship will much more effectively set the stage for a new permit application than verbal pronouncements about the company's intentions. If environmental problems exist, the company should consider the rectification of these problems under the protection of the Audit Privilege Act. Working as a team, the environmental attorney and environmental consultant can help the company restore compliance and the company's environmental image before the NSR application is submitted -- improving the chances that the application will be well received.

CONCLUSION - *Clearing the Sinuses*

Sophisticated environmental managers need more from their environmental consultants and attorneys today than extra hands. With the proliferation of mechanisms for obtaining regulatory authorization for new projects under the Texas Clean Air Act and with the abundance of hazards in the road to timely permit approval, the advice and added value of experienced environmental consultants and attorneys are often needed to successfully negotiate the entire minor New Source Review process.

BIOGRAPHY
OF
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Ninth Annual Texas
Environmental Superconference

Legislative Update



NEW LEGISLATION

"It's Shake and Bake, and I Helped"

JOHN HOWARD

NOTES

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Ninth Annual Texas
Environmental Superconference

Cleanup and Risk Assessment



TOXICOLOGY, EPIDEMIOLOGY & RISK ASSESSMENT IN ENVIRONMENTAL PROGRAMS

"Doctors Recommend It Three to One"

THOMAS MUSTA-DYDEK

TOXICOLOGY, EPIDEMIOLOGY AND RISK ASSESSMENT IN ENVIRONMENTAL PROGRAMS

"Recommended by Doctors Three to One!"

For presentation at the
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TOXICOLOGY, EPIDEMIOLOGY AND RISK ASSESSMENT IN ENVIRONMENTAL PROGRAMS

I. INTRODUCTION

Most people are aware that there are substances in the environment which can be harmful to their health. The lay public, however, may have an inaccurate view of the true risks posed by chemical exposures. It is the job of public health professionals to evaluate the actual potential for adverse health effects and to communicate their findings to the public. The two scientific fields which are most relevant to this evaluation process are toxicology and epidemiology. To be able to understand and convey the risks involved with chemical exposures, it is important to be familiar with these two disciplines. Toxicology can be defined as the study of the adverse effects of chemical agents on living organisms.[1] Epidemiology is the study of the patterns and the causes of diseases in human populations.[2] Environmental epidemiology is the sub-discipline concerned with diseases caused by exposure to chemicals in the environment. Human health risk assessment and risk management activities utilize the results from toxicological and epidemiological studies to implement public policies designed to protect human health. This presentation will describe essential principles of toxicology, epidemiology, and risk assessment and how this information is used in specific environmental programs in this country.

II. BASIC PRINCIPLES OF TOXICOLOGY

A person who believes he or she has been exposed to potentially-toxic substances wants to know whether the amounts of those chemicals encountered will cause any health problems. The corresponding toxicological terms for this are dose of the chemical and response in the organism of interest; i.e., the person. The amount of a chemical inhaled, ingested, or present on the skin (the three major routes of chemical exposure) is the starting point for determining the actual dose of the chemical or chemicals. In most cases, not all of the chemical to which a person is exposed will have an effect. Some will be changed to less-toxic forms, some will be excreted, and some can be stored in the body at sites removed from those which are sensitive to chemical injury. To exert a toxic effect, enough of the substance must reach a sensitive site in the body at a high enough level for a long enough time. If levels of contaminants and time of exposure are small enough, there will be no adverse effect on human health.

A. Dose-Response Relationships

The relationship between the dose of a chemical and the response seen in the organisms exposed to it is one of the cornerstones of toxicology. Primitive humans learned by trial and error how much and what kind of naturally-occurring materials they could eat without getting sick. The body of knowledge concerning the medicinal properties of various substances gradually grew. As time went on, the toxic effects of poisonous plants, animal venoms, and certain mineral substances were put to use in hunting, warfare, and even for political assassinations. By the time of the Middle Ages, the job of "poisoner" was well-established and had become quite sophisticated. In more recent times, the science of toxicology has developed without the need to "test" chemicals by poisoning people.

Dr. Thomas Musta-Dydek, PhD, DABT, PE
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1. Dose Considerations

From the early years of modern toxicology, it was recognized that any substance could exert toxic effects if present at high enough levels for long enough times in the body. Conversely, for almost all substances, there is some minimal level which can be tolerated without any adverse effects occurring. Put in simple terms, "the dose makes the poison". This concept is one which is essential to discussions of risks of exposure to toxic pollutants. Toxicity classification schemes are somewhat arbitrary, but an example is given in Table 1. These data show the wide range of toxicity for different doses.

There are levels of exposure to most, if not all, chemical substances which will not cause any measurable adverse effects. These levels may be very small, but they are not zero. It is natural to be more comfortable with zero emissions of toxic chemicals, but this is usually an unnecessarily restrictive position to take. One of the challenges of toxicology today is to communicate these ideas to the general population.

2. Response Considerations

The other half of the dose-response relationship is the response, or adverse health effect. A response will be observed when the dose becomes sufficiently high. The mammalian body has developed a masterful system of adaptations. It can adapt to changes in its environment, including exposure to exogenous chemicals. Some effects seen upon exposures to chemicals are adaptive in nature and do not really affect the organism's ability to function within normal physiological ranges. These effects are termed "adaptive" and are not generally classified as adverse effects. In risk assessments, what we wish to evaluate is the risk of adverse effects from chemical exposures.

3. Dose-Response Curves

The relationship between dose and response is often represented in a graph such as the one shown in Figure 1. For most chemicals, as the dose is gradually increased from zero, a level is reached at which a given adverse response or endpoint is first noted. This dose level is called the "threshold dose", the lowest dose at which the first indications of an adverse effect are noted. As the dosage is increased, the responses become more prevalent in the population of organisms exposed to the chemical. At dose levels just over the threshold dose, the effects in an individual animal are usually reversible when the exposure is stopped. As doses increase, however, the probability that irreversible damage will occur also increases. At still greater doses, death of the organism will take place. Notice that not all the animals are affected at the same dose of the chemical. This reflects the fact that there is variation in sensitivity among individual members of an animal population. Some animals are more sensitive to the effects of chemical exposures than others. This is also true for people and this fact is an important aspect of the way we evaluate health risks, as I shall discuss further below.

TABLE 1.

CLASSES OF TOXICANTS AND HUMAN LETHAL DOSE 50 (LD_{50}) VALUES FOR VARIOUS CHEMICALS (ORAL ROUTE OF EXPOSURE)

TOXICITY CLASS	LD_{50} VALUE	EXAMPLES
Super toxic	< 5 mg/kg (< 7 drops)	curare, cyanide, botulinus toxin
Extremely toxic	5-50 mg/kg (7 drops-1 tsp.)	phenol, Parathion
Very toxic	50-500 mg/kg (1 tsp-1 oz.)	carbon disulfide, methyl alcohol
Moderately toxic	0.5-5 grams/kg (1 oz.-1 pt.)	acetone, chloroform, ethyl alcohol
Slightly toxic	5-15 grams/kg (1 pt.-1 qt.)	isopropyl alcohol
Practically non-toxic	> 15 grams/kg (> 1 qt.)	water

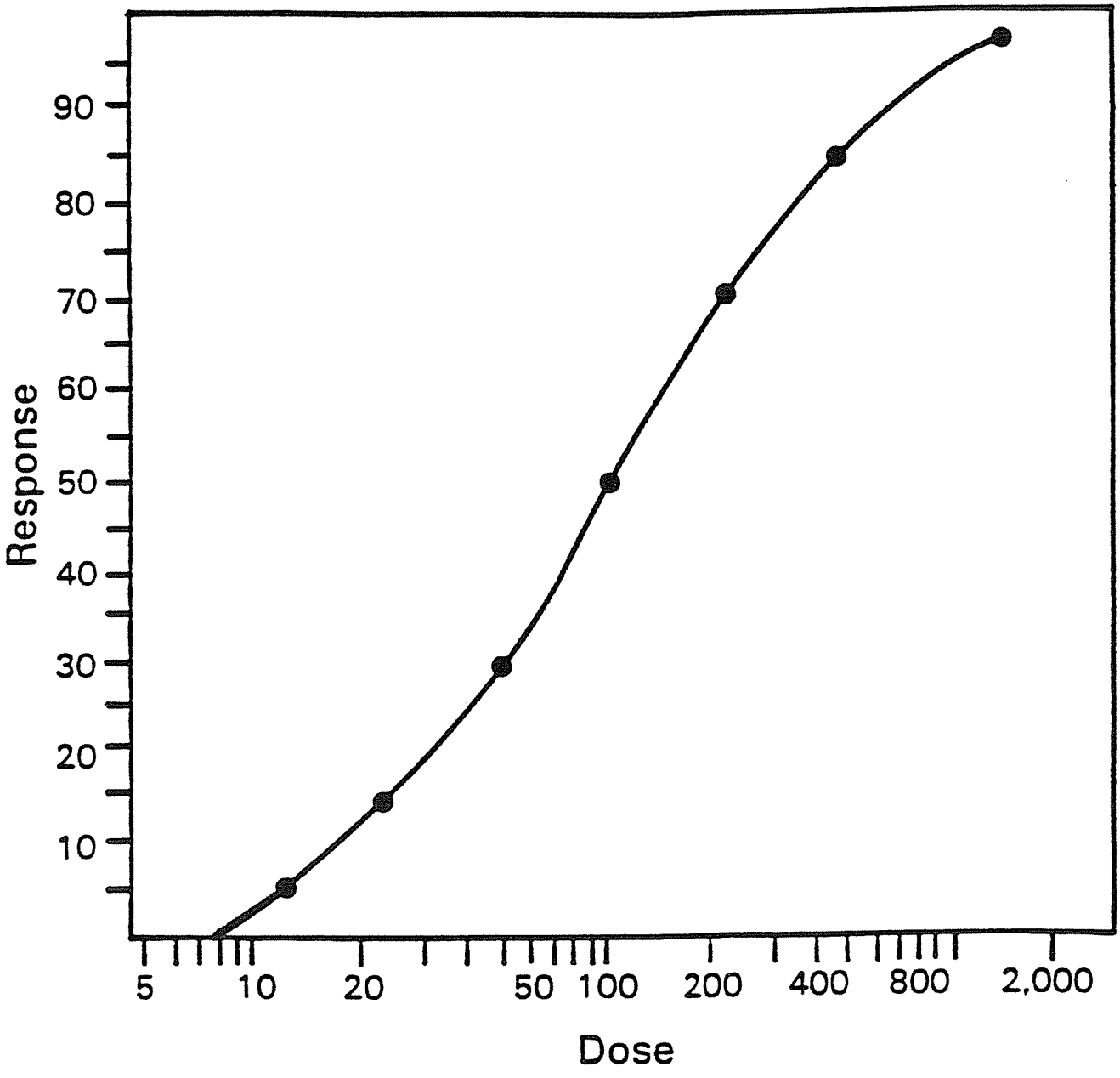

Figure 1. Diagram of dose-response relationship. Dosage is most often expressed as mg/kg and plotted on a log scale.

B. Methods for Evaluating Toxicities of Chemicals

To evaluate the human health risk associated with exposure to a chemical, it is essential to determine just how toxic the chemical actually is. Several different types of toxicity tests have been developed to accomplish this. The three major types of toxicity testing are human exposure studies, studies using laboratory animals, and "in vitro" testing methods.

1. Human Exposure Studies

Not unexpectedly, the most useful toxicity information for health risk evaluations is data from humans. Clearly, there are ethical limitations to using people as "guinea pigs" to determine the toxicity of a chemical. Since the 1970's, virtually all human exposure research has been carried out under very strictly controlled conditions. Most of the human exposure studies have been conducted for short periods of time (hours or days) using chemicals whose toxicity is fairly well-known. An example is research done by the EPA on the health effects of air pollutants. The risk to the volunteer subjects in these studies is minimal because these pollutants are present in the community air already and short-term exposures are not expected to cause any serious or irreversible health effects. Some of the air pollutants for which human exposure data exits are ozone, carbon monoxide, nitrogen oxides, and sulfur dioxide.

Another type of human toxicity data comes from studies of occupational exposures. People are exposed to many chemicals in the workplace. Much of the information we have concerning the human toxicity of chemicals comes from the occupational exposure data which have accumulated over the years. The health experience of workers who have long-term exposures to chemicals is a valuable source of toxicity information. The health effects of short-term exposures to relatively high levels of chemicals can also be determined from the experiences of workers. Occupational exposure limits (OELs) are set based on the data from the workplace experiences of people over the years. Currently there are about 700 chemicals for which OELs have been set.[3] These are the chemicals which are most commonly used and for which the most toxicity data exist.

A third type of human exposure experience data comes from what are usually called "case histories". These are reports of exposures of one or more people to chemicals. These exposures are typically a one-time occurrence to relatively high levels of substances. They can be in either occupational or non-occupational settings. The most common type of case histories are those reported by occupational medicine physicians who see the workers after the exposure has taken place. Other case histories come out of accidental poisonings in the home or from suicide attempts. Case histories are sometimes published in technical journals. While this information can be suggestive of the human toxicity of a chemical, it is rare when the actual dose is known. Furthermore, because of the wide variability between the responses of different individuals, what happened in one case may not apply to exposures of other individuals. This type of data is sometimes referred to as "anecdotal" because there was no planned exposure study involved and the information is just what was observed in a limited situation.

2. Animal Toxicity Studies

Since the number of chemicals which can be tested directly in people is very limited, most toxicity data is obtained from exposures of animals under controlled laboratory conditions. The species most often used are mice and rats, although some studies have used larger mammals such as cats, dogs, pigs, monkeys, and even donkeys. Such testing can be done for hours or days, as in the human exposure studies, or for longer periods of time. Studies of chemicals which can cause chronic diseases such as cancer need to be conducted over a large portion of an animal's life. Mice and rats have life spans of about two years and for practical reasons, these are the species used almost exclusively for long-term exposure studies.

The major limitation of toxicity testing in animals is that extrapolations are necessary before the results can be used for human health risk analysis. Despite many similarities among mammalian species, humans are different from mice, rats, or other experimental animals and members of each animal species can show differing responses to the same dose of a chemical. That is one reason that most animal toxicity studies use more than one kind of experimental animal. In most risk assessments, the default assumptions is that humans are at least as sensitive to a chemical as the most sensitive animal species. This assumption is in many cases overly-conservative, but when data are lacking, it is the prudent choice.

The two major extrapolations are necessary when using results from animal toxicity testing to assess human health risk. One is that the data must be extrapolated from the relatively high doses used in animal studies to doses which are likely to be encountered by people in everyday life. In animal exposure studies, the exposure levels are often many times greater than those which are anticipated for people. This is done to make sure that effects will be measurable, but it can introduce some complications in the risk assessment process. There are many different mathematical models which have been proposed to deal with this extrapolation. Without detailed information about the toxic mechanisms of the chemical, it is often difficult to determine which model is most appropriate. Such detailed information is lacking for the majority of chemicals. The other major type of extrapolation needed is that from non-human to human species. While both rodents and humans are mammals, the two species will not necessarily have the same response or degree of response to chemical exposure. The appropriateness of using animal data to assess human health risk is a topic of current debate among toxicologists and other risk assessors. These extrapolations introduce a degree of uncertainty in the use of animal data for human health risk assessment.

3. <u>In Vitro</u> Testing Methodologies

Both human and animal toxicity testing are expensive and time-consuming endeavors. The approach of using these methods to test the tens of thousands of chemicals in commerce, let alone the hundreds of thousands to millions of total chemicals in the world, is clearly limited. It thus makes sense to have some sort of relatively inexpensive and fairly rapid means of screening chemicals for toxic potential. <u>In vitro</u> (literally "in glass") methods can be used in this context. Individual animal or human cells or tissue samples can be exposed to toxic chemicals and the cellular or tissue response can be measured by various techniques.

Probably one of the best known of these techniques is the so-called Ames test, which is used to assess the mutagenic potential of a chemical. In this test, special bacteria are utilized which cannot normally grow in certain cell culture media. If the bacteria are exposed to a chemical which has the power to change (mutate) the bacterial DNA, however, they may re-acquire the ability to grow and form countable colonies in a Petri dish. If colonies of bacteria do grow, it is evidence that the chemical is a mutagen and therefore may be a carcinogen. A positive Ames test result is an indication that further testing to confirm the carcinogenic potential of the chemical is needed.

III. BASIC PRINCIPLES OF EPIDEMIOLOGY

A. Introduction

Epidemiology is the study of the determinants of and the patterns of human disease incidence. Epidemiologists note unusual incidences of human disease and try to find the factors which differentiate the affected persons from other groups of people who do not have the disease in question. The general approach taken in epidemiological studies is to first identify several different groups of people. The members of these groups should be as similar to each other as possible, with one exception: the "exposed" group has been or will be exposed to a chemical or other agent and the "control" group has not or will not be exposed.

The exposed and control groups are usually matched on characteristics such as age, sex, race, education level, and socioeconomic class.[4] Epidemiologists must account for and minimize the effects of bias and confounding in the study which, if not controlled for, could invalidate the results. Rigorous statistical analyses are needed in epidemiological studies to confirm that the differences seen between matched exposed and unexposed ("control") groups are indeed attributable to the agent involved and not only due to chance. Statistical methods are so much a part of epidemiology that a separate discipline called biostatistics has evolved which deals with the study of statistical methods used in designing and analyzing epidemiological studies.[5]

B. History of Epidemiology

In the earliest days of human civilization, the presence or absence of diseases in the population were most likely attributed to whether or not the gods were happy. In the fourth and fifth centuries B.C., Hippocrates expressed the first recorded notions of disease as being a mass phenomenon as well as one which could affect individuals. The next important advances in epidemiology did not occur until the fourteenth and fifteen centuries when the concept of contagion began to be recognized. The idea that diseases could be spread from person to person by the transmission of minute particles or organisms led to the elucidation of the patterns of incidence of diseases such as measles, smallpox, and cholera. Even before Pasteur's work on the germ theory of disease in the mid-1800's, epidemiologists such as John Snow were attributing the transmission of diseases to the ingestion of small amounts of infectious materials in food or in contaminated water supplies.[6]

In more recent times, epidemiology has expanded to study non-infectious illnesses such as heart disease, diabetes, and cancer. Environmental epidemiology is a relatively new field where the agents which may be the causative factors in disease are physical agents, chemical agents, or psychosocial factors. Some examples of physical agents are radiation, climate (heat or cold stress, humidity), and noise. People are exposed to chemical agents in the air they breathe in both community and occupational settings, in the water they drink, in the soils which they can incidentally ingest, and in the food they eat. Psychological and social factors such as the stress of urban living, nutritional status, or socioeconomic class can also influence disease patterns. All of this information needs to be considered in epidemiological investigations used in the evaluation of human health risk from exposure to potentially-toxic chemicals.

C. Types of Epidemiological Studies

The object of epidemiological studies concerning chemical exposures in the environment is to show that differences in the adverse health outcome can be attributed to differences in chemical exposure levels. There are three major types of epidemiological studies: prevalence (cross-sectional), retrospective (case-control), and prospective (cohort). While more detailed descriptions of how these studies are conducted can be found elsewhere[7], a short summary of each will be provided here.

1. Prevalence Studies

Prevalence studies, also called descriptive or cross-sectional epidemiological studies, look at the health information for a population at a given moment in time. No historical or follow-up data are obtained and only the prevalence of disease in different groups at the time of the study is ascertained. Prevalence studies are the easiest and least expensive to conduct, but they provide only a limited amount of information. They are often conducted as preliminary work prior to retrospective or prospective studies.[8]

As an example of an epidemiological prevalence study, suppose we want to know whether exposure to elevated levels of sulfur dioxide cause bronchitis. If we were to perform a prevalence study, we would examine the relationship between sulfur dioxide exposure and bronchitis incidence in different population groups at a particular time. One way to do this is to compare the bronchitis rates in areas which had different sulfur dioxide levels. If a finding was made that there were statistically significant differences in the incidence of bronchitis in the two areas, a further study would be indicated to refine and validate the results.

It is important to recognize the limitations of prevalence studies. Since they only look at one point in time, mortality or morbidity could be under-represented. This is because if the effects are severe, affected members of the population may have moved away to escape exposures or may have died. Furthermore, for diseases like cancer where the "latency period" (i.e., the time between exposure and onset of the disease) is long, the disease rates seen today may reflect exposures from many years ago, not the current exposure situations.

2. Retrospective Studies

In a retrospective epidemiological study, the investigators identify at least two groups of people on the basis of whether or not they have a certain disease. Thus it is usually referred to as a "case-control" study. To continue the example of the effect of sulfur dioxide levels on bronchitis incidence, if a retrospective study were done, two groups of people would be identified. One group would consist of those who have bronchitis (the "cases"). Information would be gathered for members of this group, including their ages, sexes, races, socioeconomic statuses, smoking histories, occupations, and personal and family medical histories.

The next step is to find another group of people who match as closely as possible with people in the "cases" group with the exception that they do not have elevated rates of bronchitis. This group is referred to as the "controls". The choice of a control group is often the crucial step in this type of study. Unless other factors which can lead to greater rates of bronchitis are accounted for, or "controlled", there is little hope for establishing a causal relationship between pollutant exposure and disease incidence.[9] One of the challenges of this type of study is to locate enough people for each group so that the differences seen will be statistically significant. Hundreds or even thousands of subjects are needed for epidemiological studies. After the cases and control groups have been identified, it is then necessary to go backward in time to try to quantify the sulfur dioxide exposures of the two groups.

One disadvantage to retrospective studies is that they must rely on historical records or people's recollections to determine past exposures to the chemicals of interest. It is difficult for most people to remember what chemical exposures they have had. One way around this is to rely on environmental monitoring data, but these data are often lacking. The systematic measuring and recording of ambient levels of pollutants has been a fairly recent development. Another problem is that people who have a disease which they may think was caused by chemicals may be more likely to remember incidences of exposure than people who have not been affected. This can introduce what is called "recall bias" into the analysis.[10]

3. Prospective Studies

The third major type of epidemiological investigation is called a prospective or cohort study. In contrast to the retrospective study, a prospective study looks forward in time. Prospective studies are usually called "cohort" studies because cohorts of people are chosen, usually on the basis of whether or not they have had or have the exposure to an environmental agent being studied. The health outcomes of the various groups, or cohorts, are then tracked over a fairly long period of time. Some epidemiological studies cover decades of exposures to chemicals.

To further use the example study, two or more groups of people would be identified which differ only in their degree of exposure to sulfur dioxide. These groups would then be followed over the years and the incidence of bronchitis in the different groups would be noted. Prospective studies have the advantage that exposures can be better characterized, but they are more costly and take longer to complete than retrospective studies.

D. Limitations of Epidemiological Studies

Epidemiological studies are basically uncontrolled experiments within free-living human populations. These studies have advantages and disadvantages, just as toxicological studies do. In epidemiology, the study groups are humans. The exposures seen are, by definition, those which are actually experienced by people. There is no need to extrapolate from the results of animal toxicity studies. This removes a large part of the uncertainty inherent in toxicological approaches to human health risk assessment.

While this type of study has advantages in terms of applicability to human health risk analysis, it also contains many difficult-to-control variables. Because epidemiological studies are conducted using real human populations, there are many factors which can make interpretation of the results difficult. These factors include the facts that the human population is a widely-varying group with differing genetic make-ups, differing personal habits, and differing exposures to a complicated mixture of pollutants. Often these other factors will be a much greater determinant of disease incidence than anything attributable to chemical exposure. Thus it is usually very difficult to find the small differences in disease incidence which can be attributed to potentially-toxic chemicals. The investigator must pay scrupulous attention to study design, study population group selection, data collection, and data analysis. Without these precautions, the study results could be useless.[11]

Some of the other general drawbacks of epidemiological studies are that they are expensive, time-consuming, and require highly-trained investigators to design and carry out. Finding a suitable exposed group and control group and following them through time to document disease outcomes in each group can be a daunting task. The challenge is to control for factors besides exposure to the chemical which could affect the disease incidence and to choose the population groups such that the only significant difference between them is degree of exposure to the chemical. Another shortcoming of these studies is that the results are often very specific to the exact chemical involved and the exact group of people studied. Thus the findings from one study will not necessarily apply to even slightly different situations.

IV. QUANTITATIVE HUMAN HEALTH RISK ASSESSMENT

"Risk assessment" is the characterization of the potential for adverse health effects of human exposures to environmental hazards. The assessment method which is primarily used in this country is "quantitative risk assessment". The U.S. Environmental Protection Agency (EPA) established this method in the late 1970's to the mid-1980's. This approach uses many conservative assumptions to estimate the risks of human exposure to chemicals in the environment. The EPA has established risk assessment methods for both carcinogens and for non-carcinogens.[12] These methods can be used to evaluate the potential adverse health effects associated with the impacts of the chemicals of interest. Depending on whether the "critical effect" (i.e., the biologically-significant effect which occurs at the lowest dose level) is cancer or not, the risk assessor would perform one of two similar, but different types of risk analyses. These are each described below.

A. Risk Assessment for Carcinogens

In the evaluation of the potential human carcinogenicity of chemical agents, the U.S. EPA uses the approach first described by the National Academy of Sciences[13] and subsequently established in the EPA "Guidelines for Carcinogen Risk Assessment".[14] New cancer risk assessment guidelines have been proposed, but these have not yet been promulgated. This approach consists of four major parts: hazard identification, dose-response assessment, exposure assessment, and risk characterization (risk estimation).

1. Hazard Identification

The purpose of the hazard identification step is to determine whether the agent in question poses a carcinogenic hazard to people. The major types of evidence bearing on this question are long-term animal studies under controlled laboratory conditions (animal bioassays) and human studies of the association between cancer incidence and exposure to the agent (epidemiological studies). Supporting evidence such as short-term tests for mutagenicity, metabolic and pharmacological studies, and structure-activity relationships is also considered.

The EPA uses a weight-of-evidence approach to classify the likelihood the agent in question is a human carcinogen. In the assessment of the overall weight of evidence for a chemical's potential for causing cancer, the toxicologists and other risk assessors first look at all of the available data from the human and animal toxicity studies. The next step is to give a "weight" to the results of each study according to the applicability to people and the strength of the data. The final action is to combine the weights to give an estimate of the carcinogenic potential the chemical has.

2. Dose-Response Assessment

In the dose-response assessment step in carcinogen risk assessment, the relationship between the dose of an agent and the likelihood of a carcinogenic effect is determined. This is also referred to as the potency of the carcinogen. These data come mostly from long-term animal studies. This is reflected in what the EPA calls the "cancer slope factor" or CSF. A greater CSF implies that a carcinogenic response can be caused by a relatively small dose of the chemical.

Dose-response assessment usually entails an extrapolation from the high doses administered to experimental animals or exposures noted in occupational exposure studies to the exposure levels expected in community exposure scenarios, as discussed before. Current EPA policy in these cases is to use what is called the "linearized multistage procedure". This procedure assumes that there is no threshold for carcinogenic action and that the response is linear with dose over the whole possible dose range. EPA also uses the response corresponding to the 95 percent upper confidence level rather than that given by the regression line itself ("most likely risk"). This approach gives what has been called the "plausible upper-bound risk". Therefore the risk is not likely to be greater than this upper bound risk, and it could be very much smaller (or even zero).

The EPA method is therefore very conservative in its approach to estimating cancer risks. The EPA has determined cancer slope factors for about 150 potentially-carcinogenic chemicals. These are available in the Integrated Risk Information System (IRIS) and in the Health Effects Assessment Summary Tables (HEAST) databases, which are maintained by the EPA.[15] The data obtained in the dose-response assessment are combined with that obtained in the exposure assessment step (described below) to yield a numerical estimate of risk.

3. Exposure Assessment

Standardized methods for estimating the amounts of chemicals to which a person could be exposed have been established by the EPA. The major routes of exposure to environmental chemicals are inhalation, ingestion, and dermal contact. The general equation for estimating chemical intakes is given below:

$$I = C\left(\frac{(CR)\ (EF)\ (ED)}{BW}\right)\left(\frac{1}{AT}\right)$$

In this equation,

I is the intake, usually expressed in units of milligrams of chemical per kilogram per day,

C is the chemical concentration in the media of interest; e.g. milligrams per kilogram in the soil or milligrams per cubic meter of air,

CR is the contact rate, the amount of contaminated media contacted per unit time or event; e.g. liters per day of water ingested, cubic meters per day of air inhaled,

EF is the exposure frequency, describing how many days per year the exposure has occurred or is predicted to occur,

ED is the exposure duration in years,

BW is the average body weight of the individual over the time of the exposure, and

AT is the averaging time or the period over which the exposure has occurred or could occur.

The EPA has developed standard factors (e.g. for breathing rates, water ingestion, food consumption, etc.) for use in these determinations.[16] Details of the calculation procedures for each route of exposure are given elsewhere.[17]

4. Risk Characterization

There are two main aspects of risk characterization. The first is the quantitative estimate of risk and the second is a discussion of the significance of the risk estimation. The risk estimate is given by the product of the cancer slope factor (from the hazard identification step) and the chemical intake (from the exposure assessment step). This risk estimate is then compared to an "acceptable" level of risk. A risk level of one in one million (10^{-6}) is generally considered an acceptable one for exposures in the community. Different levels of acceptable risks can be employed for different risk assessment situations.

5. Risk Assessment for Multiple Exposures

The risk assessment procedure described above pertains to exposures to single chemicals. In the real world, however, most human exposures are to more than one chemical. In the EPA method, carcinogenic risks are usually summed up to get an estimate of the total carcinogenic risk.

B. Risk Assessment for Non-Carcinogens

Despite popular belief to the contrary, not all chemicals cause cancer These other chemicals are referred to as non-carcinogens or "systemic toxicants" because they can affect different body systems. To assess the potential for adverse human health effects from exposures to non-carcinogens, EPA has developed the concept of a "reference dose", or RfDs. RfDs for various chemicals are contained in the IRIS and HEAST databases.

1. Definition of the Reference Dose

The reference dose or "RfD" for a particular chemical is an estimate of an exposure level which is likely to be without risk to even the most sensitive members of the population for a lifetime of exposure. Therefore, exposures to levels of chemicals less than the RfD are not likely to be associated with adverse health risks. If the RfD is exceeded, the probability that adverse effects will occur increases. This probability will depend on the magnitude and frequency by which the actual exposure doses exceed the reference dose. Again, many conservative assumptions and default uncertainty factors are used in this approach.

The EPA method uses the following formula to calculated RfDs, or for inhalation exposures, what they call reference concentrations (RfCs). These are doses or air concentrations below which no adverse human health effects are expected[18]:

$$RfD \text{ or } RfC = \frac{NOAEL}{(UF)\ (MF)}$$

In this equation, the NOAEL is the no adverse effects level from the toxicity study, UF are uncertainty factors, and MF is the modifying factor.

2. No Adverse Effects Level (NOAEL)

The NOAEL is determined from the exposure study data. It is defined as the highest experimental dosage level of the chemical for which no statistically or biologically significant increase in frequency or severity of an adverse health effect is seen in exposed individuals as compared with an appropriate control group of individuals.

3. Uncertainty Factors (UF)

Since the chemical exposure study population may be quite different from the human population at risk, various uncertainty factors are applied in this analysis to provide a margin of safety in the risk assessment. The standard EPA uncertainty factors are the following:

> A factor to account for the variability in susceptibility among members of the human population. This factor is included because levels of chemicals which may not cause effects in healthy adults could cause problems in other people who are not as healthy or who are more susceptible to the effects of exposure to chemicals.
>
> Another factor is used if the only available effects data are taken from long-term studies of the exposure of experimental animals to the chemical of interest. This is the so-called "interspecies extrapolation" factor. This is included because of uncertainty as to whether humans may be more susceptible to the effects of a chemical than are the animals which were studied.
>
> An additional factor is included if the experimental data are from a less-than-chronic exposure study. This will account for the possibility that if the study in laboratory animals had been carried out for a longer time, the NOAEL might have actually been less than that determined in a shorter-term study.
>
> In some experimental studies, a NOAEL may not have been determined. In such cases, the lowest dose at which effects are noted is used in the analysis. This level is the "lowest adverse effects level" or LOAEL. If LOAELs are used instead of NOAELs, another uncertainty factor is included.

In quantitative terms, each of these factors may take any value between 1 and 10. In most cases, a default value equal to 10 is used for each of these uncertainty factors.

4. Modifying Factor (MF)

An additional adjustment factor, called a modifying factor, is used in this risk analysis. The default value for the modifying factor is 1, but the factor can be as great as 10. Its magnitude depends on professional toxicological judgment concerning the experimental study and the database upon which conclusions were drawn in that study. For example, the numbers of species studied, the number animals in each exposure group, and the adequacy of other study design factors and methodologies would determine the size of the modifying factor.

5. Risk Characterization for Non-Carcinogens

To characterize the risk of exposure to a non-carcinogen, it is necessary to know what the RfD is and what the level of exposure is. RfDs have been determined by EPA toxicologists and other risk assessors for several hundred chemicals. The exposure level is estimated using the same type of technique that is used for carcinogens as discussed earlier in this presentation. The ratio of the exposure level to the RfD is known as the hazard quotient. If the hazard quotient is less than 1.0 (i.e., the exposure level is less than the RfD), the non-carcinogenic risk is acceptable.

6. Hazard Index Concept

The risk of exposure to multiple non-carcinogens is evaluated by using the concept of the hazard index. The hazard index is the sum of the hazard quotients for the individual chemicals in the mixture. Similar to the risk assessment for individual non-carcinogens, if the hazard index is less than 1.0, the risk is considered to be acceptable.

7. Conservatism in the Determination of the RfD

From the discussion above, it can be seen that the derivation of an RfD starts with a level which does not cause any adverse effects in the animal species studied (the NOAEL). This level is then reduced by the uncertainty and modifying factors to account for the uncertainties associated with using the animal data to assess human risk. The size of these factors will determine the amount of reduction from the no-effects level in animals. If all five factors are included in the analysis and each is given the maximum value of 10, this would mean that the RfD would be 100,000 times smaller than the animal NOAEL. Obviously, this can lead to some very conservative risk estimates. The toxicologist's role in this process is to provide the most accurate data possible for input into the process. This will result in the best estimate for an RfD.

V. HUMAN HEALTH RISK ASSESSMENTS IN ENVIRONMENTAL REGULATORY PROGRAMS

A. Introduction

A major public health objective in this country is the protection against adverse effects associated with exposure to potentially-toxic chemicals. These chemicals may be present in the water we drink, bathe in, and go swimming in; in the air we breathe; the food we eat; or in the soil with which we come into contact. The sources of these chemicals include industrial facilities, waste disposal sites, incinerators, occupational or personal exposures, pesticides used on farm crops and in the home, and many others. Many environmental laws have been enacted in the last 30 years which require some type of human health risk assessment. These risk assessments are based upon toxicological and/or epidemiological studies and the expert judgments of toxicologists and epidemiologists working in this area. Since these regulatory programs are based on health protection, it is obvious that health risk assessment is a key element in the process.

The U.S. Environmental Protection Agency administers the following major environmental health protection laws:

1) the Safe Drinking Water Act (SWDA),
2) the Water Pollution Control Act (WPCA),
3) the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),
4) the Toxic Substances Control Act (TSCA),
5) the Resource Conservation and Recovery Act (RCRA),
6) the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund Act), and
7) the Federal Clean Air Act (CAA).

In addition to these federal statutes, similar laws have been adopted at the state government level, both in Texas and in other states. Human health risk assessments can be required by both federal and state programs. Detailed examples of the use of risk assessment for the latter three laws will be provided below. Shorter descriptions of the other programs will be given first.

Under the Safe Water Drinking Act, the EPA is required to set health-based standards for contaminants in drinking water. Maximum contaminant levels or "MCLs" have been established for about 40 chemicals. If levels of these chemicals in drinking water are less than the respective MCLs, the risk from ingestion of drinking water will be insignificant. The Water Pollution Control Act gives EPA the responsibility for setting effluent discharge standards for water pollutants. Under this law, water quality criteria for 126 toxic chemicals were established. These criteria are based both on the toxicities of the individual chemicals involved and on the technological feasibility of achieving those limits. Toxicologists conducted these studies and interpreted the results to assist in the establishment of the MCLs and water quality criteria.

The Federal Insecticide, Fungicide, and Rodenticide Act, requires that pesticides be registered prior to marketing. This is a demonstration by the manufacturer that the pesticide will not pose any unreasonable risk to human health or to the environment. Pre-market toxicological testing for carcinogenic and non-carcinogenic effects are required for most pesticides. The 1988 amendments to FIFRA have required EPA to intensify its efforts at registration of new pesticides and re-registration of existing ones. These amendments spelled out the need for chronic as well as acute toxicity testing, with special emphasis on the neurotoxicological, behavioral, and prenatal and neonatal effects of pesticide exposures.

The Toxic Substances Control Act was enacted in an effort to control the hazards associated with the manufacture and distribution of new chemicals or chemical mixtures. It requires a "pre-manufacture notice" (PMN) in which the manufacturer must show that the chemical or chemicals in question will not pose any unreasonable risk to health or the environment. If the PMN does not convince EPA that there is no unreasonable risk, the agency can require toxicity testing of the proposed product. Toxicologists plan, carry out, and interpret the results from these studies and are major contributors to the demonstration of the risk posed by the particular chemical in question. The findings from toxicological testing can be the major determinant of whether a chemical can be successfully manufactured and marketed.

B. Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act and the regulations which have been promulgated under this law set forth operational and management requirements of certain hazardous wastes. One of the major goals of RCRA is the protection of human health and the environment. Two programs which require major inputs from the toxicologist are the RCRA permitting program and the requirements for hazardous waste combustion units.

1. RCRA Permitting Requirements

A RCRA permit is required for the operation of hazardous waste treatment, storage, and disposal facilities. In these permits, the applicant must demonstrate that the operation of their facility will not pose a risk to human health and the environment. The role of the toxicologist in this process is to provide information about protective levels of air emissions or water discharges. The amount of waste that can be handled at such facilities is greatly determined by the health-based limits which are established by the toxicologist in the RCRA permit process.

2. RCRA Requirements for Hazardous Waste Combustion Units

Another RCRA-related instance in which toxicologists play an important role is in the so-called "indirect" risk assessments that are required for the regulation of some combustion units. These are sometimes referred to as boilers and industrial furnaces, or BIFs. For example, hazardous waste incinerators and cement kilns burning hazardous wastes are subject to rules promulgated jointly under RCRA and the Federal Clean Air Act. The U.S. Environmental Protection Agency and various state environmental quality agencies have recently recognized that emissions from incinerators burning toxic chemicals can pose human health risks not only from direct inhalation of emitted chemicals, but also from "indirect" exposures. In the most general sense, indirect exposures can occur through contamination of the food chain, from plants and animals to people.

The toxicologist, in conjunction with other investigators, determines the possible pathways of exposure, the amounts of exposure which could occur, and the health risks associated with these exposures. The toxicological findings will help to determine the limits on the rate of incineration of the hazardous wastes at such facilities.

C. Federal and State of Texas Superfund Programs

Superfund programs address the cleanup or "remediation" of sites contaminated by hazardous and toxic chemicals. Both the Federal and State of Texas Superfund programs use health risk assessments in their site cleanup activities. The main document used in the federal program is called "Risk Assessment Guidance for Superfund".[19] The methodologies for determining clean-up levels in this document are based on the EPA quantitative risk assessment approach which was described earlier in this presentation. The Texas Solid Waste Disposal Act was amended in 1985 to create the Texas "State Superfund" program. This program is designed to address remediations for sites not covered by the Federal Superfund Program or other hazardous waste programs in Texas. The rules which have been promulgated pursuant to the TSWDA are

somewhat unique and will be discussed in detail below. The role toxicologists play in the establishment and implementation of these rules will also be described.

1. General Features of the Texas Risk Reduction Rules

Under the "Risk Reduction Rules", there are three options, or risk reduction standards, for site remediation. Risk Reduction Standard Number 1 is clean-up to background levels, Standard 2 is clean-up to health based levels, and Standard 3 is closure in place with controls. Under Standard 1, contaminants in affected environmental media must be reduced to background or non-detectable levels by removal or treatment. This can be a costly proposition since background levels for most chemicals are very low.

Under Standard 2, the prescribed clean-up levels for chemicals are based on levels which can be shown to be protective of public health. These levels are called Media-Specific Concentrations, or MSCs. MSCs are almost always greater than background levels, so remediations under this standard are usually less expensive and time-consuming than those which are conducted under Standard 1. Standard 3 allows greater levels of some chemicals to remain in place at the site, but long-term site controls must be installed and maintained at sites remediated under this standard. While deed recordation requirements are part of both Standards 2 and 3, these requirements are more restrictive under Standard 3. Risk assessment is an integral part of the determination of media specific concentrations under Risk Reduction Standards 2 and 3. TNRCC staff toxicologists helped to establish the MSCs which are part of these regulations.

2. Determination of Clean-Up Levels for Chemicals

The Risk Reduction Rules are used to calculate health-based limits or cleanup levels for chemicals in different environmental media. Obviously, the extent and cost of any remediation will be driven chiefly by the determinations of "how clean is clean". The smaller the clean-up level, the more complicated and costly the remediation effort will be. The TNRCC Risk Reduction Rules contain the methodology to be used to calculate these cleanup levels both for ground water and for soils. The ground water protection MSCs are set to address the potential for materials in the soil to leach into ground water. These latter MSCs are generally smaller than the direct ingestion and inhalation MSCs and thus will usually drive the remediation effort.

The TNRCC Risk Reduction Rules contain a table which lists the media specific concentrations for approximately 150 chemicals in ground water or in soils. The risk assessment method for these listed chemicals usually follows a "cook book" approach. Toxicological information has already been input into the process via the setting of the MSCs at health protective levels. If a particular site contains only chemicals which are on the TNRCC list, there is no real need for additional toxicological input. Obviously, there are many chemicals which are <u>not</u> on the list. If any of these chemicals are present at the site, there is a need for someone with training in toxicology to establish an MSC for the remediation. The rules provide methods for calculating a cleanup level for chemicals not listed on the table. Toxicological information about the chemical in question is needed to perform these calculations.

3. Future Directions for Texas Site Remediation Projects

The Risk Reduction Rules are currently under revision. The new rules will be called the Texas Risk Reduction Program, or TRRP. This program will apply to risk assessments done by the Industrial Hazardous Waste Division, the Petroleum Storage Tank Division, the Municipal Solid Waste Division, the Superfund Program, and the Voluntary Cleanup Program. The same basic procedures will be followed as in the past, with some changes. Risk Reduction Standards 1 and 2 will be combined into what will be called "Standard A" and the current Standard 3 will be known as Standard B. Requirements for conducting ecological risk assessments and cleanups of total petroleum hydrocarbons (TPH) will be a part of the TRRP. These new rules will be proposed this summer and the target date for publishing the final rules is January, 1998.

4. TNRCC Voluntary Clean-Up Program

Final rules for the Voluntary Clean-Up Program (VCP) were promulgated on March 27, 1996. This program was initiated to provide incentives for the remediation of thousands of properties in Texas which had basically been abandoned because of chemical contamination. Persons were generally unwilling to sell or buy these properties because of the potential liability involved. The TNRCC rules outline procedures for conducting what are called "response actions" under the VCP. When response actions have been successfully completed, they clear the way for the conveyance and future development of these properties. The same type of approach is followed in the determination of clean-up levels in the TNRCC Voluntary Cleanup Program as in the Risk Reduction Rules outlined above.

D. Federal Clean Air Act and Texas Clean Air Act

Federal and state air quality laws have been passed in this country to insure that exposure to chemicals in the air will not have adverse effects on human health. Toxicological and epidemiological data are used in the setting of air quality standards and air quality guidelines under these laws. The major pieces of legislation involved are the Federal Clean Air Act and the Texas Clean Air Act.

1. Federal Clean Air Act

The Federal CAA mandates that the EPA set National Ambient Air Quality Standards (NAAQS) for toxic air pollutants. So far, standards have been set for only six air pollutants: carbon monoxide, lead, nitrogen oxides, sulfur dioxide, ozone, and particulate matter. These standards have been set after extensive considerations by toxicologists, epidemiologists, and other health professionals of all available evidence from animal toxicity studies, controlled human exposure studies, and epidemiological studies. The object of setting these standards is to protect the public health with an ample margin of safety. The CAA also mandates that these standards be revised on a periodic basis to insure that new health risk data are incorporated into the standards-setting process. The NAAQS for ozone and for particulate matter are currently undergoing revisions by the EPA.

2. "Non-Criteria" Air Pollutants

Obviously, there are many more than six toxic air pollutants and efforts to protect public health should address the possible adverse human health effects from exposure to other air contaminants. There are two basic methods of establishing standards for air contaminants which do not have NAAQSs, the so-called "non-criteria" air pollutants. The first is to go through a process similar to that used to set the federal standards; that is, to do an extensive review of the animal, clinical, and epidemiological data to determine a level which would be protective of human health and welfare. The problem with this is that there are thousands of non-criteria pollutants and current resources are not adequate to the task of setting standards for all of them.

The second major approach which has been employed in standards setting for air toxics is to use some fraction of an occupational exposure limit (OEL) as an acceptable ambient level. These occupational limits could be an American Conference of Governmental Industrial Hygienists Threshold Limit Value, an Occupational Safety and Health Administration (OSHA) Permissible Exposure Limit, or a National Institute for Occupational Safety and Health (NIOSH) Recommended Exposure Limit. The main issue here is the uncertainty in adjusting an occupational limit to an acceptable limit for community exposure. Because of the uncertainties involved, the best approach is to retain flexibility in any regulatory program based on fractional TLV methodology. Levels set using the fractional OEL method should be considered guidelines, rather than air quality standards.

Another challenge in the fractional OEL approach is that there are many substances for which occupational exposure limits have not been set. Current occupational standards address less than 1000 chemicals. Some method of evaluating these other substances is needed if they are to be addressed at all. About 30% of the potentially toxic air contaminants which have been reviewed at the TNRCC are in this latter category. For some types of facilities, such as hazardous waste handling units, the percentage can be even greater than this.

3. Texas Clean Air Act

Under the Texas Clean Air Act, the six existing NAAQSs were adopted (with some additional requirements) to regulate airborne levels of these pollutants. Texas has set somewhat different air quality standards for sulfur dioxide and for particulate matter to supplement the federal standards for these contaminants. In addition to these, Texas also has state standards for beryllium, fluorides, hydrogen sulfide, and sulfuric acid mist. The Texas Clean Air Act also contains general language which requires that a health evaluation be conducted not only these air pollutants, but for any chemical which is emitted into the air of the state. This evaluation process is described in the next section.

4. TNRCC Effects Evaluation Process for Non-Criteria Air Pollutants

Texas has one of the most well-established programs for assessing the public health impacts of non-criteria air pollutants. The TNRCC currently has a staff of about 20 toxicologists in their Toxicology and Risk Assessment (TARA) Division. The details of the health effects evaluation

method used by the TNRCC staff have been given elsewhere[20], but an overview will be presented here. Like some other state air pollution control agencies, the TNRCC uses what has been called the "fractional Threshold Limit Value" approach. This is because the agency uses a fraction of occupational exposure limits as guidelines for the assessment of community exposure levels. In the State of Texas approach, however, these guideline levels are only used as tools in the review process, rather than as air quality standards.

a. Effects Screening Level Methodology

The cornerstone of the TNRCC effects evaluation process is the idea of an "effects screening level" (ESL). Screening levels exist to protect against adverse health effects, vegetation effects, corrosion effects on materials, and nuisance conditions such as odor. The short-term (1-hour average) health ESL is equal to 1/100th of the most-applicable occupational exposure limit. For a long-term (annual average) health effects level, 1/1000th of the occupational limit is used. The TNRCC Effects Screening Level is used to distinguish those situations which pose no threat to public health from those which require further evaluation. While these levels are not meant to be used as air quality standards or guidelines, ESLs can be used as a benchmark value which represents a "de minimis" risk. If the ambient air concentrations of a chemical do not exceed the screening level for that chemical, no detrimental effects on public health are expected. In this case, additional input from a toxicologist would not be required.

If the screening levels are exceeded, it does not necessarily mean that a problem exists. What happens in these cases is that a more extensive review is initiated, and this is where toxicological assistance is often required by the emitter of the air contaminants. The TNRCC method allows flexibility in considering other factors which may apply to a particular facility at a particular site. When predicted or measured ground level concentrations of one or more chemicals exceed the screening levels, the TNRCC staff conducts a more extensive review. Some of the factors they consider in this additional review include the accuracy of the predicted impact levels, the number of persons exposed, the frequency and duration of exposure, the applicability of the screening level, and the nature of the potential adverse health effect. In these cases, some toxicological input is usually called for.

The screening levels have been set at levels believed to be protective of public health with an adequate margin of safety. Depending on the type of air contaminant and the considerations discussed below, instances in which airborne levels of chemicals slightly exceed the screening levels may be acceptable. How much of an exceedance of the screening level is still health protective is a matter of toxicological judgment. This is where there is definitely a need for toxicological input. What usually happens in this case is that a proposal is made to the TARA staff, they review it and make a ruling on the matter.

b. Review of Existing or Establishment of New ESLs

Effects Screening Levels are guidelines, not standards. As such, they are subject to a more informal review process, both for existing ESLs and for chemicals which do not yet have established ESLs. The TNRCC does not have enough staff or resources to continually review

all of the existing ESLs or to undertake a systematic setting of ESLs for chemicals which do not have guidelines established yet. This is an area where toxicologists working on behalf of the affected industry can provide input to the agency's decision-making process.

When industrial emissions result in off-property impacts of chemicals which may exceed the ESL for that chemical, several options usually come to mind for the company. They can invest in additional air pollution control equipment, they can change the process to limit emissions, or they can abandon the project. An additional option which is sometimes overlooked is to examine the appropriateness of the applicable ESL. If an ESL can be increased, it is almost always a more cost-effective approach to this problem. The ESLs for many chemicals are not based on up-to-date toxicological or epidemiological data. A new review of the toxicity of a particular chemical can reveal that the existing ESL is no longer appropriate. The TARA group is always open to the submission of new toxicological data. Changes in ESLs based on new data submitted by the affected industry have been made in the past. The toxicologist obviously has a key role in this process.

VI. SUMMARY AND CONCLUSIONS

This presentation has explained how human health risk assessments are performed for the major types of environmental regulatory programs in the United States today. The two basic sciences upon which most human health risk assessments are based are toxicology and epidemiology. While some toxicology studies are done using human subjects, most are performed employing laboratory animals. Supporting evidence in toxicology is often obtained from tests done in cell culture or tissue culture systems. In general, the object of these studies is to determine or estimate the health responses at different chemical exposure levels. This gives information about how toxic a given chemical is. Epidemiological studies are conducted by comparing the disease patterns of groups of people exposed to a chemical with the disease patterns of similar groups of people who do not have the chemical exposure. If this type of study is successful, it can show an association between a person's exposure to chemicals and certain diseases. Each of these approaches has its strengths and weaknesses as described above.

Both toxicological and epidemiological information are used as a basis for human health risk assessments. The U.S. Environmental Protection Agency has established elaborate methods for assessing the risks of exposure to both carcinogenic and non-carcinogenic chemicals. The object of these risk assessments is to determine what levels of chemicals can exist in the environment without posing a threat to public health. These risk assessment methods are used in many federal and state public health protection programs. Some of these programs are the Safe Drinking Water Act; the Water Pollution Control Act; the Federal Insecticide, Fungicide, and Rodenticide Act; the Toxic Substances Control Act; the Resource Conservation and Recovery Act; the Federal and the State of Texas Superfund Acts; and the Federal and the State of Texas Clean Air Acts. The State of Texas has also developed a comprehensive program for regulating the emission of air pollutants which do not have national or state air quality standards established. This presentation has described these regulatory programs and how the risk of adverse effects on human health is assessed.

The toxicologist plays a major role in the human health risk assessments required by all of these programs and laws. This is to be expected because toxicologists study the health effects of exposure to chemicals and most environmental regulatory programs have human health protection as their main goal. Toxicologists contribute at many levels in this process. They design, carry out, and present results of basic toxicological research; they analyze and evaluate the outcomes of these studies; and they relate these results to the assessment of human health risk.

Toxicologists contribute their expertise to the determination of environmental clean-up levels for site remediations and acceptable levels for the discharges of chemicals into the water and emissions of chemicals into the air. Toxicological information is crucial to many decisions made by industries which are subject to the various federal and state laws, rules, and regulations pertaining to public health protection.

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Environmental Toxicology and Engineering | *Expert Witness Testimony* | *Risk Assessment and Health Effects Evaluations*

BIOGRAPHICAL INFORMATION

Dr. Thomas Musta-Dydek is the President of Musta-Dydek Enterprises, an environmental toxicology and engineering services consulting firm in Austin, Texas. He is a Board-Certified environmental toxicologist and a Registered Professional Engineer. He has a Bachelor's degree in Mechanical Engineering and a Master's degree in Environmental Engineering from Rice University in Houston. His doctorate is in Environmental Science and Engineering from the University of North Carolina School of Public Health, and he has done a post-doctorate fellowship in toxicology in the College of Pharmacy at the University of Texas at Austin.

Dr. Musta-Dydek has worked for the U.S. Fish and Wildlife Service in Albuquerque, and for the U.S. Environmental Protection Agency in Dallas and in Research Triangle Park, North Carolina. He has also taught in the Environmental Studies Program at St. Edward's University in Austin. Dr. Musta-Dydek is currently an adjunct professor at the University of Texas School of Public Health in San Antonio. Immediately prior to forming Musta-Dydek Enterprises, he was employed as Senior Toxicologist at Jones and Neuse, Inc., an environmental consulting firm. Before that, he was the Senior Staff Toxicologist for the Texas Air Control Board (now part of the Texas Natural Resources Conservation Commission) for seven years. He has published technical articles in various environmental journals and given many presentations at technical conferences. He is currently writing a book on health effects of toxic air pollutants.

Dr. Musta-Dydek's chief area of expertise is the evaluation of the human health and welfare effects associated with exposure to potentially-toxic chemicals. He has experience in air quality and hazardous waste disposal permitting, chemical toxicity evaluations, risk assessments for site remediations under the TNRCC Risk Reduction Rules and the Federal Superfund program, and as an expert witness in toxic tort cases. In his job at the Texas Air Control Board, he reviewed more than 1,000 air quality permit applications to evaluate the potential for adverse health effects from exposure to various air pollutants. He established many of the health effects evaluation procedures which are used by the agency today.

Dr. Musta-Dydek is also an expert witness in environmental regulatory matters and in toxic tort cases. He has been called upon to provide expert reports, deposition and affidavit testimony, and other litigation support. His projects in this area have concerned both community and occupational exposures to various chemical dusts, vapors, and gases. He provides studies and opinions concerning whether or not it was likely that the health effects claimed could have been caused by exposure to the chemicals present. He is an independent expert, having provided testimony for approximately equal numbers of plaintiffs and defendants.

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VOLUNTARY CLEANUP UPDATE

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Voluntary Cleanup Program

- Existing Voluntary Cleanup Program
- New Legislation affecting VCP

Goals of VCP

- Encourage Cleanup of Contaminated Property
- Restore Property to Full Productive Use
- Encourage Development of Brownfields
- Facilitate Property Transactions

Benefits Future Owners/Lenders

- State Liability Release Following Cleanup of Contamination
- Protection for Inadvertantly Missed Contamination
- Shielded from Changes in Cleanup Levels
- No Further Action Assurances From EPA with MOA

VCP Eligibility

- Any Site Not Subject to a RCRA Permit or Order
- Subject to a RCRA Permit = Interim Status
- Includes Some Superfund Sites
- No Sites Under RRC Jurisdiction

VCP Administrative Documents

- Application
- Agreement
- Certificate of Completion (COC)

Persons Released from Liability

- All Future Owners and Lenders - Not RPs Prior to Issuance of the Certificate of Completion
- Applicants not RPs on the date of the Application

Exceptions to Liability Release

- Acquired by Fraud, Misrepresentation, or Knowing Failure to Disclose Information
- Land Use Change to One Which Increases Risk to Human Health or the Environment

New Legislation Affecting VCP - HB 1239 & HB 2776

- Clarify existing Statute
- Expand liability release to certain past owners prior to creation of VCP
- Property Tax relief for certain remediated properties
- Innocent Owner or Operator Immunity

Modify and Clarify Portions of Existing VCP Law (HB 1239)

- Signing application does not make RP
- All Non-RPs receive liability protection
- Remove deed recordation requirements
- Owner at time of application on certificate

Expand Liability Release to Certain Past Property Owners (HB 1239)

- Purchase Property before Sept 1995
- Did Not Cause Contamination
- Did Not Operate before purchase
- Another person who is responsible completes cleanup
- Contingent upon signing MOA with EPA

Property Tax Relief for some Remediated Properties (HB 1239)

- Must be Devalued by Contamination - 2 years
- Property in Reinvestment Zone
- Agreement with Municipality
- Contingent on Reciept of Certificate
- Excludes School Taxes
- Phases out over 4 years

Immunity From Liability for Innocent Owner or Operator (HB 2776)

- Contamination must be sourced offsite
- Demonstration to TNRCC for certificate
- Must grant access for future cleanup
- Must restrict property use to protect public

Challenges for Innocent Owner/Operator Determinations

- Truly Innocent Owner/Operator?
- Inconclusive Data
- Same Contaminants source and offsite property

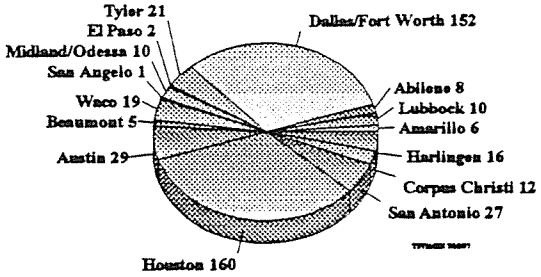
ON-LINE VCP INFORMATION

VCP INTERNET HOMEPAGE

- http://www.tnrcc.state.tx.us/waste/pcd/vcp/index.html

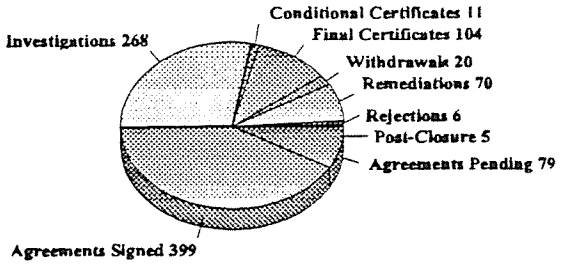
Voluntary Cleanup Program - 6/97

Applications by TNRCC Region (478 Sites)



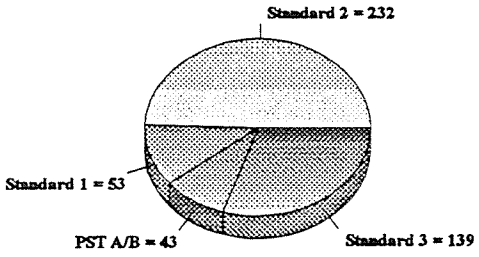
Voluntary Cleanup Program - 6/97

Phases of Projects (478 Sites)



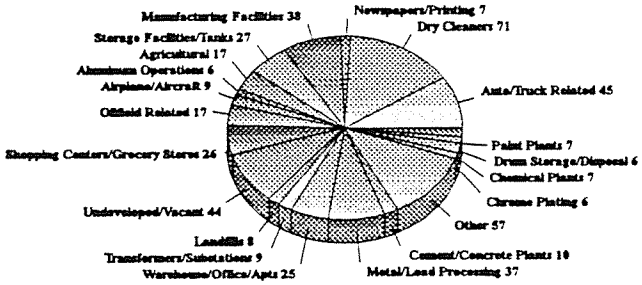
Voluntary Cleanup Program - 6/97

Applicable Risk Reduction/PST Rules (478 Sites)



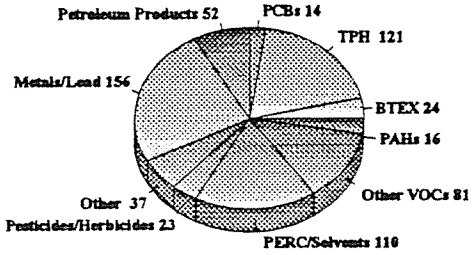
Voluntary Cleanup Program - 6/97

Types of Facilities (478 Sites)



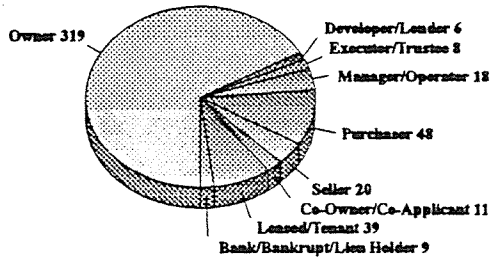
Voluntary Cleanup Program - 6/97

Contaminant Categories (478 Sites)



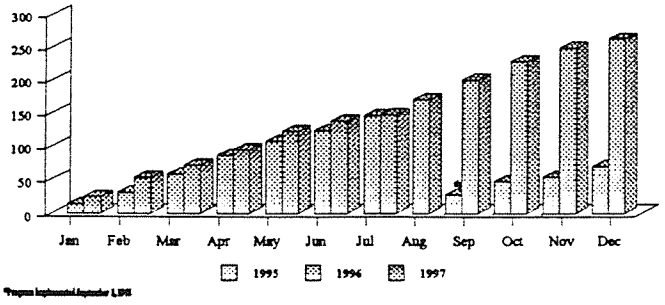
Voluntary Cleanup Program - 6/97

Applicant Type (478 Sites)



Voluntary Cleanup Program

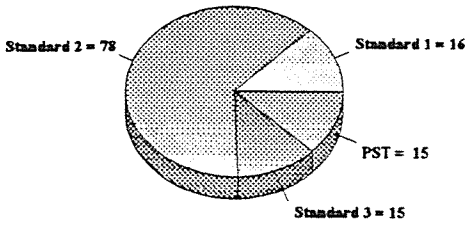
Applications Received (1995 - 1997)



*Program implemented September 1995

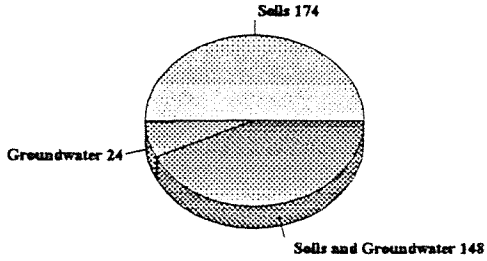
Voluntary Cleanup Program 6/97

Certificates Issued By Risk Reduction/PST Rules



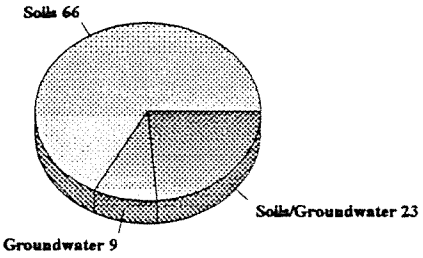
Voluntary Cleanup Program 6/97

Groundwater/Soil Contamination (478 Sites)



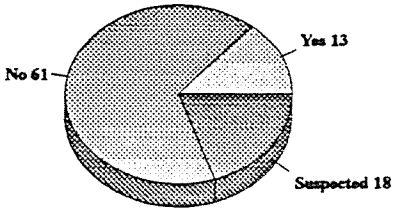
Voluntary Cleanup Program 6/97

Certificates Issued by Soils/Groundwater



Voluntary Cleanup Program 6/97

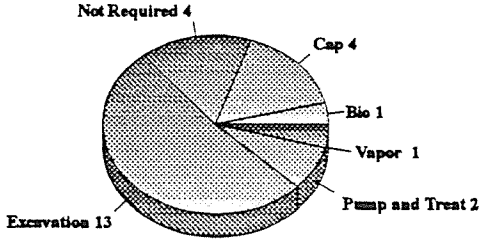
Off-Site Contamination (478 Sites)



DRAFT

Voluntary Cleanup Program 6/97

Type Remediation (478 Sites)



DRAFT

Bill Number: TX75RHB 1239 Date: 5/27/97

ENROLLED

AN ACT

relating to the voluntary cleanup program, including municipal tax abatements for certain property located in reinvestment zones and subject to voluntary cleanup agreements.

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

SECTION 1. Sections 361.133(b) and (c), Health and Safety Code, are amended to read as follows:

(b) The fund consists of money collected by the commission from:

(1) fees imposed on the owner or operator of an industrial solid waste or hazardous waste facility for commercial and noncommercial management or disposal of hazardous waste or commercial disposal of industrial solid waste under Section 361.136 and fees imposed under Section 361.138;

(2) interest and penalties imposed under Section 361.140 for late payment of a fee or late filing of a report;

(3) money paid by a person liable for facility cleanup and maintenance under Section 361.197;

(4) the interest received from the investment of this

fund, in accounts under the charge of the comptroller [~~treasurer~~], to be credited pro rata to the hazardous and solid waste remediation fee fund;

(5) monies transferred from other agencies under provisions of this code or grants or other payments from any person made for the purpose of remediation of facilities under this chapter or the investigation, cleanup, or removal of a spill or release of a hazardous substance;

(6) fees imposed under Section 361.604; and

(7) federal grants received for the implementation or administration of state voluntary cleanup programs or federal brownfields initiatives.

(c) The commission may use the money collected and deposited to the credit of the fund under this section, including interest credited under Subsection (b)(4), only for:

(1) necessary and appropriate removal and remedial action at sites at which solid waste or hazardous substances have been disposed if funds from a liable person, independent third person, or the federal government are not sufficient for the removal or remedial action;

(2) necessary and appropriate maintenance of removal and remedial actions for the expected life of those actions if:

(A) funds from a liable person have been

collected and deposited to the credit of the fund for that purpose; or

(B) funds from a liable person, independent third person, or the federal government are not sufficient for the maintenance;

(3) expenses concerning compliance with:

(A) the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. Section 9601 et seq.) as amended;

(B) the federal Superfund Amendments and Reauthorization Act of 1986 (10 U.S.C. Section 2701 et seq.); and

(C) Subchapters F and I;

(4) expenses concerning the regulation and management of household hazardous substances and the prevention of pollution of the water resources of the state from the uncontrolled release of hazardous substances;

(5) expenses concerning the cleanup or removal of a spill, release, or potential threat of release of a hazardous substance where immediate action is appropriate to protect human health and the environment; and

(6) expenses concerning implementation of the voluntary cleanup program under Subchapter S or federal brownfields initiatives.

SECTION 2. Section 361.603, Health and Safety Code, is amended by adding Subsection (c) to read as follows:

(c) Notwithstanding Subsection (a), a site or portion of a site that is subject to a commission permit or order is eligible for participation in the voluntary cleanup program on dismissal of the permit or order. An administrative penalty paid to the general revenue fund under the permit or order is nonrefundable.

SECTION 3. Subchapter S, Chapter 361, Health and Safety Code, as added by Chapter 986, Acts of the 74th Legislature, Regular Session, 1995, is amended by adding Section 361.6035 to read as follows:

Sec. 361.6035. ELIGIBILITY OF CERTAIN PERSONS FOR RELEASE FROM LIABILITY. (a) A person who purchased a site before September 1, 1995, is released, on certification under Section 361.609, from all liability to the state for cleanup of contamination that was released at the site covered by the certificate before the purchase date, except for releases or consequences that the person contributed to or caused, if:

(1) the person did not operate the site, or any portion of the site, before the purchase date; and

(2) another person that is a responsible party under Section 361.271 or 361.275(g) successfully completes a voluntary cleanup of the site under this subchapter.

(b) A person described by Subsection (a)(2):

(1) remains liable to the state for any contamination that was released at the site before the date the certificate is issued; and

(2) is not liable to the state for any contamination that was released at the site after the date the certificate is issued unless the person:

(A) contributes to or causes the release of contamination; or

(B) changes the 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.

SECTION 4. Section 361.604(b), Health and Safety Code, is amended to read as follows:

(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; and

(iii) whether the voluntary cleanup is

subject to Section 361.6035;

(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.

SECTION 5. Section 361.605(b), Health and Safety Code, is amended to read as follows:

(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 once without submitting an additional application fee if the person resubmits the application not later than the 45th day after the date the executive director issues notice that the application has been rejected.

SECTION 6. Sections 361.609(b), (c), and (d), Health and Safety Code, are amended to read as follows:

(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 at the time the application to participate in the voluntary cleanup program was filed.

(c) ~~[The executive director shall file a copy of thecertificate of completion in the real property records of thecounty 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.

SECTION 7. Section 361.610, Health and Safety Code, is amended to read as follows:

Sec. 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:

(1) does not become a responsible party solely because the person signs the application; and

(2) is released, on certification under Section

361.609, from all liability to the state for cleanup of areas of the site covered by the certificate ~~[certification]~~, except for releases and consequences that the person causes.

(b) A person who is not a responsible party under Section 361.271 or 361.275(g) at the time the commission issues a certificate of completion under Section 361.609 is released, on issuance of the certificate, from all liability to the state for cleanup of areas of the site covered by the certificate, except for releases and consequences that the person causes.

(c) The release from liability provided by this section does not apply to a person who:

(1) acquires ~~[is not effective if]~~ a certificate of completion ~~[is acquired]~~ by fraud, misrepresentation, or knowing failure to disclose material information; ~~[.]~~

(2) knows at the time the person ~~[(c) If a certificate of completion for a site is issued by the commission, an owner who]~~ acquires an interest in the ~~[property on which the]~~ site for which the certificate of completion was issued that the certificate was acquired in a manner provided by Subdivision (1); or

(3) ~~[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.

SECTION 8. Subchapter B, Chapter 312, Tax Code, is amended by adding Section 312.211 to read as follows:

Sec. 312.211. AGREEMENT BY MUNICIPALITY RELATING TO PROPERTY SUBJECT TO VOLUNTARY CLEANUP AGREEMENT. (a) This section applies only to:

(1) real property:

(A) that is located in a reinvestment zone;

(B) that is not in an improvement project financed by tax increment bonds;

(C) that is the subject of a voluntary cleanup agreement under Section 361.606, Health and Safety Code; and

(D) the value of which is adversely affected by the release of a hazardous substance or contaminant according to the two preceding appraisals by the appraisal office; and

(2) tangible personal property located on the real property.

(b) The governing body of a municipality eligible to enter into a tax abatement agreement under Section 312.002 may agree in writing with the owner of property described by Subsection (a) to exempt from taxation a portion of the value of the property for a

period not to exceed four years. The agreement takes effect on January 1 of the next tax year after the date the owner receives a certificate of completion for the property under Section 361.609, Health and Safety Code. The agreement may exempt from taxation:

(1) not more than 100 percent of the value of the property in the first year covered by the agreement;

(2) not more than 75 percent of the value of the property in the second year covered by the agreement;

(3) not more than 50 percent of the value of the property in the third year covered by the agreement; and

(4) not more than 25 percent of the value of the property in the fourth year covered by the agreement.

(c) A property owner may not receive a tax abatement under this section for the first tax year covered by the agreement unless the property owner includes with the application for an exemption under Section 11.28 filed with the chief appraiser of the appraisal district in which the property has situs a copy of the certificate of completion for the property.

(d) A property owner who files a copy of the certificate of completion for property for the first tax year covered by the agreement is not required to refile the certificate in a subsequent tax year to receive a tax abatement under this section for the property for that tax year.

(e) The chief appraiser shall accept a certificate of completion filed under Subsection (c) as conclusive evidence of the facts stated in the certificate.

(f) The governing body of the municipality may cancel or modify the agreement if:

(1) the use of the land is changed from the use specified in the certificate of completion; and

(2) the governing body determines that the new use may result in an increased risk to human health or the environment.

(g) A municipality may enter into a tax abatement agreement covering property described by Subsection (a) under this section or under Section 312.204, but not under both sections. Section 312.204 applies to an agreement entered into under this section except as otherwise provided by this section.

(h) A school district may not enter into a tax abatement agreement under this section.

SECTION 9. Section 312.002(a), Tax Code, is amended to read as follows:

(a) A taxing unit may not enter into a tax abatement agreement under this chapter and the governing body of a municipality or county may not designate an area as a reinvestment zone unless the governing body has established guidelines and criteria governing tax abatement agreements by the taxing unit and

a resolution stating that the taxing unit elects to become eligible to participate in tax abatement. The guidelines applicable to property other than property described by Section 312.211(a) must provide for the availability of tax abatement for both new facilities and structures and for the expansion or modernization of existing facilities and structures.

SECTION 10. Sections 312.201(c) and (d), Tax Code, are amended to read as follows:

(c) Area of a reinvestment zone designated for residential tax abatement or commercial-industrial tax abatement may be included in an overlapping or coincidental residential or commercial-industrial zone. In that event, the zone in which the property is considered to be located for purposes of executing an agreement under Section 312.204 or 312.211 is determined by the comprehensive zoning ordinance, if any, of the municipality.

(d) The governing body may not adopt an ordinance designating an area as a reinvestment zone until the governing body has held a public hearing on the designation and has found that the improvements sought are feasible and practical and would be a benefit to the land to be included in the zone and to the municipality after the expiration of an agreement entered into under Section 312.204 or 312.211, as applicable. At the hearing, interested persons are entitled to speak and present evidence for

or against the designation. Not later than the seventh day before the date of the hearing, notice of the hearing must be:

(1) published in a newspaper having general circulation in the municipality; and

(2) delivered in writing to the presiding officer of the governing body of each taxing unit that includes in its boundaries real property that is to be included in the proposed reinvestment zone.

SECTION 11. Section 312.2041(a), Tax Code, is amended to read as follows:

(a) Not later than the seventh day before the date on which a municipality enters into an agreement under Section 312.204 or 312.211, the governing body of the municipality or a designated officer or employee of the municipality shall deliver to the presiding officer of the governing body of each other taxing unit in which the property to be subject to the agreement is located a written notice that the municipality intends to enter into the agreement. The notice must include a copy of the proposed agreement.

SECTION 12. Section 312.205, Tax Code, is amended to read as follows:

Sec. 312.205. SPECIFIC TERMS OF TAX ABATEMENT AGREEMENT. (a) An agreement made under Section 312.204 or 312.211 must:

(1) list the kind, number, and location of all proposed improvements of the property;

(2) provide access to and authorize inspection of the property by municipal employees to ensure that the improvements or repairs are made according to the specifications and conditions of the agreement;

(3) limit the uses of the property consistent with the general purpose of encouraging development or redevelopment of the zone during the period that property tax exemptions are in effect;

(4) provide for recapturing property tax revenue lost as a result of the agreement if the owner of the property fails to make the improvements or repairs as provided by the agreement;

(5) contain each term agreed to by the owner of the property;

(6) require the owner of the property to certify annually to the governing body of each taxing unit that the owner is in compliance with each applicable term of the agreement; and

(7) provide that the governing body of the municipality may cancel or modify the agreement if the property owner fails to comply with the agreement.

(b) An agreement made under Section 312.204 or 312.211 may include, at the option of the governing body of the municipality, provisions for:

(1) improvements or repairs by the municipality to streets, sidewalks, and utility services or facilities associated with the property, except that the agreement may not provide for lower charges or rates than are made for other services or properties of a similar character;

(2) an economic feasibility study, including a detailed list of estimated improvement costs, a description of the methods of financing all estimated costs, and the time when related costs or monetary obligations are to be incurred;

(3) a map showing existing uses and conditions of real property in the reinvestment zone;

(4) a map showing proposed improvements and uses in the reinvestment zone; and

(5) proposed changes of zoning ordinances, the master plan, the map, building codes, and city ordinances.

SECTION 13. Sections 312.206(a) and (c), Tax Code, are amended to read as follows:

(a) If property taxes on property located in the taxing jurisdiction of a municipality are abated under an agreement made under Section 312.204 or 312.211, the governing body of each other taxing unit eligible to enter into tax abatement agreements under Section 312.002 in which the property is located may execute a written agreement with the owner of the property not later than the

90th day after the date the municipal agreement is executed. The agreement must contain terms identical to those contained in the agreement with the municipality providing for the portion of the property that is to be exempt from taxation under the agreement, the duration of the agreement, and the provisions included in the agreement under Section 312.205, even if the value of the property at the time the agreement is executed is not the same as its value when the municipal agreement was executed and even if improvements or repairs have been made to the property since the municipal agreement was executed. If the governing body of the taxing unit by official action at any time before the execution of the municipal agreement expresses an intent to enter into an agreement with the owner of property under this subsection or to be bound by the terms of the municipal agreement if the municipality enters into an agreement under Section 312.204 or 312.211 with the owner relating to the property, the terms of the municipal agreement regarding the share of the property to be exempt in each year of the municipal agreement apply to the taxation of the property by the taxing unit. If the taxing unit that expressed its intent to enter into an agreement or to be bound by the municipal agreement is a county, those terms of the municipal agreement also apply to the taxation of the property by a taxing unit in the county to which a county tax abatement agreement would apply under Section

312.004.

(c) If the governing body of a municipality designates a reinvestment zone that includes property in the extraterritorial jurisdiction of the municipality, the governing body of a taxing unit eligible to enter into tax abatement agreements under Section 312.002 in which the property is located may execute a written agreement with the owner of the property to exempt from its property taxes all or part of the value of the property in the same manner and subject to the same restrictions as provided by Section 312.204 or 312.211 for a municipality. The taxing unit may execute an agreement even if the municipality does not execute an agreement for the property, and the terms of the agreement are not required to be identical to the terms of a municipal agreement. However, if the governing body of another eligible taxing unit has previously executed an agreement to exempt all or part of the value of the property and that agreement is still in effect, the terms of the subsequent agreement relating to the share of the property that is to be exempt in each year that the existing agreement remains in effect must be identical to those of the existing agreement.

SECTION 14. Section 312.402(a), Tax Code, is amended to read as follows:

(a) The commissioners court may execute a tax abatement agreement with the owner of taxable real property located in a

reinvestment zone designated under this subchapter. The execution, duration, and other terms of an agreement made under this section are governed by the provisions of Sections 312.204, ~~[and]~~ 312.205, and 312.211 applicable to a municipality. Section 312.2041 applies to an agreement made by a county under this section in the same manner as it applies to an agreement made by a municipality under Section 312.204 or 312.211.

SECTION 15. A tax abatement agreement under Section 312.211, Tax Code, applies only to ad valorem taxes imposed on or after January 1, 1998.

SECTION 16. (a) Except as provided by Subsection (b) of this section, this Act takes effect September 1, 1997.

(b) Sections 2-4 of this Act take effect on the later of:

(1) September 1, 1997; or

(2) the date the Texas Natural Resource Conservation Commission enters into a memorandum of agreement with the United States Environmental Protection Agency, Region 6, authorizing the inclusion of certain potentially responsible parties to the group of persons eligible to participate in the voluntary cleanup program established by Subchapter S, Chapter 361, Health and Safety Code, as added by Chapter 986, Acts of the 74th Legislature, Regular Session, 1995.

(c) The Texas Natural Resource Conservation Commission shall

publish the memorandum of agreement described by Subsection (b) of this section in the Texas Register.

(d) A person to whom notice of rejection of an application is issued under Section 361.605, Health and Safety Code, before September 1, 1997, may resubmit the application once without submitting an additional application fee if the person resubmits the application not later than October 15, 1997.

SECTION 17. 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.

_____ _____

President of the Senate Speaker of the House

I certify that H.B. No. 1239 was passed by the House on April 11, 1997, by a non-record vote; and that the House concurred in Senate amendments to H.B. No. 1239 on May 25, 1997, by a non-record vote.

_____

Chief Clerk of the House

I certify that H.B. No. 1239 was passed by the Senate, with amendments, on May 23, 1997, by a viva-voce vote.

_____

Secretary of the Senate

APPROVED: _____

Date

_____

Governor

Subsections (a) and (b).

(Sections 361.704-361.750 reserved for expansion

SUBCHAPTER V. IMMUNITY FROM LIABILITY OF INNOCENT OWNER OR OPERATOR

Sec. 361.751. DEFINITIONS. In this subchapter:

(1) "Contaminant" has the meaning assigned by Section 361.601.

(2) "Innocent owner or operator" means a person that:

(A) is an owner or operator of property that has become contaminated as a result of a release or migration of contaminants from a source or sources not located on or at the property; and

(B) did not cause or contribute to the source or sources of the contamination referred to in Paragraph (A).

Sec. 361.752. IMMUNITY FROM LIABILITY; ACCESS TO PROPERTY. (a) An innocent owner or operator of property is not liable under this code or the Water Code for investigation, monitoring, remediation, or corrective or other response action regarding the conditions attributable to a release or migration of a contaminant or otherwise liable regarding those conditions.

(b) A person that acquires a portion of the tract on which the source of a release of contaminants is located from the person that caused the release is eligible for immunity under Subsection

(a) only if, after appropriate inquiry consistent with good commercial or customary practice, the person did not know or have reason to know of the contamination at the time the person acquired the property.

(c) To be eligible for immunity under Subsection (a), an owner or operator must grant reasonable access to the property for purposes of investigation or remediation to a person designated by the executive director. An agreement for reasonable access may provide:

(1) that the designated person may not unreasonably interfere with the use of the property;

(2) for payment of reasonable compensation for access to the property; or

(3) that the owner or operator is indemnified from liability for an intentional or negligent act of the designated person arising from the person's access to and use of the property.

(d) This section does not limit any right of the commission under another provision of this code or the Water Code to obtain access to the property.

Sec. 361.753. CERTIFICATION. (a) A person may apply to the commission for a certificate confirming that the person is an innocent owner or operator. The application must include a complete site investigation report that demonstrates that:

(1) the property has become contaminated as a result of a release or migration of contaminants from a source or sources not located on or at the property;

(2) the owner or operator has not caused or contributed to the source or sources of the contamination referred to in Subdivision (1); and

(3) the owner or operator is eligible for immunity under Section 361.752(b).

(b) The commission may charge an application fee in an amount not to exceed the cost of reviewing the application. The commission shall deposit a fee collected under this subsection to the credit of the hazardous and solid waste remediation fee fund.

(c) Not later than the 45th day after the date the commission receives the application, the commission shall notify the applicant whether the application is complete.

(d) Not later than the 90th day after the date the commission receives the application, the commission shall:

(1) issue or deny the certificate; or

(2) notify the applicant of any additional information needed to review the application.

(e) Not later than the 45th day after the date the commission receives the additional information requested under Subsection (d)(2), the commission shall issue or deny the

certificate.

(f) The certificate evidences the immunity from liability of the applicant as provided by Section 361.752.

(g) The commission may condition the issuance of the certificate on the placement of restrictions on the use of the property that are reasonably necessary to protect the public health, including:

(1) institutional controls such as deed restrictions or municipal zoning restrictions; or

(2) at the owner's or operator's option, other control measures.

Sec. 361.754. RIGHTS OF INNOCENT OWNER OR OPERATOR REGARDING CONTAMINATION FROM SOURCE NOT LOCATED ON OR AT PROPERTY. This subchapter does not limit the right of an innocent owner or operator to pursue any remedy available at law or in equity for conditions attributable to the release or migration of contaminants from a source or sources that are not located on or at the property.

SECTION 16. Subchapter C, Chapter 2155, Government Code, is amended by adding Section 2155.145 to read as follows:

Sec. 2155.145. CERTAIN PURCHASES BY TEXAS NATURAL RESOURCE CONSERVATION COMMISSION. The Texas Natural Resource Conservation Commission is delegated all purchasing functions relating to the

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 450 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 RCRA field investigator and as a remedial project manager and unit manager in the Superfund program.

Charles participated in the writing of the Texas Voluntary Cleanup Program law and the Texas Voluntary Cleanup Program rules. He has lectured extensively on administrative and technical issues regarding the Texas Risk Reduction Rules and the Texas Voluntary Cleanup Program. Charles attended Southwest Texas State University where he received his Bachelor and Masters degrees in Biology, respectively.

He is a member of the Association of State and Territorial Solid Waste Management Officials Voluntary Cleanup Task Force.

RISK REDUCTION RULES

"You're Not Really Clean Until You're Zestfully Clean"

RON PEDDE

"Texas Risk Reduction Program"

Background and Current Status:

Currently the Texas Natural Resource Conservation Commission (TNRCC) does not have a single technical standard for corrective action. Each program area within the agency conducts or approves cleanups using different requirements and standards. The Industrial & Hazardous Waste Program uses our existing Risk Reduction Rules. The Petroleum Storage Tank Program uses the Petroleum Storage Tank Risk-Based Corrective Action Rules. Other program areas use background or some other negotiated value for site cleanup. The result of using this patchwork of standards is that the agency treats the same contaminate differently in different program areas.

In an effort to develop a consistent and reasonable risk-based corrective action program that will be applicable to all the program areas of the agency, the Commission authorized the development of the Texas Risk Reduction Program (TRRP).

The TRRP will be applicable to all of the program areas of the Office of Waste Management (OWM) and the Texas Natural Resource Conservation Commission (TNRCC). The new rules will replace the current Risk Reduction Rules and the Petroleum Storage Tank Risk-Based Corrective Action Rules. The new rules will apply to all corrective action program areas.

The basic goals of the TRRP will be directed toward protection of public health and the environment while balancing those fundamental goals with the economic welfare of the citizens of this state. A key goal in development of the proposed rules will be to encourage remedial actions that, rather than creating "brownfields" unsuitable for future development, serve to preserve or enhance the economic vitality of the affected property and surrounding community. To this end, the proposed rules will set forth a risk management program targeted toward preservation of active and productive land use. This risk reduction process is structured around two optional "remedy standards." Remedy standard "A" is a permanent remedy and remedy standard "B" are remedies using control measures. Based upon the desired future land use of the affected property, the standards establish specific procedures for site investigation, exposure assessment, remedial action, and post-closure care that must be implemented to ensure adequate protection of public health and the environment. Within this framework, the responsible person is given flexibility for development of site-specific remediation goals and performance-based remedial action plans. These procedures are intended both to streamline the application review process and to expedite the implementation of appropriate, cost-effective remedial actions.

This program must be based on good science, the most supportable risk assessment practices, and common sense. This program will use a risk-based approach to help focus investigations, to determine appropriate protective concentration levels, and to set reasonable response objectives that will protect human health and the environment. The risk-based program will more effectively focus the limited resources of the TNRCC and the regulated community on those contaminated sites that pose the greatest threat to the public and environment.

As described in the conceptual documents, the OWM has developed an approach for the TRRP to provide a reasonable and common sense balance between three different risk management approaches which could be used to address the risks posed by contaminated sites.

The first of these approaches is "pollution prevention." Under this concept, future risk to human health and the environment is reduced by prohibiting the unauthorized discharge of chemicals of concern to the environment. Extension of this approach could also be used to prohibit the continuing release of chemicals of concern into environmental media.

The second approach is "pollution cleanup." Under this type of response action, risk is reduced through removal or treatment to lower the concentration of chemicals of concern to protective levels throughout the soils and groundwater at a site.

And finally, the third approach is "exposure prevention." Under this concept, risk is reduced through the use of engineering and/or institutional controls to prevent the exposure of humans or environmental receptors to unprotective levels of chemicals of concern.

During its February 22, 1996 work session, TNRCC authorized the OWM to proceed with the development of the TRRP. The OWM published an initial concept document on May 14, 1996, describing the conceptual approaches envisioned for incorporation into the new risk-based program. More than 40 interested parties submitted over 1,000 individual comments on the initial conceptual document. The OWM reviewed these comments and on December 16, 1996 issued a revised conceptual document, more clearly describing the basic aspects of the proposed risk-based program. More than 30 interested parties submitted over 800 individual comments on the second draft of the concept document.

After reviewing all of the comments from both drafts of the concept document, the OWM developed several major policy issues to be addressed by the TNRCC prior to issuing draft rules. Those major policy issues, along with recommendations made by the OWM, will be presented to the Commissioners for their review and final decision. After the Commission addresses the policy issues, the OWM will write rules for the TRRP.

Major Policy Issues to be Addressed by the TNRCC

As previously indicated, the OWM has developed several major policy issues to be addressed by the Commission. The following section discusses some of the larger issues, their importance to the TRRP and the recommendations of the OWM. However, it is important to repeat here that the Commission will make the final decision on each policy issue and those decisions will not necessarily be the same as the OWM recommendations.

Issue 1: Site Investigation

Importance: The limits of the site investigation affect the costs of the investigation and the confidence level of actually locating chemicals of concern (COC) in media. The inclusion of clear expectations and requirements for the site investigation are important to reduce delays and insure protection of human health and the environment.

Recommendation: A site assessment shall be performed to characterize the full nature and degree of contamination, as well as the horizontal and vertical extent of contamination in all media that equals or exceeds the applicable (residential or commercial/industrial) Tier 1 critical protective concentration levels (PCL). In order to successfully demonstrate to the satisfaction of the executive director that all impacted soils (i.e., adsorbed phase) that equals or exceeds the applicable Tier 1 critical PCL have been characterized horizontally, the investigation shall indicate a trend of declining concentrations away from source areas with at least one sample with concentrations below the Tier 1 critical PCL for each COC. For the vertical soil assessment, it is necessary to demonstrate whether groundwater has been impacted by defining the extent of adsorbed phase contamination to non-detect or to the zone of saturation, whichever is encountered first. If groundwater is encountered during the soil assessment, a monitor well must be installed and sampled to evaluate potential groundwater impacts. When groundwater is impacted, in order to successfully demonstrate to the satisfaction of the executive director that all impacted groundwater that equals or exceeds the applicable Tier 1 critical PCL has been characterized horizontally, the investigation shall indicate a trend of declining concentrations away from source areas with at least one sample with concentrations below the Tier 1 critical PCL for each COC. Persons shall define the vertical extent of groundwater impact to below the Tier 1 critical PCL by screening a well in a deeper aquifer with concentrations less than the Tier 1 critical PCL unless the person demonstrates to the executive director's satisfaction based upon the hydrogeology and COC properties that vertical migration to a lower aquifer is not possible. Persons shall take proper precautions to prevent cross-contamination when installing wells through impacted zones. Regardless of whether a residential or commercial/industrial Tier 1 critical PCL is applicable for the on-site investigation, persons must also determine if concentrations have migrated onto off-site properties above the applicable (residential or commercial/ industrial) Tier 1 critical PCL for the off-site properties.

A site investigation report shall be prepared that contains sufficient documentation, such as but not limited to descriptions of procedures and conclusions of the investigation, to demonstrate that the goals of the site investigation have been obtained. The site investigation report shall also document

the identification and characterization of all source areas (e.g., NAPLs); direction and rate of movement, composition, and concentrations of COC in environmental media (including the potential for migration to other media); identification of all potential receptors and exposure pathways; summaries of sampling methodology; analytical results; and quality assurance/quality control. The site investigation report shall document that the data necessary to support the risk evaluation and remedy selection have been adequately and appropriately collected.

Issue 2: Requirements for Off-Site Areas and Leased Lands

Importance: This section details notification requirements to impacted landowners and the requirement for the responsible person to get written landowner concurrence prior to recording any deed notices. The requirement to get landowner concurrence allows landowners to participate in decisions affecting their property and in many cases will allow landowners to require their property be restored for residential use without requiring any institutional or engineering controls.

Recommendation: In the course of the site investigation, if any samples are collected on property owned by another person (i.e., off-site areas and leased lands) or on property where an interest such as a fee ownership, leasehold (e.g., tenants), easement, or right-of-way is held by another person, then all information related to those samples shall be made available to leaseholders to the extent they are known or obvious and to all interest holders of record. The information shall include at a minimum, all analytical results from the sample analyses along with the Tier 1 PCL (look-up table) values for both land use classifications and each COC detected in the sample analysis. Notice of the availability of this information shall be provided within 90 calendar days of the date of analysis, as recorded by the performing laboratory or at the time of submission of a plan and/or report for agency review, whichever occurs first. If other information (i.e., evidence other than actual samples collected on the subject property), is submitted to the agency that indicates concentrations of COC exceeding the appropriate Tier 1 critical PCL are present 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, this information shall also be made available to leaseholders to the extent they are known or obvious and to all interest holders of record. The timing of this "notice of availability" shall coincide with submission of the information to the agency.

When either one of the two previous provisions requires information to be made available, the person shall also provide landowners a copy of the notice entitled "Explanation of Risk Reduction Process." Notice of the availability of historical information (i.e., information collected prior to these rules being applicable to the site) shall be provided at the time of submission of the first plan and/or report to the executive director for review under these rules that includes this same historical information. If an actual exposure to COC at concentrations exceeding the risk-based exposure limits (RBEL) is occurring, notice shall be made as soon as possible but no later than three weeks from the date of analysis as recorded by the performing laboratory to those exposed, the property owner(s), and the executive director.

Once a leaseholder or interest holder of record indicates his desire to obtain the information required to be made available, the person must deliver the information to the requestor within seven days from the date of request.

Concerning the timing of landowner concurrence and deed recordation, the person must obtain written concurrence from the landowner prior to conducting deed recordation under Remedy Standard A or Remedy Standard B. The person must submit a written request to the landowner to obtain permission to file the deed notice in the county deed records. This written request must contain a copy of the deed notice, a clear explanation as to the content and purpose of the deed notice, and a clear statement that failure on the part of the landowner to respond in 90 days from the date of receipt of the request will be construed as implied consent by the TNRCC to the deed recordation. A copy of the request sent to the landowner, proof of receipt by the landowner and written concurrence with the proposed deed recordation must be included with the final report submitted for agency review and approval. If written landowner concurrence is not obtained and the 90 days "no response" provision is not satisfied as determined by the executive director, the executive director will not approve the final report documenting attainment of the response objective(s). The agency is not removing the requirement to obtain landowner concurrence when decontamination or removal of all media to residential PCL is demonstrated to be technically impracticable.

Issue 3: Land use Classification

Importance: The proper classification of the use of the land surface is necessary to ensure cleanup levels are developed which are protective of those individuals currently or reasonably expected to be exposed.

Recommendation: The development of PCL is based on the current use (i.e., residential or commercial/industrial) of the impacted properties. Therefore, the current use of impacted properties must be determined during the site assessment. Land use is determined by comparison of existing land use to the following definitions for residential and commercial/industrial. The PCL must be protective of the actual land use as defined below at the time of agency approval of the final report documenting attainment of response objective(s).

- *Residential Land* - Property used for dwellings such as single family houses and multi-family apartments, children's homes and nursing homes. Because of the similarity of exposure potential and the sensitive nature of the potentially exposed population, day care facilities, educational facilities, hospitals, and parks shall also be considered residential. Properties that are restricted to residential use by a legally enforceable zoning ordinance or specific deed restriction also meet this definition, whether or not it is currently being used in a residential manner.

- *Commercial/Industrial Land* - Any real property or portions of a property not used for human habitation or for other purposes with a similar potential for human exposure as defined above. Examples of commercial/industrial land use include manufacturing; industrial research and development; utilities; commercial warehouse operations; lumber yards; retail gas stations; auto service stations; auto dealerships; equipment repair and service stations; professional offices (lawyers, architects, engineers, real estate, insurance, etc.); medical/dental offices and clinics (not including hospitals); financial institutions; publicly owned office buildings; any retail business whose principal activity is the sale of food or merchandise; personal service establishments (health clubs, barber/beauty salons, mortuaries, photographic studios, etc.); churches (not including churches providing day care or school services other than during normal worship services); and motels/hotels (not including those which allow residence). Land use activities consistent with this classification have the primary Standard Industrial Classification (SIC) major group numbers 01 - 48 inclusive; 49 except 4941; 50 - 67 inclusive; 70 except 7021 and 7033; 72 - 79 inclusive; 80 except 8051, 8059, 8062, 8063, and 8069; 81 and 82 except 8211, 8221, and 8222; 83 except 8351 and 8361; 84 - 86 inclusive; 87 - 91 inclusive; 92 except 9223; and 93 - 97 inclusive. Properties that are restricted to commercial/industrial use (i.e., do not allow residential use) by a legally enforceable zoning ordinance or specific deed restriction also meet this definition.

For properties that are classified as commercial/industrial, an institutional control (i.e., deed notice) shall be placed in the county deed records to note the limitations on the use of the property due to the presence of COC. The current or future owner of the property affected by the institutional control shall notify the executive director in writing at least 120 days prior to changing the land use or altering the condition of the site such that the conditions specified in the institutional control would no longer be met. The owner and operator will then provide a reevaluation of the site to the executive director within 30 days of the date of notification such that the property owner is able to demonstrate:

(1) that levels of regulated COC have degraded to concentration levels below the applicable (i.e., residential or commercial/industrial) critical PCL for the planned land use or site condition change;

(2) the site will be adequately remediated to meet the applicable (i.e., residential or commercial/industrial) critical PCL for the planned land use or site condition change; or

(3) application of a revised institutional control will ensure adequate protection of human health and the environment. The revised institutional control shall conform with all requirements of this section relating to institutional controls.

Issue 4: Acceptable Risk/Hazard Levels

Importance: The establishment of acceptable levels of risk/hazard serves as the starting point in the development of scientifically defensible protective concentration levels. Historically, this issue has been contentious because regulatory agencies have specified an acceptable risk range (defining *de minimus* cancer risk levels as ranging from $1x10^{-4}$ to $1x10^{-6}$) rather than a single bright line value. As a result, debates have ensued regarding exactly what the acceptable risk level should be for a particular site, with responsible parties striving for $1x10^{-4}$ and regulatory agencies striving for $1x10^{-6}$.

Recommendation: Establish a single acceptable risk/hazard level rather than a range of acceptable levels to ensure the same level of protection of human health across all sites. PCL for individual carcinogens and noncarcinogens should be calculated based on acceptable risk and hazard levels of $1x10^{-5}$ and 1, respectively. Chemical-specific PCL should serve as the regulatory level for the purpose of site remediation except in cases where there are more than 10 chemicals present at a site. In such cases, it will be necessary to evaluate the cumulative impact of exposure to multiple chemicals. Chemical-specific PCL should be downwardly adjusted as necessary to ensure that collectively, site risks and hazards do not exceed $1x10^{-4}$ and 10, respectively. It is important to understand that we are regulating based primarily on chemical-specific PCL, with the cumulative evaluation done solely to determine if the chemical-specific PCL need to be downwardly adjusted to account for multiple chemical exposures. For example, if there is a single chemical, the acceptable risk/hazard will be $1x10^{-5}$ and 1, not $1x10^{-4}$ and 10.

Issue 5: Changes to Default Exposure Parameters and Site Parameters

Importance: The selection of appropriate input values for the calculation of cleanup levels is paramount to ensure that cleanups are protective of human health and the environment. The decision to use site-specific information to vary some exposure parameters is strictly a policy issue and may be a significant local community concern.

Recommendation: Persons may provide site-specific evidence that demonstrates to the satisfaction of the executive director that values other than those default values (specific to cross-media transfer and lateral transport) are more appropriate. Also, the executive director may evaluate site-specific demonstrations related to bioavailability.

Persons may petition the Commission to vary the following default exposure parameters: exposure duration, exposure frequency and duration of event for **commercial/industrial land use only**. The decision to allow variances from these default exposure parameters will be based upon site-specific data, which must warrant any variations based upon historical, current, and probable future land use considering redevelopment potential, as well as surrounding land use. Persons requesting such variances, must provide public notification explaining the request for variance to the local community, adjacent landowners and local municipality planning boards or similar governmental unit 30 days prior to requesting Commission action. Documentation of public notification must be

submitted to the agency along with the information prepared to demonstrate that such a variance is supported by site-specific information. The public and the local planning authority may submit information to the agency that demonstrates that a proposal for variances from the default exposure parameters would be incompatible with existing neighboring land uses and would not preserve the active and productive land use of the subject property. Persons who receive variances from these default exposure parameters must indicate this fact in their property deed records and provide proof of such filing prior to approval of any final reports by the executive director.

Issue 6: Whether to set out Mandatory and Contingent Exposure Pathways or to allow relevant exposure pathways to be determined by responsible parties.

To determine appropriate cleanup levels and response actions for sites, exposure pathways are specified in the TRRP that must be evaluated for all sites.

Importance: The analysis of exposure pathways identifies the area of the soil and groundwater that is not protective for human or environmental exposure. The delineated area that exceeds protective concentrations must be addressed with a remedial action (cleanup and/or control).

Recommendation: Set forth standard mandatory and contingent exposure pathways that must be evaluated at all sites. To have environmental risk, chemicals must be present at unprotective concentrations and there must be potential for human and/or environmental exposure. By setting forth exposure pathways that must be investigated, the TRRP forces an investigation of the soil and groundwater to determine if chemicals are present at unprotective concentrations. The TRRP presumes that there will be exposure to any unprotective concentrations unless a remedial action is taken to prevent exposure through either a cleanup and/or control action.

Without the evaluation of standard exposure pathways, exposure pathways may be presumed to be irrelevant because of site conditions or land use patterns. For example, someone could say that impacted soil poses no risk and there is no need to investigate the impacted soil because the soils are covered by concrete, or that no one uses the groundwater nearby so there is no need to investigate soil leachate conditions or impacted groundwater. These may be reasonable conclusions for a given site, but they should be factored into the remedy as part of the solution to prevent exposure. By allowing site conditions to screen exposure pathways up-front, it will be less apparent to agency staff that deed recordation is needed to ensure such exposure prevention conditions remain effective over the long term. Deed recordation under such conditions will be a basic component of the remedy standard and will therefore be less likely to be inappropriately omitted.

Issue 7: Prescribed Versus Site-Specific Locations For Human Points Of Exposure.

Should the human points of exposure to environmental media be prescribed within the regulations or should these determinations be made based upon site-specific determinations?

Importance: The points of exposure define the locations where humans will be assumed to have a reasonable potential to come into contact with COC within environmental media (i.e., soil, groundwater, air, and surface water). These locations are then used to define the area and volume of soils and groundwater that would not be protective for human exposure and must be removed, decontaminated, and/or controlled in some fashion during the remedial action. The requirements for remedies that are proposed to be included in the TRRP are expressed entirely in terms of performance-based response objectives that must be attained for impacted areas of soil and groundwater. In order to provide a meaningful performance-based response objective two attributes must be clearly specified. First, the protective concentrations of COC to which humans and environmental receptors could be exposed without adverse effects must be determined. And second, the location within an environmental medium (i.e., the point of exposure) where comparison with this health protective value will be performed must also be specified. If the TRRP rules are promulgated as envisioned at this point, the performance-based soil and groundwater response objectives will be the only information that regulated entities and the staff will have regarding the types of remedies that are to be implemented. If a remedy will attain the performance that is required by the response objectives, then it will be approved. If a remedy will not attain the required performance, then it will be denied. Under such a proposed regulatory program, it is critical that the required performance be very clearly stated in the rules. Specifying the prescribed and alternate points of exposure to environmental media within the regulations is necessary in order to clearly define the performance that is being required.

Recommendation: The proposed rules for the TRRP should specifically identify the on and off-site points of exposure for humans to the various environmental media for both remedy standards. The proposed rules should also state for each remedy standard whether an alternate location for a point of exposure could be used, and if so under what conditions.

Issue 8: Soil Points of Exposure.

What points of exposure to soil should be used for residential and commercial/industrial land uses?

Importance: The points of exposure to soil defines the depth horizons where it is reasonably likely for humans to come into direct contact with soils under residential and commercial/industrial land uses. This is an important part of the analysis for determining the area and volume of soil that is not protective for human or environmental exposure. The delineated soil must be removed, decontaminated, and/or controlled in some fashion during the remedial action.

Recommendation: For residential land use, ingestion of soils, inhalation of soil volatiles and particulates, dermal contact with soils, and consumption of site-grown vegetables by a resident must be evaluated as a combined exposure pathway for the upper 15 feet of soil. For residential land use, 15 feet is considered the maximum depth above which it is reasonably likely that affected soils may be excavated during the installation of utilities, basements, swimming pools, foundation piers, septic systems, etc. For residential land use we are making the protective assumption that the excavated

soils will be brought to the land surface and subsequently used as fill material. This results in the conclusion that residents could be exposed at the surface to contaminated soils originating within the upper 15 feet of soils at a site. The 15 foot default depth may be adjusted upward or downward based on typical construction practices for an area.

For commercial/industrial land use, site worker ingestion of soils, dermal contact with soils, and inhalation of volatiles and particulates from soils must be evaluated as a combined exposure pathway within the upper 5 feet of soils. Likewise, construction worker ingestion of soils, dermal contact with soils, and inhalation of volatiles and particulates from soils must also be evaluated as a combined exposure pathway within the upper 5 feet of soils. And finally, inhalation of volatiles by site workers and construction workers located on the land surface which results from soils within the depth interval from 5 to 15 feet must also be evaluated. The 15 foot default depth may be adjusted upward or downward based on typical construction practices for an area.

Issue 9: Groundwater Classification

Importance: The proper classification of groundwater is of critical importance to the successful implementation of the Risk Rules in protecting human health and the environment. The classification system attempts to evaluate the "Use and Value" of groundwater in the State of Texas and is used to set appropriate response objectives based upon the "Use and Value" determination.

Recommendation: Incorporate the following groundwater classification system into the TRRP.

- *Class 1, Primary Groundwater Resource* - groundwater that is within ½ mile of a well used to supply drinking water to a **public water system** (as defined in 30 TAC 290.38) and is also within or is likely to migrate, based upon the chemical properties of the COC and the hydrogeology, to the groundwater production zone of such public water supply well;

- a groundwater zone that is the only reliable source of water (i.e., connection to a **public** water system is not available or will not be made available as part of the response objective) not more than 800 feet below the land surface that is capable of producing groundwater with total dissolved solids (TDS) less than 1,000 milligrams per liter (mg/l) and at a rate greater than 5,000 gallons per day (gpd) to a well; or

- groundwater with a high resource value (i.e., those aquifers capable of yielding groundwater with less than or equal to 3,000 TDS and at rates greater than or equal to 144,000 gpd to a well).

- *Class 2, Current or Potential Groundwater Supply* - a groundwater zone which is currently used within ½ mile of the groundwater protective concentration level

exceedence (PCLE) zone to supply groundwater for human consumption, agricultural purposes or any purpose which could result in exposure as determined by the executive director, or that is capable of producing waters with less than 10,000 mg/l TDS and at rates greater than 150 gpd to a well; and

- *Class 3, Not a Current or Potential Groundwater Supply* - a groundwater zone which is not currently used within ½ mile of the groundwater PCLE zone to supply groundwater for human consumption, agricultural purposes or any purpose which could result in exposure as determined by the executive director and that is not capable of producing water with less than 10,000 mg/l TDS or at rates greater than 150 gpd to a well.

The only changes made from the second concept paper include revisions to Class 1 groundwater. OWM received comments that the TDS level was too low to adequately protect groundwater that the state is planning on using in the future. The TDS was increased from 1,000 mg/l to 3,000 mg/l for the "high resource value groundwater" and should be consistent with the "50 Year Water Plan" developed by the Texas Water Development Board. Yields were also increased to better address the likelihood of use.

Issue 10: Groundwater Response Objectives.

What performance-based response objectives should be established for zones of impacted Class 1 and 2 groundwater under Remedy Standard B?

Importance: One of the most important policy judgments which the TNRCC must make when adopting the TRRP will be the appropriate balance between "pollution cleanup" and "exposure prevention" approaches when responding to impacted groundwater under Remedy Standard B. This is especially important since Remedy Standard A would require a person to restore impacted groundwater to protective concentration levels throughout the extent of the plume. Essentially, the TNRCC must distinguish those circumstances under Remedy Standard B when groundwater must be restored to its beneficial use versus those conditions when protection of human health and the environment can appropriately be provided through the use of engineering and institutional controls that prevent exposure. The conceptual document for the TRRP addresses this issue by specifying performance-based groundwater response objectives that are dependent upon the classification of groundwater at a site and specified locations for the points of exposure to that groundwater. This is a critical aspect of the TRRP since much of the flexibility and cost-savings that can be derived from the adoption of a risk-based corrective action program are highly dependent upon the response objectives that are established for responding to impacted groundwater.

Recommendation: OWM recommends that the proposed rules for the TRRP retain the approach of specifying performance-based response objectives that vary depending upon groundwater classification and that specify the location in groundwater where COC concentrations must be at

levels that are protective of human health and the environment. Further, OWM recommends that the differential protection approach specified in the response objectives for Class 1 and 2 groundwater under Remedy Standard B that are included in the latest version of the conceptual document be retained for use in the proposed rules.

The TRRP would establish a pollution cleanup approach for Class 1 groundwater (i.e., a primary groundwater resource) under Remedy Standard B by specifying that a well for use by the applicable receptor could be installed at any location throughout the plume of impacted groundwater. The proposed response objective would require this class of groundwater to be restored to levels suitable for use as a drinking water supply if technically practicable. Class 1 groundwater has the highest resource value of all groundwater in the state and warrants use of restoration as a drinking water supply as the objective for response actions.

The TRRP proposes that under certain conditions a person would be able to use an exposure prevention rather than a pollution cleanup approach for responding to impacted Class 2 groundwater (i.e., a current or potential groundwater supply) under Remedy Standard B. Provided the person can make the required demonstrations, the point of exposure to Class 2 groundwater could be moved from directly within the groundwater source area to the boundary of an effective institutional control. Under the proposed plan, the on-site point of exposure to Class 2 groundwater could be moved up to the lesser of:

- 500 feet beyond the current health-based limit of the plume,
- 1.25 times the current plume length, or
- two years travel time from the down gradient property boundary.

An off-site point of exposure to Class 2 groundwater could be used provided the distance from the current health-based limit of the plume to the proposed point of exposure meet the lesser of the above criteria and the adjacent landowner provides his written permission and is willing to have a notice placed on the deed records that prohibits use of the groundwater. Thus, the TRRP presents a differential protection policy where Class 2 groundwater would not need to be restored for use as a drinking water supply. A person would be required to limit the growth of the plume, to place an institutional control that prevents use of the groundwater, and to prevent unprotective levels of COC from migrating to on-and off-site points of exposure to groundwater, surface water, soil, and air.

Issue 11: Soil Response Objectives.

What performance-based response objectives should be established under Remedy Standard B for impacted soils that serve as a continuing source for the migration of COC to underlying Class 2 groundwater?

Importance: The process used to define soil COC concentrations that will be protective of groundwater is an important policy decision that the TNRCC must make when adopting the TRRP. At many sites this process will define the volume of contaminated soils that must be removed, decontaminated, and/or controlled in some fashion during the remedial action. This process is thus intimately tied to the extent and complexity, of the response actions that will be required to address areas of contaminated soils.

Recommendation: OWM recommends that the proposed rules for the TRRP retain the approaches regarding this issue that are described in the latest version of the conceptual document. At sites where groundwater is uncontaminated, the soil PCL should be set such that the risk-based exposure limit will not be exceeded in the Class 2 groundwater directly below the soil source area. A different approach is recommended for those sites where the Class 2 groundwater underlying the soil source area is already impacted. In this situation, the soil protective concentration level should be the COC concentration that can remain in soils and not result in the risk-based exposure limit being exceeded at an alternate location for the point of exposure to Class 2 groundwater. OWM recommends that an additiona,l possibly limiting, requirement be imposed that areas of contaminated soils be addressed so that the concentration of COC within the underlying Class 2 groundwater not be allowed to increase over time.

Issue 12: Should surface water dilution considerations be allowed to set soil and groundwater remedial response objectives?

Importance: The use of surface water dilution greatly impacts the flexibility responsible parties have in setting soil and groundwater remedial response objectives and impacts the contaminant load to a surface water body.

Recommendation: Allow the use of surface water dilution to set soil and groundwater remedial response objectives for only surface waters where the surface water standard has not been exceeded at the area of groundwater discharge to the surface water, and the chemical is not listed as impairing the nearest classified segment at or downstream of the site. Surface water dilution considerations will not be allowed where the surface water is not yet affected.

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Ron Pedde received a Bachelors Degree in Civil Engineering from South Dakota State University in 1973.

For 16 years he worked in the private sector as a consulting engineer doing environmental work in the water quality area.

In January 1989 Ron joined the Texas Water Commission, a predecessor agency of the Texas Natural Resource Conservation Commission, as a permit engineer in the Water Quality Division, where he worked in the Municipal Permits Unit drafting wastewater discharge permits.

In July of 1990 Ron moved to the Petroleum Storage Tank Division as the Section Manager for the Responsible Party Remediation Section (RPR). In the RPR Section, Ron was in charge of all Responsible Party Lead corrective action in the State of Texas.

In April of 1994 Ron joined the staff of the Office of Waste Management as a technical advisor to the Deputy Director. The Office of Waste Management is responsible for implementing the Underground Storage Tank program, State and Federal Superfund programs, Industrial and Hazardous Waste program and the Municipal Solid Waste program.

Ron currently holds registration as a Professional Engineer in four states, South Dakota, Wyoming, Colorado and Texas.

Ron is also registered as a Land Surveyor in Wyoming.

LEGAL ISSUES RELATED TO VCP/RRR

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NINTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

LEGAL ISSUES RELATED TO THE VOLUNTARY CLEANUP PROGRAM AND RISK REDUCTION RULES

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LEGAL ISSUES RELATED TO THE VOLUNTARY CLEANUP PROGRAM AND RISK REDUCTION RULES

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INTRODUCTION.

This paper sets forth an outline of the concepts contained in the Texas Voluntary Cleanup Program and Risk Reduction Rules from a legal perspective. It is intended as a general outline to familiarize readers with the potential applicability of the VCP Program and rules to various transactional applications.

I. Short Summary of the Voluntary Cleanup Program.

In general, the Voluntary Cleanup Program ("VCP") is intended to facilitate property transfers by providing certain levels of protection to prospective purchasers and lenders when property that is the subject of a transaction may be contaminated. Those wishing to take advantage of the protection of this program must file an application and provide relevant information regarding levels of contamination that may be present. Pursuant to the program, a work plan for agreed-upon remediation is submitted, cleanup is commenced upon approval of the work plan, and a certificate of completion is ultimately issued if the agreed-upon work is properly completed.

The attraction of the program is that the certificate of completion should provide subsequent purchasers and lenders with protection from enforcement by the State of Texas and the Environmental Protection Agency ("EPA") for the matters addressed in the cleanup, although it does not preclude the possibility of private tort suits from third parties. Sites that do not require remediation may also receive a certification of completion. The application procedure for a site that will not require cleanup is identical to that required for contaminated sites.

It should also be noted that an applicant can withdraw from the VCP if at some point during the process it elects not to pursue this avenue. However, the practical reality of such a withdrawal is that an applicant may likely already have identified the existence of certain actual or potential contamination to the State. In light of such notification, an applicant would run the risk that the State would subsequently pursue it with an enforcement order requiring a cleanup to be performed. Accordingly, this potential should be factored into any decision to file an application pursuant to the VCP.

II. Components of the Voluntary Cleanup Program.

A. Purpose of the VCP.

The VCP[1] was enacted by the State of Texas on May 27, 1995 and became effective on September 1, 1995. The stated purpose of the program is to provide incentives to encourage the cleanup of contaminated properties necessary to complete real estate transactions. The VCP attempts to achieve this purpose by removing the liability of future landowners and lenders to the State for the specific contamination or releases cleaned up under the program.[2] By eliminating future environmental liability concerns for these matters, real estate transactions can move forward.

B. VCP Application Requirements.

A person or entity who wishes to participate in the VCP must submit to the TNRCC an application and a fee of $1,000.[3] The application must contain general information concerning the applicant, along with general information concerning the site. The application also must contain an environmental assessment of the actual or threatened release of a hazardous substance or contaminant at the site and any other background information requested by the TNRCC. The environmental assessment must include a legal description of the site, a description of the physical characteristics of the site, the operational history of the site (to the extent known by the applicant), information of which the applicant is aware concerning the nature and extent of any relevant contamination or release at the site or immediately contiguous to the site, and relevant information of which the applicant is aware concerning the potential for human exposure to contamination at the site.[4]

An application submitted to the VCP must be accepted or rejected by the TNRCC within 45 days of receipt.[5] Section 361.605 allows the TNRCC to reject an application if an

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[1]Chapter 361, Subchapter S, Health and Safety Code.

[2]VCP § 361.602

[3]VCP § 361.604(b)

[4] *Id.*

[5]30 TAC § 333.4.

enforcement action is pending relating to or regarding the same site and TNRCC objects to the site's being accepted into the VCP. The TNRCC may also reject an application on other grounds, such as if a federal grant requires an enforcement action at the site. If the application is incomplete or inaccurate, the TNRCC must provide a list of all information needed to make it complete or accurate not later than the 45th day after receipt of the original application; an additional application fee is not required upon resubmittal.[6] If the TNRCC rejects the application, it must notify the applicant, explain the reasons for rejection, and refund half the application fee unless the applicant desires to resubmit the application.[7]

C. Voluntary Cleanup Agreement.

Any site that is not already subject to a TNRCC permit or order, or upon dismissal of the permit or order, is eligible for participation in the VCP.[8] A person or entity electing to participate in the VCP must enter into a voluntary cleanup agreement with TNRCC and pay all Commission oversight costs related to the voluntary cleanup.[9] A voluntary cleanup agreement must provide for: (1) recovery by the Commission of all reasonable costs incurred by the Commission in review and oversight of the person's work plan and reports, as well as those Commission costs attributable to the voluntary cleanup agreement, which are in excess of the $1,000 application fee required to accompany the application; (2) a schedule of payments to the Commission to be made by the person in satisfaction of such costs; and (3) appropriate tasks, deliverables and schedules relating to the terms of the agreement.[10]

The voluntary cleanup agreement shall identify all statutes and rules that must be complied with, describe any cleanup work plan or report to be submitted for review, include a schedule for submitting such information, and state the technical standards to be applied in evaluating the work plans and reports.[11] The standards for cleanup under: (a) the Texas Risk Reduction Rules,[12] or (b) the petroleum storage tank rules, may apply to many persons who undertake a voluntary cleanup.[13] Those rules specify cleanup levels for different types of contaminated media such as air, surface water, groundwater and soil.

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[6]VCP § 361.605(b)

[7]VCP § 361.605(c)

[8]VCP § 361.603(a) and (c).

[9]VCP § 361.603(b)

[10]VCP § 361.606(b)

[11]VCP § 361.606(c)

[12]30 TEX. ADMIN. CODE § 335, Subchapter S (West 1995).

[13]*See, e.g.*, 30 TEX. ADMIN. CODE § 335.8 (West 1995) (Applicability).

The TNRCC or the applicant may terminate a voluntary cleanup agreement by providing 15 days' advance written notice to the other; however, no liability releases would be given.[14] Only those costs incurred or obligated by the TNRCC before notice of termination of the agreement are then recoverable. The risk of an enforcement order by the State following such withdrawal, however, should be noted due to the identification of contamination via the VCP application.

D. Work Plans and Reports.

After signing a voluntary cleanup agreement, the applicant must prepare and submit appropriate work plans and reports to the TNRCC for review.[15] Such 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 TNRCC that site conditions warrant a focused investigation.[16] Addressing the areal extent of contamination off-site, however, is not required if the contaminant release off-site is on property also owned or otherwise controlled by the applicant.[17]

After reviewing and evaluating the work plans and reports for accuracy, quality and completeness, the TNRCC must approve the work plan or report or notify the person concerning additional information or commitments needed to obtain approval. The TNRCC may request additional or corrected information at any time during the evaluation process.

E. Certificate of Completion and Liability Protection.

Once the TNRCC determines that a person has successfully completed an approved voluntary cleanup, the TNRCC issues a certificate of completion ("certificate") including a legal description of the site and the name of the site's owner, indicating the proposed future land use of the site, and acknowledging the release of liability for lenders and future landowners as a result of the successful cleanup.[18] Once a certificate of completion is issued, Section 361.610(c) provides that 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 subsequent owner or lender was a responsible party under the Texas Solid Waste Disposal Act (i.e., the State Superfund law) at the time the application was filed. A person who is *not* a responsible party at the time of

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[14]VCP § 361.607

[15]VCP § 361.608

[16]30 TAC § 333.7(a).

[17]30 TAC § 333.7(c)(2).

[18]VCP § 361.609

application is released, *upon issuance of the certificate of completion*, from all liability to the State for cleanup of areas of the site covered by the certificate.[19]

In other words, a subsequent purchaser is relieved of liability to the State for matters covered in the certificate once a final certificate is issued, so long as that subsequent purchaser is not in any way otherwise responsible for the contamination ultimately remediated at the site by the previous owner. The State retains the right to bring claims against lenders or subsequent landowners relating to contamination or releases at the site either unknown at the time of the voluntary cleanup or known but expressly excluded from the cleanup remedy. Future owners, for example, also could be responsible for any *new* contamination event. Finally, releases of liability are not applicable to persons who change land use from that specified in the certificate if the new use may result in increased risks to human health or the environment.[20]

Although not explicit in the statute or regulations, TNRCC personnel have previously taken the position that "applicants" (including those who are subsequent owners or lenders and who acquire title *before* a certificate is issued) are protected from liability for those matters addressed in the voluntary cleanup agreement. To date, this still appears to be the policy of TNRCC, even though this policy has not been reduced to writing. As long as the subsequent owner is included on the VCP application and the voluntary cleanup agreement, such protection has been interpreted by the TNRCC staff to exist both during the interim time period after application but before issuance of a certificate, and after final issuance of the certificate of completion. If, however, a person fails to complete the specified cleanup, or otherwise does not comply with the voluntary cleanup agreement, the person cannot count on the protection afforded by the VCP. As long as both buyer and seller are on the VCP application and the voluntary cleanup agreement, the TNRCC's currently informal position is that it will consider both to have been relieved of liability for matters covered in the cleanup once a certificate is issued.

On May 1, 1996, Region VI of the U.S. EPA and the TNRCC entered into a Memorandum of Agreement regarding federal enforcement actions involving contaminated properties that are in the Texas Voluntary Cleanup Program. Under the Memorandum of Agreement, while a site with an ongoing investigation or remediation remains in compliance with the terms of the VCP agreement, or when the 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, EPA will not plan or anticipate any federal action under the Resource Conservation and Recovery Act, 42 U.S.C. §6901 et seq., or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 et seq., for that site or part of that site covered by the VCP agreement or Certificate of Completion. The Memorandum does stipulate, however, that EPA could initiate or resume enforcement action if a site poses a threat to human health or the environment, the program participant fails to complete cleanup, or an emergency situation arises.

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[19]VCP § 361.610(a)

[20]VCP § 361.610(c).

F. Partial Cleanups.

The VCP also provides for partial cleanup of known contamination at a property. The TNRCC may approve work plans and reports for a partial response action at the property only if the partial remedy: (1) will be completed in a manner that protects human health and the environment, (2) will not cause, contribute to 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.[21] For such 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.[22]

III. Risk Reduction Rules.

In Texas, the TNRCC's Risk Reduction Rules, 30 Tex. Admin. Code §§ 335.551-.569 (West 1994), establish the standards for cleanup of solid wastes. The Risk Reduction Rules establish three possible cleanup standards, outlined below.

A. Risk Reduction Standard Number 1.

Risk Reduction Standard Number 1, generally the most stringent level of cleanup that a remediating party may implement, requires cleanup of contaminants to background levels. Its requirements are briefly summarized as follows:

- Cleanup to background levels is required.
- No prior agency approval is required prior to implementing cleanup. However, prior notice to TNRCC of intent to perform cleanup is required.
- A report documenting attainment of the cleanup standard must be filed with TNRCC upon completion of remediation.
- No deed recordation or post-closure care requirements apply.

B. Risk Reduction Standard Number 2.

Risk Reduction Standard Number 2 is generally less stringent than Standard Number 1, but more stringent than Standard Number 3. It requires cleanup to a health-based cleanup standard established by the TNRCC, which generally may permit leaving contaminants in place at levels in excess of background. The requirements for achieving cleanup to Risk Reduction Standard Number 2 are summarized as follows:

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[21] VCP § 361.608(d).

[22] 30 TAC § 333.10(b).

- No prior agency approval is required prior to implementing cleanup. However, prior notice to TNRCC of intent to perform cleanup is required.

- A report documenting attainment of the cleanup standard must be filed with TNRCC upon completion of remediation.

- Notice must be filed in deed records that the site has been remediated to a health-based cleanup standard.

- No post-closure care requirements apply.

- Compliance with health-based standards established by the TNRCC for the various environmental media (which standards are generally less stringent than cleanup to background levels) is required.

C. Risk Reduction Standard Number 3.

Risk Reduction Standard Number 3 is typically applied when attainment of Standard Number 2 is impracticable, and an alternate cleanup standard will reduce to the maximum extent practicable the risk presented by the contamination. The requirements of Risk Reduction Standard Number 3 are summarized briefly as follows:

- Cleanup to a standard established for the particular site based on individual site characteristics is required. Generally this standard is less stringent than Standard Numbers 1 and 2.

- TNRCC approval of proposed cleanup standard and remediation strategy must be received prior to implementation.

- A report documenting attainment of the cleanup standard must be filed with TNRCC upon completion of remediation.

- Notice must be filed in deed records that the site has been remediated to a cleanup standard designed to reduce to the maximum extent practicable substantial present and future risk.

- Post-closure care requirements may apply.

IV. Additional Legal Issues.

A. New Provisions.

1. Innocent Landowner Provision. H. B. 2776, which becomes effective on September 1, 1997, adds an "innocent landowner" immunity provision to the Texas Solid Waste Disposal Act. No rules have yet been drafted by the TNRCC's VCP Division to

govern exactly how the immunity will be implemented in the VCP program, so the actual mechanics of the immunity (and how they will be applied) is as yet uncertain. However, the bill generally provides the immunity to apply as follows.

- Subchapter V of the bill provides immunity to innocent landowners from liability under the Texas Health and Safety Code and the Texas Water Code for investigations, monitoring or remediation of contamination resulting from a release of contaminants from a source not located on their property and for which they have no responsibility. More specifically, an "innocent landowner" is defined as a person that is an owner or operator of property that has become contaminated as a result of a release or migration of contaminants from a source or sources not located on or at the property and who did not cause or contribute to the source of such contamination.

- An innocent landowner may apply for a certificate confirming this immunity. The application must include an application fee and a complete "site investigation report" which demonstrates that the source of contamination is off site and that the landowner has not caused or contributed to the contamination.

- The landowner must allow reasonable access to the property for investigations by parties responsible for the contamination. The TNRCC may issue a conditional certificate to the innocent landowner which includes a requirement for the placement of deed restrictions or other control measures.

- The innocent landowner may pursue "any remedy available at law or in equity for conditions attributable to the release or migration of contaminants."

2. H. B. No. 2705, clarifies that although a site already subject to a Commission permit or order is not considered eligible for the VCP program, dismissal of the permit or order can render the site eligible for inclusion in the VCP.

It also provides that a person who purchased a site before September 1, 1995 (the effective date of the VCP), can also be released from all liability to the State for cleanup of contamination that was released at the site covered by the certificate before the purchase date not caused or contributed to by the person if: (1) the person did not operate the site or any portion prior to the purchase date, and (2) another person who is a responsible party successfully completes a voluntary cleanup of the site pursuant to the program.

B. Notification Issues.

1. Identifies Existence of Contamination.

In order to access the benefits of the VCP, an applicant has to notify TNRCC of the contamination at issue. Applicants who make the notification to facilitate an impending transaction may find themselves in a quandary if the transaction falls through,

having notified the agency of a problem but no longer being in a position to transfer the property. While the VCP rules allow an applicant to withdraw from the program, the State already has knowledge of the existence of the problem and may elect to investigate further and/or initiate enforcement action.

2. Obligation to Identify all Known Information.

It should also be kept in mind that the TNRCC interprets the requirements of the VCP to require that an applicant submit all known information about a VCP property as part of the VCP application and the required accompanying "ENVIRONMENTAL ASSESSMENT." While TNRCC does not specifically require that every report about the property be submitted in whole with the application, all relevant information about the property contained in each report regarding the property must be summarized and made available in some relevant, usable form to the TNRCC for their review.

C. Clean-up Standards.

While placing a property in the VCP generally results in a more expedited paperwork review and work approvals, applicants should keep in mind that the applicable standards for cleanup remain identical to those that would be required for properties being remediated outside of the VCP.

Similarly, while the approval and paperwork aspects of a remediation may be accelerated, the project itself can still linger for significant periods of time before a final Certificate of Completion is issued.

D. Third-Party Liability.

The risks of litigation from third parties is not ameliorated by inclusion in the VCP and issues raised when contamination migrates off-site still exist in the context of implementation of the VCP.

E. Transactional Issues.

Making the VCP Part of the Legal Transaction. To the extent that parties to a real estate transaction are making the property transfer contingent upon inclusion of the subject property in the VCP, the precise terms of the VCP's role in the transaction should be included in the governing purchase and sale documents. Issues that should be addressed in the transaction documents include, among other things:

- the identity of all parties to be included on the VCP application;
- the responsibilities of each party with regard to the payment of the application fee and a discussion of who will undertake and fund any required remediation;

- language to resolve any conflicts that may arise between buyer and seller with regard to what cleanup standards are to be implemented in the course of negotiations with the agency (*i.e.*, how to resolve buyer's potential desire for a clean closure remedy versus seller's desire to use a potentially more economical risk-based standard that allows contamination to remain in-place under appropriate circumstances);

- how negotiations and decision making with the agency will proceed as between the parties;

- provisions that address what will happen to the transaction if the subject property is ultimately not accepted into the VCP or if one of parties wishes to withdraw from the VCP or the transaction.

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079707/1406

AN ACT

relating to the **program** for the **voluntary cleanup** of contaminants.

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

SECTION 1. Section 361.603, Health and Safety Code, is amended by adding Subsection (c) to read as follows:

(c) Notwithstanding Subsection (a), a site or portion of a site that is subject to a commission permit or order is eligible for participation in the **voluntary cleanup program** on dismissal of the permit or order. An administrative penalty paid to the general revenue fund under the permit or order is nonrefundable.

SECTION 2. Subchapter S, Chapter 361, Health and Safety Code, as added by Chapter 986, Acts of the 74th Legislature, Regular Session, 1995, is amended by adding Section 361.6035 to read as follows:

Sec. 361.6035. ELIGIBILITY OF CERTAIN PERSONS FOR RELEASE FROM LIABILITY. (a) A person who purchased a site before September 1, 1995, is released, on certification under Section 361.609, from all liability to the state for **cleanup** of contamination that was released at the site covered by the certificate before the purchase date, except for releases or consequences that the person contributed to or caused, if:

(1) the person did not operate the site, or any portion of the site, before the purchase date; and

(2) another person that is a responsible party under Section 361.271 or 361.275(g) successfully completes a **voluntary cleanup** of the site under this subchapter.

(b) A person described by Subsection (a)(2):

(1) remains liable to the state for any contamination that was released at the site before the date the certificate is issued; and

(2) is not liable to the state for any contamination that was released at the site after the date the certificate is issued unless the person:

(A) contributes to or causes the release of contamination; or

(B) changes the 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.

SECTION 3. Section 361.604(b), Health and Safety Code, is amended to read as follows:

(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; and

(iii) whether the **voluntary cleanup** is subject to Section 361.6035;

(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.

SECTION 4. (a) This Act takes effect on the later of:

(1) September 1, 1997; or

(2) the date the Texas Natural Resource Conservation

Commission enters into a memorandum of agreement with the United States Environmental Protection Agency, Region 6, authorizing the inclusion of certain potentially responsible parties to the group of persons eligible to participate in the **voluntary cleanup program** established by Subchapter S, Chapter 361, Health and Safety Code, as added by Chapter 986, Acts of the 74th Legislature, Regular Session, 1995.

(b) The Texas Natural Resource Conservation Commission shall publish the memorandum of agreement described by Subsection (a) of this section in the Texas Register.

SECTION 5. 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.

President of the Senate

Speaker of the House

I certify that H.B. No. 2705 was passed by the House on May 14, 1997, by a non-record vote; and that the House concurred in Senate amendments to H.B. No. 2705 on May 29, 1997, by a non-record vote.

Chief Clerk of the House

I certify that H.B. No. 2705 was passed by the Senate, with amendments, on May 26, 1997, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED:

Date

Governor

ACG C.S.H.B. **2705** 75(R) BILL ANALYSIS

ENVIRONMENTAL REGULATION
C.S.H.B. **2705**
By: Chisum
4-18-97
Committee Report (Substituted)

BACKGROUND

The Texas Natural Resource Conservation Commission (TNRCC) administers a **voluntary cleanup** program which became effective September 1, 1995. Under the program, a person may cleanup a contaminated site with the approval and oversight of the TNRCC. When the site has been remediated to the appropriate cleanup level, the site owner is provided with a Certificate of Completion and future landowners receive a release from liability to the state. The program encourages economic development of remediated property by insuring that future landowners are not responsible for contamination caused by previous owners. Moreover, cleanup of contaminated sites may be achieved through: (1) an enforcement order issued by the TNRCC; (2) federal or state superfund programs; or (3) the Federal Resource Conservation and Recovery Act (RCRA). **Voluntary cleanup** of contaminated sites through the use of private funds can be accomplished faster and more efficiently than these other methods. To facilitate participation in **voluntary cleanup**, the program needs improvement to increase further the benefits presently being realized by the state. This bill contemplates the need to negotiate the implementation of the new provisions of the **voluntary cleanup** program with the United States Environmental Protection Agency to insure the retention of existing state programs.

PURPOSE

C.S.H.B. **2705** expands the **voluntary cleanup** program to allow a narrow group of past or current owners, who are currently ineligible, to participate in the program. Specifically, a landowner who acquired a site prior to September 1, 1995, who did not cause any contamination at the site prior to the date they acquired it, would be eligible for release from liability under limited circumstances. The TNRCC will be afforded greater flexibility to allow contaminated sites to be part of a **voluntary cleanup** program.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency or institution.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 361.603, Health & Safety Code, by adding Subsection (c) which allows TNRCC to transfer a site or a portion of a site that is subject to a permit or order into the **voluntary cleanup** program, but any administrative penalty is nonrefundable.

SECTION 2. Adds Section 361.6035 to Subchapter S, Chapter 361, Health & Safety Code, which allows a person who purchased a site prior to September 1, 1995, to be released from liability to the state upon the issuance of a

Certificate of Completion if prior to purchasing the property the person was not an operator or generator on the site, and a responsible party, other than the person released, remains subject to liability to the state for contamination in existence before the date the certificate is issued..

SECTION 3. Amends Section 361.604(b), Health & Safety Code, to require that certain additional information be included in an application to participate in the **voluntary cleanup** program.

SECTION 4. Effective date.

SECTION 5. Emergency clause.

COMPARISON OF ORIGINAL TO SUBSTITUTE

C.S.H.B. **2705** removes provisions in the filed version authorizing responsible parties to be completely released from liability to the state for the cleanup of a contaminated site.

C.S.H.B. **2705** removes from the filed version the provision authorizing the resubmission of a rejected application.

C.S.H.B. **2705** removes requirements from the filed version that all identified persons in an application to participate in a **voluntary cleanup** program be relieved from liability.

C.S.H.B. **2705** removes the provision in the filed version authorizing the person who undertook the **voluntary cleanup** and the current owner of the site to petition the commission to review a determination by the executive director that a **voluntary cleanup** program has not been successfully completed.

C.S.H.B. **2705** removes the provision from the filed version that precludes the application of a release from liability to persons changing 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.

C.S.H.B. **2705** removes the provision in the filed version that precludes the application of a release from liability to persons disturbing or modifying the remediation accomplished during the **voluntary cleanup** in a manner that may result in increased risks to human health or the environment.

SRC-MAX, MAX C.S.H.B. **2705** 75(R)BILL ANALYSIS

Senate Research CenterC.S.H.B. **2705**
By: Chisum (Brown)
Natural Resources
5-17-97
Committee Report (Substituted)

DIGEST

The Texas Natural Resource Conservation Commission (TNRCC) administers a **voluntary cleanup** program which became effective September 1, 1995. Under the program, a person may cleanup a contaminated site with the approval and oversight of the TNRCC. When the site has been remediated to the appropriate cleanup level, the site owner is provided with a certificate of completion and future landowners receive a release from liability to the state. The program encourages economic development of remediated property by insuring that future landowners are not responsible for contamination caused by previous owners. This bill sets forth provisions regarding the program for the **voluntary cleanup** of contaminants.

PURPOSE

As proposed, C.S.H.B. **2705** sets forth provisions regarding the program for the **voluntary cleanup** of contaminants.

RULEMAKING AUTHORITY

This bill does not grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 361.603, Health and Safety Code, by adding Subsection (c), to provide that a site or portion of a site that is subject to the Texas Natural Resource Conservation Commission (commission) permit or order is eligible for participation in the **voluntary cleanup** program on dismissal of the permit or order. Provides that an administrative penalty paid to the general revenue fund under the permit or order is nonrefundable.

SECTION 2. Amends Chapter 361S, Health and Safety Code, as added by Chapter 986m Acts of the 74th legislature, Regular Session, 1995, by adding Section 361.6035, as follows:

Sec. 361.6035. ELIGIBILITY OF CERTAIN PERSONS FOR RELEASE FROM LIABILITY. Provides that a person who purchased a site before September 1, 1995, is released, on certification under Section 361.609, from all liability to the state for cleanup of contamination that was released at the site covered by the certificate before the purchase date, except for releases for consequences that the person contributed to or caused under certain conditions. Sets forth provisions regarding the liability of a person described by Subsection (a)(2).

SECTION 3. Amends Section 361.604(b), Health and Safety Code, to require an application submitted under this section to contain general information concerning whether the **voluntary cleanup** is subject to Section 361.6035.

SECTION 4. Effective date: September 1, 1997, or the date the commission enters into a memorandum of agreement with the United States Environmental

Protection Agency, Region 6, authorizing certain provisions.

SECTION 5. Emergency clause

SUMMARY OF COMMITTEE CHANGES

SECTION 2.

Amends Section 361.6035, Chapter 361S, Health and Safety Code, to provide that a person described by Subsection (a)(2) is not liable to the state for any contamination that was released at the site after the date the certificate is issued unless the person: contributed to or caused the release of contamination; or changed the land use from the use of specified in the certificate of completion if the new use may result in increased risks to human health or the environment.

AN ACT

relating to the regulation of state superfund sites.

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

SECTION 1. Section 361.133, Health and Safety Code, is amended by adding Subsections (g)-(i) to read as follows:

(g) Notwithstanding Subsection (c), the executive director may use money in the fund, including interest credited under Subsection (b)(4), for expenses concerning a cleanup or removal of a spill, release, or potential threat of release of a hazardous substance if the site is eligible for listing under Subchapter F, proposed for listing under Subchapter F, or listed under the state registry before September 1, 1989, and:

(1) immediate action is appropriate to protect human health or the environment and there is a substantial likelihood that the cleanup or removal will prevent the site from needing to be listed under Subchapter F; or

(2) a cleanup or removal:

(A) can be completed without extensive investigation and planning; and

(B) will achieve a significant cost reduction for the site.

(h) If the commission collects a fee that is deposited in a dedicated fund established for the purpose of cleaning up a facility, tank, or site described by this subsection, the commission may not use money in the hazardous and solid waste remediation fee fund to clean up a:

(1) waste tire recycling facility;

(2) municipal solid waste facility;

(3) petroleum storage tank; or

(4) used oil collection and recycling site that received used oil after August 31, 1995.

(i) Not later than the 31st day before the date the commission begins a cleanup or removal under Subsection (g), the commission must publish notice of its intent to perform the cleanup or removal in the Texas Register.

SECTION 2. Section 361.136(i), Health and Safety Code, is amended to read as follows:

(i) The storage, processing, or disposal of industrial solid wastes or hazardous wastes generated in a removal or remedial action accomplished through the expenditure of money [~~public funds~~] from the hazardous and solid waste remediation fee fund or generated in a removal or remedial action in this state conducted by the United States Environmental Protection Agency shall be exempt from the assessment of a waste management fee under this section.

SECTION 3. Section 361.183(a), Health and Safety Code, is amended to read as follows:

(a) Before [~~the~~] listing [~~of~~] a facility on the state registry, the executive director shall determine whether the potential endangerment to public health and safety or the environment at the facility can be resolved by:

(1) the present owner or operator under the federal Resource Conservation and Recovery Act of 1976 (42 U.S.C. Section 6901);

(2) [~~or by~~] some or all of the potentially responsible parties identified in Subchapter I, under an agreed administrative order issued by the commission; or

(3) an agreement under Subchapter S, as added by Chapter 986, Acts of the 74th Legislature, Regular Session, 1995.

SECTION 4. Subchapter F, Chapter 361, Health and Safety Code, is amended by adding Section 361.1855 to read as follows:

Sec. 361.1855. PROPOSAL OF LAND USE OTHER THAN RESIDENTIAL. (a) The executive director shall hold a public meeting to obtain

public input and information regarding the appropriate use of land on which a facility is located that is the subject of a remedial investigation/feasibility study if:

(1) a land use other than residential is proposed as appropriate for the land by:

(A) the executive director; or

(B) a potentially responsible party who has entered into an agreed order with the commission;

(2) the proposal is made before the study is completed; and

(3) a local government has not zoned the land as residential only.

(b) Any interested person may comment at the meeting.

(c) The meeting is legislative in nature and not a contested case hearing under Chapter 2001, Government Code.

(d) Not later than the 31st day before the date of the meeting, the commission shall:

(1) publish notice of the meeting in the Texas Register and in a newspaper of general circulation in the county in which the facility is located;

(2) mail notice of the meeting to each potentially responsible party by certified mail, return receipt requested, at the party's most recent address as shown on the records of the commission; and

(3) make the commission's records regarding the facility available to any interested person.

(e) The notice shall:

(1) state the date, time, and place of the meeting; and

(2) provide information regarding the proposed land use.

(f) The failure of a potentially responsible party to receive a notice under this section does not affect the responsibilities, duties, or liabilities of the party.

(g) After the meeting, the executive director shall select the appropriate land use for purposes of selecting a proposed remedial action.

SECTION 5. Section 361.187(b), Health and Safety Code, is amended to read as follows:

(b) The commission shall publish notice of the meeting in the Texas Register and in a newspaper of general circulation in the county in which the facility is located at least 30 [~~45~~] days before the date of the public meeting. The notice shall provide information regarding the proposed remedial action and the date, time, and place of the meeting. The commission shall also mail the same information to each potentially responsible party by certified mail, return receipt requested, at the party's last known address at least 30 [~~45~~] days before the public meeting. Contemporaneously with the issuance of notice of the public meeting, the executive director shall make available to all interested parties the public records the executive director has regarding the facility. For purposes of providing this information, the executive director shall provide a brief summary of those public records and make those public records available for inspection and copying during regular business hours. Nonreceipt of any notice mailed to a potentially responsible party under this section does not affect the responsibilities, duties, or liabilities imposed on the party.

SECTION 6. Section 361.188(a), Health and Safety Code, is amended to read as follows:

(a) After consideration of all good faith offers to perform a remedial action, the commission shall issue a final administrative order that must:

(1) list the facility on the state registry, thus

determining that the facility poses an imminent and substantial endangerment to public health and safety or the environment;

(2) specify the appropriate land use for purposes of selecting the appropriate remedial action;

(3) specify the selected remedial action;

(4) [~~(3)~~] list the parties determined to be responsible for remediating the facility;

(5) [~~(4)~~] make findings of fact describing actions voluntarily undertaken by responsible parties;

(6) [~~(5)~~] order the responsible parties to remediate the facility and, if appropriate, reimburse the hazardous waste disposal fee fund for remedial investigation/feasibility study and remediation costs;

(7) [~~(6)~~] establish a schedule for completion of the remedial action;

(8) [~~(7)~~] state any determination of divisibility of responsible party liability; and

(9) [~~(8)~~] give notice of the duties and restrictions imposed by Section 361.190.

SECTION 7. Section 361.189, Health and Safety Code, is amended to read as follows:

Sec. 361.189. Deletions from Registry. (a) The executive director or an [~~any~~] owner or operator or other named responsible party of a facility listed or to be listed on the state registry may request the commission to delete the facility from the state registry, modify the facility's priority within the state registry, or modify any information regarding the facility by submitting a written statement setting forth the grounds of the request in the form the commission may by rule require.

(b) The commission by rule shall establish procedures, including public meetings [~~hearings~~], for review of requests submitted under this section.

(c) If the commission deletes a facility from the state registry because the cleanup of the facility is being addressed under Subchapter S, as added by Chapter 986, Acts of the 74th Legislature, Regular Session, 1995, the facility automatically reverts to the status the facility had immediately before the facility was deleted from the registry on the date of the executive director's determination that the cleanup of the facility is not being addressed adequately. A public meeting is not required for an action under this subsection.

SECTION 8. Sections 361.194(b) and (c), Health and Safety Code, are amended to read as follows:

(b) The lien imposed by this section arises and attaches to the real property subject to or affected by a remedial action at the time an affidavit is recorded and indexed in accordance with this section in the county in which the real property is located. The executive director shall determine whether to prepare an affidavit. In making the determination, the executive director shall proceed in the manner that the executive director determines will most likely result in the least overall costs to the state after any cost recovery action. For the purpose of determining rights of all affected parties, the lien does not relate back to a time before the date on which the affidavit is recorded, which date is the lien inception date. The lien continues until the liability for the costs is satisfied or becomes unenforceable through operation of law.

(c) An authorized representative of the commission must [~~shall~~] execute the affidavit. The affidavit must show:

(1) the names and addresses of the persons liable for the costs;

(2) a description of the real property that is subject to or affected by the remediation action for the costs or claims;

and

(3) the amount of the costs and the balance due.

SECTION 9. Section 361.197, Health and Safety Code, is amended by adding Subsection (d) to read as follows:

(d) The commission shall file a cost recovery action against each responsible party for the total costs of an action taken under Section 361.133(c)(1), (2), (3), (5), or (6) or Section 361.133(g).

SECTION 10. Section 361.200, Health and Safety Code, is amended to read as follows:

Sec. 361.200. [~~DE MINIMIS~~] SETTLEMENT. The commission shall assess and by rule may develop and implement a [~~de minimis~~] settlement program. Under the program, the commission shall consider the advantages of developing a final settlement with potentially responsible parties that are responsible for [~~only a minor portion of the~~] response costs at a facility because of [~~the~~] hazardous substances. The settlement program may include:

(1) de minimis settlements;

(2) covenants not to sue;

(3) mixed funding; and

(4) partial settlements [~~the party is responsible for are minimal in amount or in hazardous effect by comparison with the hazardous substances attributable to other parties~~].

SECTION 11. Section 361.271, Health and Safety Code, is amended by adding Subsections (e) and (f) to read as follows:

(e) A fiduciary's responsibility for solid waste is subject to Subchapter T.

(f) A lender's responsibility for solid waste is subject to Subchapter U.

SECTION 12. Section 361.277, Health and Safety Code, is amended to read as follows:

Sec. 361.277. EFFECT OF SETTLEMENT AGREEMENT WITH STATE [~~JUDGMENT BY STATE AGAINST NONSETTLING PARTY; ACTION FOR CONTRIBUTION BY NONSETTLING PARTY~~]. (a) If fewer than all of the persons identified as liable under this subchapter agree with the state to take remedial action to abate an actual or threatened release of solid waste that is an imminent and substantial endangerment to the public health and safety or the environment under an administrative order issued under Section 361.272 or an action filed by the state under this subchapter, the state may seek a judgment against a nonsettling person for the total amount of the cost of the remedial action minus that amount the settling persons agree to pay or spend.

(b) A person who enters a settlement agreement with the state that resolves all liability of the person to the state for a site subject to Subchapter F is released from liability to a person described by Section 361.344(a) for cost recovery, contribution, or indemnity under Section 361.344 regarding a matter addressed in the settlement agreement.

(c) A settlement agreement does not discharge the liability of a nonsettling person to the state unless the agreement provides otherwise.

(d) Notwithstanding Subsection (c), a settlement agreement reduces the potential liability to the state of the nonsettling persons by the amount of the settlement [~~In an action for contribution brought by a nonsettling person against a settling person, the nonsettling person has the burden to prove that the amount of cleanup costs that a settling person agreed to pay under an agreement with the state is unreasonable considering the factors under Section 361.343 and the need to undertake timely cleanup action concerning the release or threatened release~~].

SECTION 13. Section 361.343, Health and Safety Code, is amended by amending Subsection (b) and adding Subsection (c) to read as follows:

(b) In apportioning costs under Subsection (a), the court shall credit against a responsible party's share of the costs of eliminating a release or threatened release of solid waste the party's expenditures related to the cleanup at issue if the commission or the executive director approves the cleanup. If the expenditures were made before the property was proposed to be listed on the state registry and the commission or the executive director approves the cleanup, the court shall also reduce in an equitable and just manner the party's proportionate share of the costs.

(c) The apportionment of costs only adjusts the rights of parties identified by Section 361.271 and does not affect a person's liability to the state.

SECTION 14. Section 361.344(a), Health and Safety Code, is amended to read as follows:

(a) A person [~~subject to a court injunction or an administrative order issued under this chapter, or a third person identified by Section 361.192(c),~~] who conducts a removal or remedial action that is approved by the commission and is necessary to address [~~acts to eliminate~~] a release or threatened release[~~, in addition to having the right to file an action for contribution or indemnity, or both, in an appeal proceeding or in an action brought by the attorney general,~~] may bring suit in a district court to recover the reasonable and necessary costs of that action [~~incurred to eliminate the release or threatened release~~] and other costs as the court, in its discretion, considers reasonable. This right is in addition to the right to file an action for contribution, indemnity, or both in an appeal proceeding or in an action brought by the attorney general.

SECTION 15. Chapter 361, Health and Safety Code, is amended by adding Subchapters T, U, and V to read as follows:

SUBCHAPTER T. FIDUCIARY LIABILITY

Sec. 361.651. DEFINITIONS. In this subchapter:

(1) "Fiduciary":

(A) means a person acting for the benefit of another party as a bona fide:

(i) trustee;

(ii) executor;

(iii) administrator;

(iv) custodian;

(v) guardian of an estate or guardian ad litem;

(vi) receiver;

(vii) conservator;

(viii) committee of the estate of an incapacitated person;

(ix) personal representative;

(x) trustee, including a successor to a trustee, under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender; or

(xi) representative in any other capacity that the commission, after providing public notice, determines to be similar to the capacities described in Subparagraphs (i)-(x); and

(B) does not include:

(i) a person that is acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit, unless the trust or other fiduciary estate was created as part of, or to facilitate,

one or more estate plans or because of the incapacity of a natural person; or

(ii) a person that acquires ownership or control of a solid waste facility with the objective purpose of avoiding liability of the person or of any other person.

(2) "Fiduciary capacity" means the capacity of a person in holding title to a solid waste facility or otherwise having control of or an interest in the solid waste facility pursuant to the exercise of the responsibilities of the person as a fiduciary.

(3) "Solid waste facility":

(A) means:

(i) all contiguous land, including structures, appurtenances, and other improvements on the land, used for processing, storing, or disposing of solid waste, including a publicly or privately owned solid waste facility consisting of several processing, storage, or disposal operational units such as one or more landfills, surface impoundments, or a combination of units; and

(ii) any building, structure, installation, equipment, pipe, or pipeline, including any pipe into a sewer or publicly owned treatment works, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or any site or area where a hazardous substance has been deposited, stored, disposed of, placed, or otherwise come to be located; and

(B) does not include a:

(i) consumer product in consumer use; or

(ii) vessel.

Sec. 361.652. LIABILITY OF FIDUCIARIES. (a) Except as otherwise provided by Subchapter I, Chapter 26, Water Code, or rules adopted under that subchapter, the liability of a fiduciary under this code or the Water Code for the release or threatened release of solid waste at, from, or in connection with a solid waste facility held in a fiduciary capacity does not exceed the assets held in the fiduciary capacity.

(b) Subsection (a) does not apply to the extent that a person is liable independently of the person's ownership of a solid waste facility as a fiduciary or actions taken in a fiduciary capacity.

(c) Subsections (a) and (d) do not limit the liability pertaining to a release or threatened release of solid waste if negligence, gross negligence, or wilful misconduct of a fiduciary causes or contributes to the release or threatened release.

(d) Except as otherwise provided by Subchapter I, Chapter 26, Water Code, or rules adopted under that subchapter, a fiduciary is not liable in the fiduciary's personal capacity under this code or the Water Code for:

(1) undertaking or directing another person to undertake a response action under the national contingency plan adopted under 42 U.S.C. Section 9605, under a commission-approved cleanup plan, or under the direction of an on-scene coordinator designated under the national contingency plan or a commission-approved cleanup plan;

(2) undertaking or directing another person to undertake any other lawful means of addressing solid waste in connection with the solid waste facility;

(3) terminating the fiduciary relationship;

(4) including in the terms of the fiduciary agreement a covenant, warranty, or other term or condition that relates to compliance with an environmental law or monitoring or enforcing the term or condition;

(5) monitoring or undertaking one or more inspections

of the solid waste facility;

(6) providing financial or other advice or counseling to other parties to the fiduciary relationship, including the settlor or beneficiary;

(7) restructuring, renegotiating, or otherwise altering the terms and conditions of the fiduciary relationship;

(8) administering, as a fiduciary, a solid waste facility that was contaminated before the fiduciary relationship began; or

(9) declining to take an action described by Subdivisions (2)-(8).

(e) This section does not:

(1) affect a right, immunity, or defense available under this code or the Water Code that is applicable to a person subject to this section;

(2) create any liability for a person; or

(3) create a private right of action against a fiduciary or any other person.

(f) This section does not apply to a person if the person:

(1) acts in a capacity other than that of a fiduciary or in a beneficiary capacity and, in that capacity, directly or indirectly benefits from a trust or fiduciary relationship; or

(2) is a beneficiary and a fiduciary with respect to the same fiduciary estate and, as a fiduciary, receives benefits that exceed customary or reasonable compensation, and incidental benefits, permitted under other applicable law.

(g) This section does not preclude a claim under this code or the Water Code against:

(1) the assets of the estate or trust administered by the fiduciary; or

(2) a nonemployee agent or independent contractor retained by a fiduciary.

(Sections 361.653-361.700 reserved for expansion)

SUBCHAPTER U. LENDER LIABILITY

Sec. 361.701. DEFINITIONS. In this subchapter:

(1) "Extension of credit" includes a lease finance transaction:

(A) in which the lessor does not initially select the leased solid waste facility and does not during the lease term control the daily operations or maintenance of the solid waste facility; or

(B) that conforms with, as appropriate, regulations issued by:

(i) the appropriate federal banking agency or the appropriate state bank supervisor, as those terms are defined by Section 3, Federal Deposit Insurance Act (12 U.S.C. Section 1813); or

(ii) the National Credit Union Administration Board.

(2) "Financial or administrative function" includes a function such as a function of a credit manager, accounts payable officer, accounts receivable officer, personnel manager, comptroller, or chief financial officer, or a similar function.

(3) "Foreclosure" and "foreclose" mean, respectively, acquiring, and to acquire, a solid waste facility through:

(A) purchase at sale under a judgment or decree, power of sale, or nonjudicial foreclosure sale;

(B) a deed in lieu of foreclosure, or similar conveyance from a trustee;

(C) repossession, if the solid waste facility was security for an extension of credit previously contracted;

(D) conveyance under an extension of credit previously contracted, including the termination of a lease

agreement; or

(E) any other formal or informal manner by which the person acquires, for subsequent disposition, title to or possession of a solid waste facility in order to protect the security interest of the person.

(4) "Lender" means:

(A) an insured depository institution, as that term is defined by Section 3, Federal Deposit Insurance Act (12 U.S.C. Section 1813);

(B) an insured credit union, as that term is defined by Section 101, Federal Credit Union Act (12 U.S.C. Section 1752);

(C) a bank or association chartered under the Farm Credit Act of 1971 (12 U.S.C. Section 2001 et seq.);

(D) a leasing or trust company that is an affiliate of an insured depository institution;

(E) any person, including a successor or assignee of any such person, that makes a bona fide extension of credit to or takes or acquires a security interest from a nonaffiliated person;

(F) the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Agricultural Mortgage Corporation, or any other entity that in a bona fide manner buys or sells loans or interests in loans;

(G) a person that insures or guarantees against a default in the repayment of an extension of credit, or acts as a surety with respect to an extension of credit, to a nonaffiliated person;

(H) a person that provides title insurance and that acquires a solid waste facility as a result of assignment or conveyance in the course of underwriting claims and claims settlement; and

(I) an agency of this state that makes an extension of credit to or acquires a security interest from:

(i) a federal or state agency;

(ii) a county, municipality, or other body politic or corporate of this state, including:

(a) a district or authority created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution;

(b) an interstate compact commission to which this state is a party; or

(c) a nonprofit water supply corporation created and operating under Chapter 76, Acts of the 43rd Legislature, 1st Called Session, 1933 (Article 1434a, Vernon's Texas Civil Statutes); or

(iii) another person.

(5) "Operational function" includes a function such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer.

(6) "Security interest" includes a right under a mortgage, deed of trust, assignment, judgment lien, pledge, security agreement, factoring agreement, or lease and any other right accruing to a person to secure the repayment of money, the performance of a duty, or any other obligation by a nonaffiliated person.

(7) "Solid waste facility":

(A) means:

(i) all contiguous land, including structures, appurtenances, and other improvements on the land, used for processing, storing, or disposing of solid waste, including a publicly or privately owned solid waste facility consisting of several processing, storage, or disposal operational units such as

one or more landfills, surface impoundments, or a combination of units; and

(ii) any building, structure, installation, equipment, pipe, or pipeline, including any pipe into a sewer or publicly owned treatment works, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or any site or area where a hazardous substance has been deposited, stored, disposed of, placed, or otherwise come to be located; and

(B) does not include a:

(i) consumer product in consumer use; or

(ii) vessel.

Sec. 361.702. EXCLUSION OF LENDERS NOT PARTICIPANTS IN MANAGEMENT. (a) In Section 361.271, the term "owner or operator" does not include a person that is a lender that:

(1) without participating in the management of a solid waste facility, holds a security interest in or with regard to the solid waste facility; or

(2) did not participate in management of a solid waste facility before foreclosure, notwithstanding the fact that the person:

(A) forecloses on the solid waste facility; and

(B) after foreclosure, sells, re-leases, in the case of a lease finance transaction, or liquidates the solid waste facility, maintains business activities, winds up operations, undertakes a response action with respect to the solid waste facility under the national contingency plan adopted under 42 U.S.C. Section 9605, under a commission-approved cleanup plan, or under the direction of an on-scene coordinator appointed under the national contingency plan or a commission-approved cleanup plan, or takes any other measure to preserve, protect, or prepare the solid waste facility before sale or disposition, if the person seeks to sell, re-lease, in the case of a finance transaction, or otherwise divest the person of the facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

(b) For purposes of Subsection (a)(2)(B), a lender is presumed to divest the lender of the solid waste facility at the earliest practicable, commercially reasonable time if, within 12 months after foreclosure, the lender:

(1) lists the solid waste facility with a broker, dealer, or agent who deals in that type of property; or

(2) advertises the solid waste facility for sale or other disposition at least monthly in:

(A) a real estate publication;

(B) a trade or other publication appropriate for the solid waste facility being advertised; or

(C) a newspaper of general circulation in the area in which the solid waste facility is located.

(c) For purposes of Subsection (b), the 12-month period begins:

(1) when the lender acquires marketable title if the lender, after the expiration of any redemption period or other waiting period required by law, was acting diligently to acquire marketable title; or

(2) on the date of foreclosure or its equivalent if the lender does not act diligently to acquire marketable title.

(d) Except as otherwise provided by Subchapter I, Chapter 26, Water Code, or rules adopted under that subchapter, a lender is not liable under this code or the Water Code to undertake a removal or remedial action or to pay a fine or penalty arising from the release or threatened release of solid waste at, from, or in

connection with the solid waste facility in which the lender maintains a security interest or that the lender has acquired through foreclosure if:

(1) the lender has not participated in management before foreclosure;

(2) the conditions giving rise to the release or threat of release existed before foreclosure; and

(3) the lender seeks to divest the lender of the property under Subsections (a)(2)(B) and (b).

(e) Notwithstanding Subsection (d), if a lender after foreclosure operates, directs the operation of, or maintains the operation of business activities, this section does not exempt or excuse the lender from compliance with legal requirements applicable to the operation of that business. Those operational requirements include permitting, reporting, monitoring, compliance with emission limitations, financial responsibility and assurance requirements, payment of fees, and payment of fines and penalties for noncompliance with those requirements.

Sec. 361.703. PARTICIPATION IN MANAGEMENT. (a) For purposes of Section 361.702, the term "participate in management":

(1) means actually participating in the management or operational affairs of a solid waste facility; and

(2) does not include merely having the capacity to influence, or the unexercised right to control, a solid waste facility or facility operations.

(b) A person that is a lender that holds a security interest in or with regard to a solid waste facility is considered to participate in management only if, while the borrower is still in possession of the solid waste facility encumbered by the security interest, the person:

(1) exercises decision-making control over the environmental compliance related to the solid waste facility such that the person has undertaken responsibility for the solid waste handling or disposal practices related to the solid waste facility; or

(2) exercises control at a level comparable to that of a manager of the solid waste facility such that the person has assumed or manifested responsibility:

(A) for the overall management of the solid waste facility encompassing day-to-day decisionmaking with respect to environmental compliance; or

(B) over all or substantially all of the operational functions, as distinguished from financial or administrative functions, of the solid waste facility other than the function of environmental compliance.

(c) The term "participate in management" does not include:

(1) performing an act or failing to act before the time at which a security interest is created in a solid waste facility;

(2) holding a security interest or abandoning or releasing a security interest;

(3) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

(4) monitoring or enforcing the terms and conditions of the extension of credit or security interest;

(5) monitoring or undertaking one or more inspections of the solid waste facility;

(6) requiring a response action or other lawful means of addressing the release or threatened release of solid waste in connection with the solid waste facility before, during, or on the expiration of the term of the extension of credit;

(7) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the solid waste facility;

(8) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

(9) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

(10) conducting a response action under the national contingency plan adopted under 42 U.S.C. Section 9605, under a commission-approved cleanup plan, or under the direction of an on-scene coordinator appointed under the national contingency plan or a commission-approved cleanup plan, if the actions do not rise to the level of participating in management within the meaning of Subsections (a) and (b).

(Sections 361.704-361.750 reserved for expansion

SUBCHAPTER V. IMMUNITY FROM LIABILITY OF INNOCENT OWNER OR OPERATOR

Sec. 361.751. DEFINITIONS. In this subchapter:

(1) "Contaminant" has the meaning assigned by Section 361.601.

(2) "Innocent owner or operator" means a person that:

(A) is an owner or operator of property that has become contaminated as a result of a release or migration of contaminants from a source or sources not located on or at the property; and

(B) did not cause or contribute to the source or sources of the contamination referred to in Paragraph (A).

Sec. 361.752. IMMUNITY FROM LIABILITY; ACCESS TO PROPERTY. (a) An innocent owner or operator of property is not liable under this code or the Water Code for investigation, monitoring, remediation, or corrective or other response action regarding the conditions attributable to a release or migration of a contaminant or otherwise liable regarding those conditions.

(b) A person that acquires a portion of the tract on which the source of a release of contaminants is located from the person that caused the release is eligible for immunity under Subsection (a) only if, after appropriate inquiry consistent with good commercial or customary practice, the person did not know or have reason to know of the contamination at the time the person acquired the property.

(c) To be eligible for immunity under Subsection (a), an owner or operator must grant reasonable access to the property for purposes of investigation or remediation to a person designated by the executive director. An agreement for reasonable access may provide:

(1) that the designated person may not unreasonably interfere with the use of the property;

(2) for payment of reasonable compensation for access to the property; or

(3) that the owner or operator is indemnified from liability for an intentional or negligent act of the designated person arising from the person's access to and use of the property.

(d) This section does not limit any right of the commission under another provision of this code or the Water Code to obtain access to the property.

Sec. 361.753. CERTIFICATION. (a) A person may apply to the commission for a certificate confirming that the person is an innocent owner or operator. The application must include a complete site investigation report that demonstrates that:

(1) the property has become contaminated as a result of a release or migration of contaminants from a source or sources

not located on or at the property;

(2) the owner or operator has not caused or contributed to the source or sources of the contamination referred to in Subdivision (1); and

(3) the owner or operator is eligible for immunity under Section 361.752(b).

(b) The commission may charge an application fee in an amount not to exceed the cost of reviewing the application. The commission shall deposit a fee collected under this subsection to the credit of the hazardous and solid waste remediation fee fund.

(c) Not later than the 45th day after the date the commission receives the application, the commission shall notify the applicant whether the application is complete.

(d) Not later than the 90th day after the date the commission receives the application, the commission shall:

(1) issue or deny the certificate; or

(2) notify the applicant of any additional information needed to review the application.

(e) Not later than the 45th day after the date the commission receives the additional information requested under Subsection (d)(2), the commission shall issue or deny the certificate.

(f) The certificate evidences the immunity from liability of the applicant as provided by Section 361.752.

(g) The commission may condition the issuance of the certificate on the placement of restrictions on the use of the property that are reasonably necessary to protect the public health, including:

(1) institutional controls such as deed restrictions or municipal zoning restrictions; or

(2) at the owner's or operator's option, other control measures.

Sec. 361.754. RIGHTS OF INNOCENT OWNER OR OPERATOR REGARDING CONTAMINATION FROM SOURCE NOT LOCATED ON OR AT PROPERTY. This subchapter does not limit the right of an innocent owner or operator to pursue any remedy available at law or in equity for conditions attributable to the release or migration of contaminants from a source or sources that are not located on or at the property.

SECTION 16. Subchapter C, Chapter 2155, Government Code, is amended by adding Section 2155.145 to read as follows:

Sec. 2155.145. CERTAIN PURCHASES BY TEXAS NATURAL RESOURCE CONSERVATION COMMISSION. The Texas Natural Resource Conservation Commission is delegated all purchasing functions relating to the administration of Subchapters F and I, Chapter 361, Health and Safety Code, subject to the rules adopted by the commission under Section 2155.132(c).

SECTION 17. Section 2166.003(a), Government Code, is amended to read as follows:

(a) Unless otherwise provided, this chapter does not apply to:

(1) a project constructed by and for the Texas Department of Transportation;

(2) a project constructed by and for a state institution of higher education;

(3) a pen, shed, or ancillary building constructed by and for the Department of Agriculture for the processing of livestock before export;

(4) a project constructed by the Parks and Wildlife Department;

(5) a repair or rehabilitation project, except a major renovation, of buildings and grounds on the commission inventory;

(6) a repair and rehabilitation project of another

using agency, if all labor for the project is provided by the regular maintenance force of the using agency under specific legislative authorization and the project does not require the advance preparation of working plans or drawings; [~~or~~]

(7) a repair and rehabilitation project involving the use of contract labor, if the project has been excluded from this chapter by commission rule and does not require the advance preparation of working plans or drawings; or

(8) an action taken by the Texas Natural Resource Conservation Commission under Subchapter F or I, Chapter 361, Health and Safety Code.

SECTION 18. Subchapter A, Chapter 2253, Government Code, is amended by adding Section 2253.002 to read as follows:

Sec. 2253.002. EXEMPTION. This chapter does not apply to a public work contract entered into by a state agency relating to an action taken under Subchapter F or I, Chapter 361, Health and Safety Code, or Subchapter I, Chapter 26, Water Code.

SECTION 19. Section 26.265, Water Code, is amended by adding Subsections (h)-(j) to read as follows:

(h) Notwithstanding Subsection (g), a responsible person who enters into a settlement agreement with the state that resolves all liability of the person to the state for a site subject to Subchapter F, Chapter 361, Health and Safety Code, is released from liability to a person described by Section 361.344(a), Health and Safety Code, for contribution or indemnity under this code regarding a matter addressed in the settlement agreement.

(i) A settlement agreement does not discharge the liability of a nonsettling person to the state unless the agreement provides otherwise.

(j) Notwithstanding Subsection (i), a settlement agreement reduces the potential liability to the state of the nonsettling persons by the amount of the settlement.

SECTION 20. This Act takes effect September 1, 1997.

SECTION 21. 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.

_____ President of the Senate

_____ Speaker of the House

I certify that H.B. No. 2776 was passed by the House on May 8, 1997, by a non-record vote; and that the House concurred in Senate amendments to H.B. No. 2776 on May 22, 1997, by a non-record vote.

_____ Chief Clerk of the House

I certify that H.B. No. 2776 was passed by the Senate, with amendments, on May 20, 1997, by a viva-voce vote.

_____ Secretary of the Senate

APPROVED: _____ Date

_____ Governor

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DEBRA L. BAKER
PARTNER
225-7369

DEBRA L. BAKER

BIOGRAPHY

Ms. Baker is a partner with the law firm of Mayor, Day, Caldwell & Keeton, L.L.P. in Houston, Texas, where she is head of the Firm's Houston Office Regulatory Environmental Practice Group. She obtained her law degree from the Georgetown University Law Center in 1984 where she received the Magoichi Kato Scholarship Award for Academic Excellence for Japanese American students and obtained a Bachelor of Science degree, Summa Cum Laude, from the University of Maryland in 1981. Ms. Baker is an author and editor of the First and Second Editions of the Texas Environmental Law Handbook, published in January 1989 and October 1990 and is a co-author of two other environmental treatises. She has worked, published and spoken on a wide variety of environmental regulatory issues, involving, among others, air, water, solid and hazardous wastes, permitting, enforcement, and Superfund matters. She has authored and published more than 40 articles on various environmental topics, and has testified as an expert on environmental law issues. In addition to her regulatory environmental experience, Ms. Baker has had significant environmental litigation experience in probate, bankruptcy and criminal court, as well as state and federal court, in connection with a variety of environmental matters. As a result of her environmental work in the real estate transactional field, Ms. Baker was appointed Chair of the American Bar Association's Environmental Law Group of the ABA Section of Real Property, Probate and Trust Law, and had supervisory responsibility for 10 environmental committees for that ABA Section, until the recent expiration of her 3-year appointment. Ms. Baker is also co-founder and past Chair of the Houston Bar Association's Environmental Law Section, serves as an adjunct Professor of Environmental Law at the University of Houston Law Center and the South Texas College of Law. She is admitted to practice both in Texas and the District of Columbia.

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MARLA R. THOMPSON

Marla Thompson graduated summa cum laude from Texas A&M University with a Bachelor of Science degree in 1992. She received her law degree from the Columbia University School of Law in 1995, with honors as a Harlan Fiske Stone scholar. While at Columbia, Ms. Thompson was a member of the Columbia Journal of Environmental Law. She joined the firm in October, 1995 and practices in the Environmental Regulatory Practice Group. Ms. Thompson has worked extensively with issues associated with the transfer of contaminated properties, including facilitating such transactions by virtue of their inclusion in the Texas Voluntary Cleanup Program.

Ninth Annual Texas
Environmental Superconference

TNRCC Policy



TNRCC DECISION MAKING - An Inside Look

"The Loneliest Job in the World"

GEOFFREY CONNOR

THE PERMITTING PROCESS: DECISION--MAKING ROLES

Presented by

GEOFFREY S. CONNOR, GENERAL COUNSEL

Texas Natural Resource Conservation Commission (TNRCC)

to

Ninth Annual Texas Environmental Superconference

August 1997

I. Introduction

A. Roughly 10,000 permits were issued from last year to date, that's a cumulative figure which includes new, renewed and modified air, water and waste permits. This number is not all inclusive of the types of permits issued by TNRCC's three major offices: Waste Management, Water Resource Management and Air Quality.

B. Many permit applications will be contested and brought before the Commission.

1) The purpose of this presentation is to offer insight into the decision-making process for permitting and how that influences the Commissioners' decisions in contested cases. Keep in mind ... the TNRCC is, next to the federal EPA, the second largest environmental protection agency in the country.

2) A second objective is to share some observations about ineffective case presentations made before the Commission and conclude with some insights about successful presentations.

II. Staff have key decision-making role in permitting process.

A. Front line staff begin the permitting process.

1) Permit writers in the Water Resource Office,

2) Engineers/ technical permit writers in the Office of Air Quality, and

3) Permit Coordinators in the Office of Waste Management are the front line staff who write the initial draft permits which:

a) consider applicant requests, and
b) must meet federal/state standards, rules and regulations.

B. Team Leaders, Supervisors and Peer Review Committees have broader decision-making roles. They
1) evaluate the draft permit for technical and administrative completeness-e.g. check paperwork, signatures, if permit class requested is appropriate, that standards are applied.
2) create new industry permit classes. e.g. The wastewater division created the Dry Dock (area where ships are repaired) Permit as a result of inadvertent discharges that were polluting the Houston Ship Channel.
3) have discretion to use "best professional judgement," in cases where a permit application makes requests not covered by state or federal standards but has potential to harm public health and environment, e.g. using a chemical not on the list of pollutants or under categorical guidelines.
4) prepare proposal recommendations for Executive Director.

C. Directors, Supervisors negotiate areas of concern to applicants, affected communities and landowners. Examples of appeals that are negotiable are:
1) a city challenging a wastewater permit because it will call for construction of new wastetreatment plant that city has no funds for, supervisor can request alternative approaches in the permit design but that retain state/federal standards.
2) a community's concern that a new manufacturing plant will increase traffic and endanger school children. The Office of Air Quality will suggest ways to address concerns before approving the permit. Air Quality Office uses a proactive approach to satisfy needs of all partiesand avoid hearing requests.
3) an applicant who disagrees with the permit writer's decision of the ratio of chemical concentrations released or discharged into a stream. Applicant may suggest a

different ratio that meets state/federal standards for water quality.

4) interpretation of administrative rules.
5) hazardous waste permits for corrective actions, e.g. company has 10 well tanks, one shows contamination; TNRCC open to having the one well sampled, not all ten. Permits for operational units allow for little flexibility/negotiation due to very prescriptive federal/state standards.

D. Division Directors decision-making roles in permit process varies by Office.
   1) In the Office of Water Resource Management, Division Director Tom Weber approves wastewater permits which are forwarded to Chief Clerk for public notice; if no hearings requested, permit forwarded to Executive Director for signature.
   2) In Office of Air Quality, New Source Review Director Victoria Hsu has signature authority.
   3) In Office of Waste Management, permit forwarded to Chief Clerk who mails permits requiring public notice to applicant who must publish notice; if no hearings requested, Chief Clerk forwards permit to Executive Director for signature.

E. Executive Director and Deputy Directors retain authority for review and signature but in general, are not active participants in permitting process given that:
   1) permit design is largely prescribed by state and federal rules, regulations and standards;
   2) staff have academic and technical expertise as well as understanding of federal/state rules and standards to make decisions.

III. Commissioners, Executive Director and the Public all have legal counsel whose roles differ.

A. General Counsel makes procedural and substantive decisions with authority to:
   1) waive, change filing deadlines;
   2) give Commissioners legal advice and opinion for their vote;
   3) issue continuances on request of party or on his own motion;
   4) set time for oral presentations;
   5) extend time limits for filing motions;
   6) unlike Exec. Dir. legal staff and the Public Interest Counsel, communication between the General Counsel and Commissioners are not *ex parte*;
   7) review case filings and those of the applicant, protestant(s) and any amicus parties and provide an analysis and recommendation to the Commissioners.

B. Executive Director's Legal staff's role is to represent Executive Director's position and
   1) verify permit is legally sufficient under state and federal laws;
   2) advise Commission of what issues in a contested case are within jurisdiction of Commission.

C. Public Interest Counsel, a "unique office," represents the public interest. His role is to:
   1) be a statutory party to all proceedings;
   2) ascertain permits protect the environment, public health and public safety;
   3) guide and educate protestants and applicants on hearing process;
   4) offer Commissioners new and broad perspectives and interpretations on how to meet rules and laws.

IV. Some Observations of Ineffective Approaches to Contested Case Presentations.

A. The presumption that emotional arguments outweigh the record or technical facts.
B. Issues raised and relief sought are outside the TNRCC's jurisdiction.
C. The presumption by applicants that the Executive Director and legal staff will make their case for them.
D. Absence of representatives or affected parties undermines the credibility of the protestants' or applicants' case.
E. Spurious allegations and personal attacks cloud relevant issues.
F. Undisclosed agendas undermine the hearing process and create unnecessary delays and drain on staff resources.
G. Protestant's goal is unclear.

V. Some Insights into Successful Contested Case Presentations.

A. Relevant issues are raised.
B. Applicant demonstrates clear understanding of the permit and the adverse impact, if any, it will have on a community.
C. Filing deadlines are met with appropriate documentation.
D. Facts, references, and legal interpretations are offered to Commissioners.
E. Applicant/Protestant are aware of permit issues raised by staff.
F. Applicant/Protestant has taken advantage of attending worksessions to get into mindset of staff and Commissioners.
G. Applicant/Protestant is familiar with each Commissioners' professional background and expertise.
H. Applicant/Protestant understands TNRCC's role and the legal and technical issues it must address.
I. Applicant/Protestant are familiar with changes in federal/state law.
J. Applicants/Protestants get to their point.

Conclusion

The permitting process is well-designed to meet the needs of its customers. Staff not only design the permits but have the latititude and discretion to address the concerns of protestants and applicants. When differences cannot be resolved and a contested case comes before the Commission, their decision will largely depend on the opinions of the General Counsel, Executive Director's Legal Staff, the Public Interest Counsel as well as the protestants' and applicants' ability to make an effective presentation.

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.

He previously served during the administration of Governor William P. Clements, Jr. from 1988 to 1991. He served as Assistant General Counsel and later Deputy General Counsel to the Governor.

Connor is a graduate of Southwest Texas State University (B.A. 1985) and The University of Texas Law School (J.D. 1988). He is Board Certified in Administrative Law (Texas Board of Legal Specialization) and is active in a variety of professional and community activities including the American Bar Association, American Agricultural Law Association, State Bar's Standing Committee on Agricultural Law, Christian Legal Society, the Travis County Bar Association, the Austin Council on Foreign Affairs, St. David's Episcopal Church, and Helping Our Brothers Out, Inc.

Ninth Annual Texas Environmental Superconference

Emerging Technologies



GROUNDWATER REMEDIATION

"Lifts and Separates"

JOHN LOPER

ROUX

EMERGING GROUNDWATER REMEDIATION TECHNOLOGIES

NINTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

JULY 31, 1997

REMEDIATION TECHNOLOGIES

ROUX

- Source Elimination
- Risk Characterization
- Natural Attenuation
- Containment/Control
- Removal
- Treatment

GROUNDWATER REMEDIATION TRENDS

ROUX

- Increasing Acceptance Of Risk-Based Cleanup Standards
- Focus On Control At Property Boundary Or Receptor Point At Risk
- Improved Technical Understanding Of Natural Attenuation Mechanisms
- Emphasis On Low-Tech, Passive Treatment Methods

"LIFTS AND SEPARATES" BEING REPLACED BY "PART OF EVERYDAY LIFE"

EMERGING TECHNOLOGIES

ROUX

- Control
- Removal
  - Physical
  - Chemical
- Treatment
  - Chemical
  - Biological
  - Combined Unit Processes

EMERGING CONTROL TECHNOLOGIES

ROUX

- Formation Fracturing
- Gates and Funnels
- Treatment Walls

EMERGING REMOVAL TECHNOLOGIES

ROUX

- Physical
  - Air Sparging
  - Thermal
  - Ultrasound
- Chemical
  - Surfactant Flushing
  - Extraction

EMERGING TREATMENT TECHNOLOGIES

ROUX

- **Chemical**
  - Oxidation
  - Reduction
- **Biological**
  - Enhancements of Natural Systems
  - Designer Bacteria and Enzymes
  - Combined Aerobic/Anaerobic Systems
- **Combined Unit Processes**
  - Constructed Wetlands

ROUX

MAKING YOUR WORLD A LITTLE EASIER

TEXAS ENVIRONMENTAL SUPERCONFERENCE

ROUX

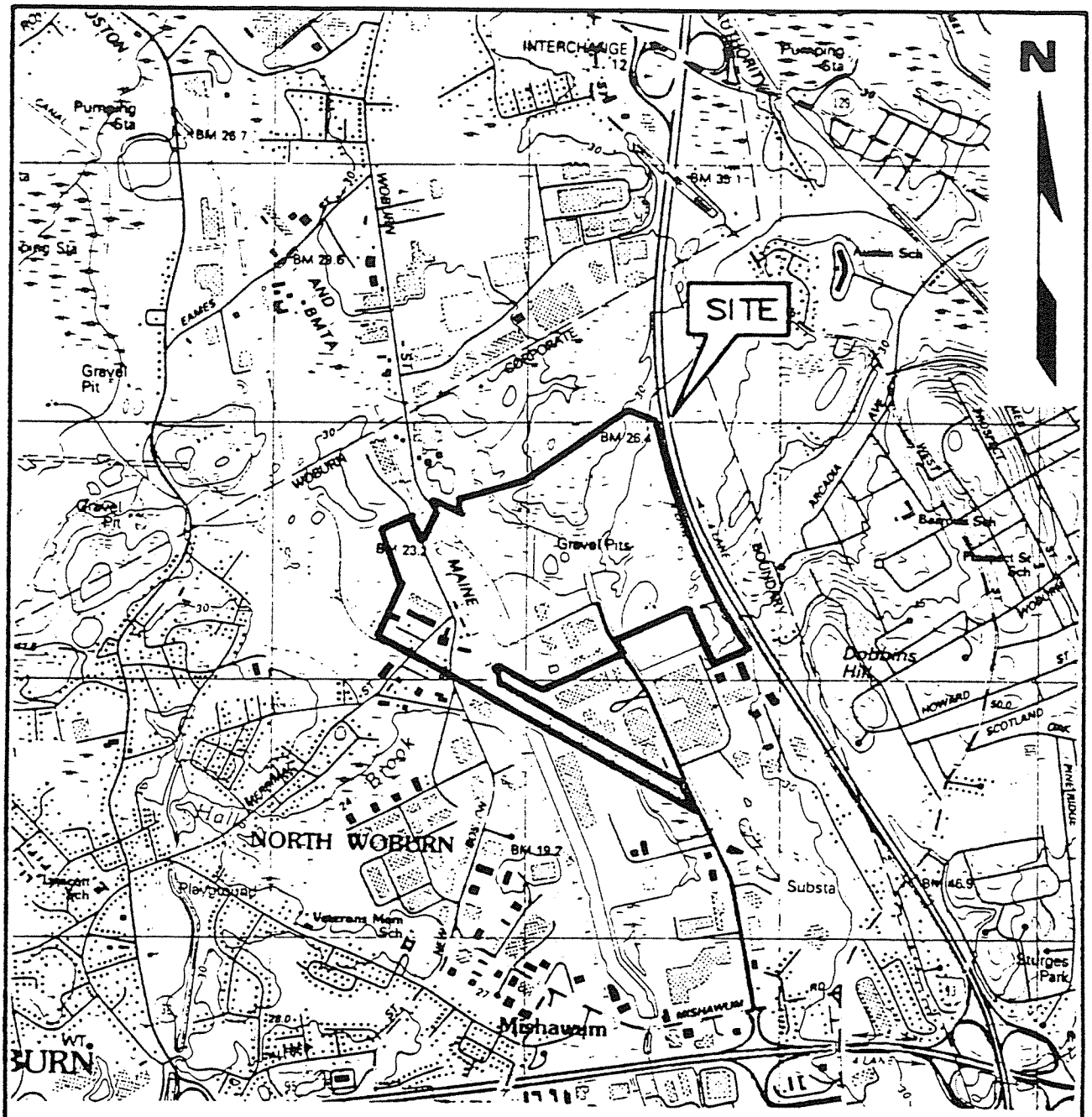
CASE HISTORY OF EVOLVING REMEDIATION TECHNOLOGIES AT A SUPERFUND SITE IN WOBURN, MA

TEXAS ENVIRONMENTAL SUPERCONFERENCE

SITE DESCRIPTION

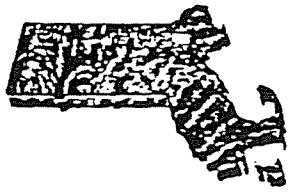
ROUX

- 300 Acre Site Impacted by Past Chemical Manufacturing and Animal Hide Landfilling Activities
- Ground-Water Impacted by Arsenic and Benzene
- 50 ft Saturated Thickness in Overburden System Overlying Bedrock
- Heterogeneous Sand, Silt and Clay



2,000' 0' 2,000'

APPROXIMATE



SOURCE: U.S.G.S. READING, MASSACHUSETTS, QUADRANGLE 1987 7.5 MINUTE SERIES (TOPOGRAPHIC)

Title:

SITE LOCATION MAP

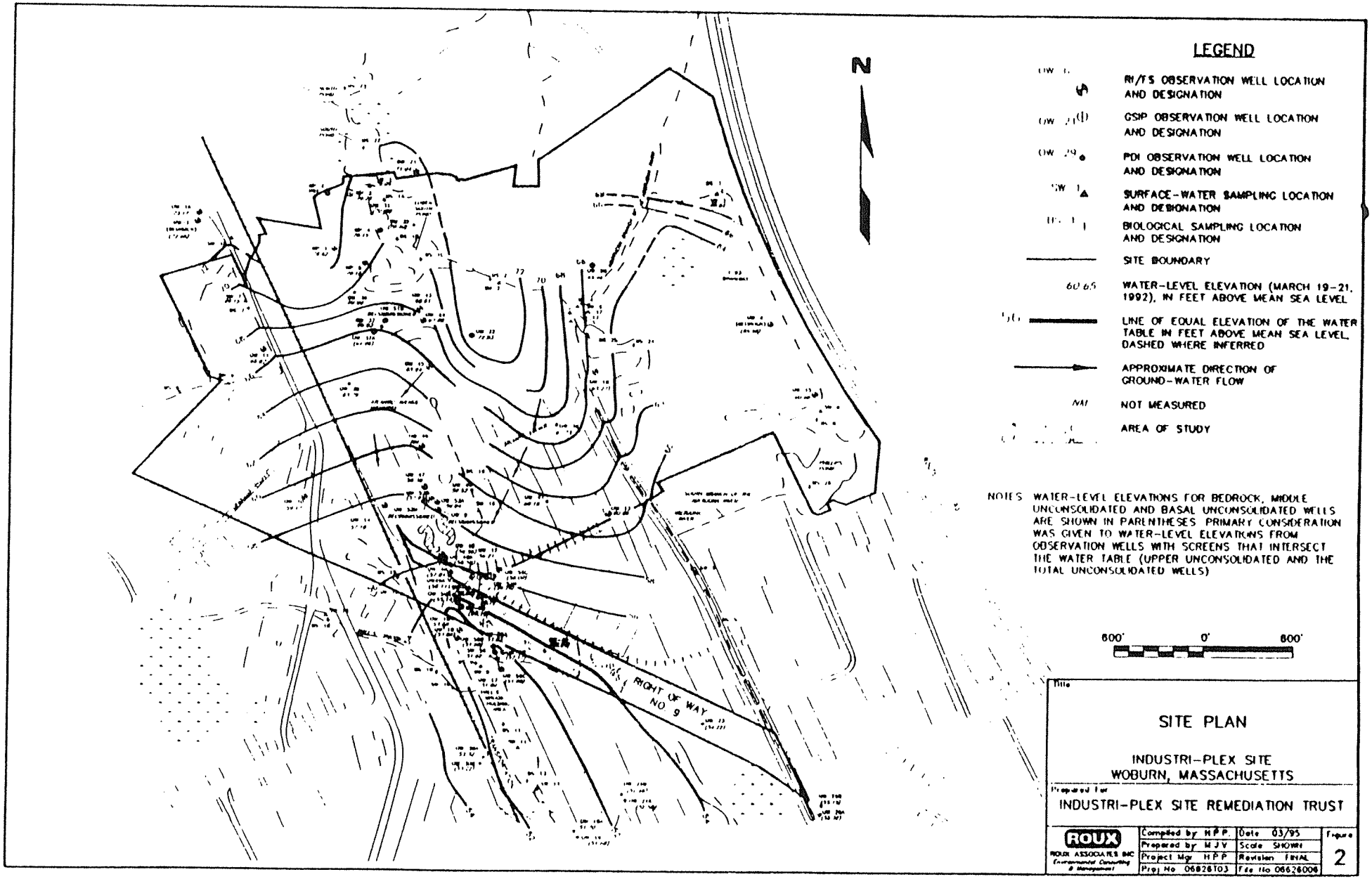
INDUSTRI-PLEX SITE
WOBURN, MASSACHUSETTS

Prepared For:

INDUSTRI-PLEX SITE REMEDIATION TRUST

ROUX ASSOCIATES INC
Environmental Consulting & Management

Compiled by: P.J.H.	Date: 03/95	Figure
Prepared by: M.J.V.	Scale: SHOWN	1
Project Mgr: H.P.P.	Revision: FINAL	
Proj No: 06626T03	File No:	


N
LEGEND
RI/FS OBSERVATION WELL LOCATION AND DESIGNATION
GSIP OBSERVATION WELL LOCATION AND DESIGNATION
PDI OBSERVATION WELL LOCATION AND DESIGNATION
SURFACE-WATER SAMPLING LOCATION AND DESIGNATION
BIOLOGICAL SAMPLING LOCATION AND DESIGNATION
SITE BOUNDARY
60.65 WATER-LEVEL ELEVATION (MARCH 19-21, 1992), IN FEET ABOVE MEAN SEA LEVEL
LINE OF EQUAL ELEVATION OF THE WATER TABLE IN FEET ABOVE MEAN SEA LEVEL, DASHED WHERE INFERRED
APPROXIMATE DIRECTION OF GROUND-WATER FLOW
NM NOT MEASURED
AREA OF STUDY
NOTES WATER-LEVEL ELEVATIONS FOR BEDROCK, MIDDLE UNCONSOLIDATED AND BASAL UNCONSOLIDATED WELLS ARE SHOWN IN PARENTHESES. PRIMARY CONSIDERATION WAS GIVEN TO WATER-LEVEL ELEVATIONS FROM OBSERVATION WELLS WITH SCREENS THAT INTERSECT THE WATER TABLE (UPPER UNCONSOLIDATED AND THE TOTAL UNCONSOLIDATED WELLS)
600' 0' 600'
RIGHT OF WAY NO 9
Title
SITE PLAN
INDUSTRI-PLEX SITE
WOBURN, MASSACHUSETTS
Prepared for
INDUSTRI-PLEX SITE REMEDIATION TRUST
ROUX
ROUX ASSOCIATES, INC
Environmental Consulting & Management
Compiled by H.P.P.
Prepared by M.J.V.
Project Mgr. H.P.P.
Proj. No. 06826T03
Date 03/95
Scale SHOWN
Revision FINAL
File No. 06826006
Figure
2

REMEDIAL OBJECTIVE

ROUX

- Cap and Close Hide Landfills
- 80 % Reduction in Benzene in Ground Water
- No Arsenic Impact at Surface Water Discharge Boundary

REMEDIAL ALTERNATIVES

ROUX

- Ground-Water Pump and Treat System Could Not Meet Surface-Water Discharge Standards
- Conventional Air Sparging/Soil Vapor Extraction System Resulted in Uncontrolled Gas Migration
- Additional Pilot Studies Performed to Evaluate Design Enhancements

SITE LIMITING FACTORS

ROUX

- Low Permeability Zones Restrict Vertical Air Flow
- Bedrock Fractures Provide Preferential Flow Paths for Air Injected at Depth
- Air Movement in Overburden System at Rates Required to Physically Strip and Recover Benzene Cannot Be Reliably Predicted or Controlled

SPARGING DESIGN ALTERNATIVES

ROUX

- Modify Site to Create Uniform Permeable Zone and Facilitate High, controlled Air-Flow Rates
- Focus on Biological and Chemical Oxidation Unit Processes

DESIGN OPTIMIZATION

ROUX

USE OF OXYGEN AS SPARGE MEDIUM TO ELIMINATE AIR CONTROL PROBLEMS AND INCREASE TRANSFORMATION RATES

- **Stimulates Naturally Occurring, Aerobic Biological Processes to Degrade Benzene**
- **Increases Eh to Provide Oxidation and Co-Precipitation of Iron and Arsenic**
- **Prevents Air Control Problems**

PILOT TEST RESULTS

ROUX

- In Situ Oxygen Injection at 0.1 scfm on 20 ft Centers Sufficient to Increase D.O. Levels
- No Excess Gas or Flow Control Problems
- Field Demonstration of As/Fe Removal
- Lab Demonstration of Benzene Degradation
- Field Data Confirmed General COD Reduction; However, Test Duration Was Insufficient to Confirm Benzene Degradation

FULL-SCALE OPERATION

ROUX

- System Components Installed
  - Multiple Horizon 1/2 Inch Injection Wells Installed Along Downgradient Perimeter (900 ft)
  - Liquid Oxygen Supply System Installed
  - Conveyance Piping and Controls Installed
- Monitoring/Performance Plan Under Negotiation With USEPA

John R. Loper, P.E.
Vice President
Roux Associates, Inc.
(281)335-4000

John R. Loper, P.E. is a Principal Engineer and Vice President of Roux Associates, Inc., a nationwide environmental consulting and management firm headquartered in New York. Mr. Loper has 22 years experience in the development, design and operation of water treatment technologies and systems. Prior to joining Roux Associates, Inc. in 1986, Mr. Loper served as Business Director of FMC Corporation's Aquifer Remediation Systems, a new business venture established to commercialize proprietary *in situ* biodegradation methods to treat subsurface contamination.

Mr. Loper holds Bachelor of Arts and Science Degrees in Applied Science and Chemical Engineering, repectively, from Lehigh University, where he graduated with High Honors. He subsequently earned his Master of Science Degree in Chemical Engineering from the West Virginia College of Graduate Studies while working full time as a process/environmental engineer for FMC Corporation. Mr. Loper has presented several papers and seminars on innovative subsurface treatment methods and is a seasoned veteran in evaluating and applying such methods. Mr. Loper is a member of a number of professional and honorary organizations including the National Society of Professional Engineers, the American Institute of Chemical Engineers, the National Ground Water Association, the Environmental Law Institute, and the Water Environment Federation. He is a licensed Professional Engineer in nine states, a Texas-licensed Corrective Action Project Manager, and serves as a volunteer in the Texas EnviroMentor Program.

SUPERCRITICAL OXIDATION

"Kills Germs on Contact"

DICK LYON

SUPERCRITICAL WATER OXIDATION TREATMENT

ECO WASTE TECHNOLOGIES

ECO WASTE TECHNOLOGIES

- FORMED IN 1990
- SUBSIDIARY OF RPC, INC.
- UT-AUSTIN R&D SPONSORSHIP
- WORLD'S FIRST COMMERCIAL OPERATING UNIT
- CONTINUING PROCESS DEVELOPMENT
- DEMONSTRATION PLANT UNDER CONSTRUCTION IN EUROPE BY CHEMATUR ENGINEERING, AB (LICENSEE)

SCWO PERFORMANCE

- UP TO 99.9999 % CONVERSION OF CONTAMINANTS
  - ORGANIC CARBON TO CO_2
  - ORGANIC AMINES AND AMMONIA TO N_2 (no NO_X)
  - ORGANIC HALOGENS TO H-X
  - ORGANIC SULFUR TO H_2SO_4 (no SO_X)
- VOLATILE SOLIDS DESTROYED
- HEAVY METALS GENERALLY OXIDIZED TO NON-LEACHABLE ASH
- INERTS SEPARATE AS FINE, NON-LEACHABLE ASH

ADVANTAGES OF SCWO

- COMPLETE DESTRUCTION OF ORGANIC WASTES
- ENERGY RECOVERY (STEAM) POSSIBLE
- SIMPLIFIED PERMITTING STRATEGIES
- ON-SITE TREATMENT
- GOOD PUBLIC ACCEPTABILITY
- COST-COMPETITIVE WITH OTHER THERMAL TREATMENT TECHNOLOGIES
  - INCINERATOR
  - BOILER, INDUSTRIAL FURNACE, KILN

TARGETED WASTES FOR SCWO TREATMENT

- ORGANIC-LADEN WASTEWATERS
  - 3 TO 15% CONCENTRATION
- SLUDGES
  - CHEMICAL PROCESS INDUSTRY
  - PAPERMILL
  - REFINERY
  - MUNICIPAL
- CONCENTRATED ORGANICS, e.g., EXCESS HAZARDOUS MATERIALS (EHM) GENERATED BY MILITARY FACILITIES

CASE STUDY - HUNTSMAN CORPORATION'S AUSTIN LABS

- PETROCHEMICAL PRODUCTION FACILITY
- WASTES GENERATED: 4000 TPY ORGANICS AND WASH WATER
- OFF-SITE DISPOSAL EMPLOYED INCINERATION $0.80 - $1.00/gallon

GOALS OF ALTERNATE TREATMENT

- REDUCE COST
- ELIMINATE WASTE TRANSPORTATION
- IMPROVE RELATIONSHIP WITH THE PUBLIC AND THE REGULATORY COMMUNITY

WASTE CONSTITUENTS AND STREAMS

WASTE CONSTITUENTS:

METHANOL, POLYOLS, AMINES, OXYGENATES, AMMONIA AND WATER

WASTE STREAMS

STREAM	ORGANICS (wt. %)	ORGANICS (TPY)	STREAM (TPY)
PROCESS WASH WATER	1-4	70	2750
ORGANICS	70	840	1200
TOTAL	22-24	910	3950

REQUIRED PERFORMANCE SPECIFICATIONS FOR SCWO UNIT

- TOC (mg/L) - MONTHLY (<100), DAILY (<150)
- AMMONIA (mg/L) - MONTHLY (<20), DAILY (<30)
- AIR EMISSIONS - MUST BE LESS THAN 5 TONS PER YEAR (Steady State)
  - Ammonia
  - Carbon Monoxide
  - Oxides of Nitrogen (NO_x)
  - Ozone
  - Particulates (PM 10)
  - Sulfur Dioxide (SO_2)
  - Total Hydrocarbons (THC)

SCWO, The Best Answer

- ON-SITE TREATMENT
- EASY TO PERMIT
- COMPLETE DESTRUCTION OF ORGANICS WITH ACCEPTABLE FINAL PRODUCTS
- VERY COMPETITIVE UNIT COSTS
- GOOD PUBLIC ACCEPTABILITY

HUNTSMAN PERMITTING STRATEGY

- LIQUID EFFLUENT
  - PERMIT AS WASTEWATER PRETREATMENT
  - DISCHARGE TO AUSTIN POTW

    OR
  - RECOVERY AND REUSE
- OFF-GAS
  - VERY LOW VOC, NO_X, SO_X AND CO
  - QUALIFIED FOR TNRCC STANDARD EXEMPTION

TYPICAL PERFORMANCE AT HUNTSMAN - LIQUID EFFLUENT

	ORGANIC FEED	EFFLUENT
ORGANICS	10 wt.% 50,000 ppm TOC	< 0.005 wt.% 1-25 ppm TOC
NITROGEN COMPOUNDS	ORGANIC AMINES AND AMMONIA	BELOW DETECTION LIMITS

PROOF PERFORMANCE AT HUNTSMAN-OFF GAS

CONSTITUENT	VALUE
NO_2 (ppmvd)	0.8
CO (ppmvd)	65
O2 (%)	8.75
THC (ppmvd)	237
SO_2 (ppmvd)	0.1
NH_3 (ppmvd)	8.9
O_3 (ppmvd)	0.48
MOISTURE %	11.28

Source: Huntsman Proof Runs

HUNTSMAN'S RECOGNITION FOR USING SCWO

- RECEIVED 1996 TEXAS GOVERNOR'S AWARD FOR ENVIRONMENTAL EXCELLENCE IN THE CATEGORY OF INNOVATIVE TECHNOLOGIES
- CAN REDUCE REPORTED TOXIC RELEASE INVENTORY (TRI) BY 93%
- MET GOALS OF CLEAN INDUSTRIES 2000 PROGRAM

TYPICAL APPROACH TO ASSESS SCWO FOR AN APPLICATION

- PAPER STUDY
- TREATABILITY STUDY
- FINAL ECONOMIC PROPOSAL
  - TURNKEY
  - BUILD/OPERATE (TOLLING)
  - ASSURANCE OF PERFORMANCE

OPERATION OF THE FIRST SUPERCRITICAL WATER OXIDATION INDUSTRIAL WASTE FACILITY

R. N. McBrayer, Eco Waste Technologies, Inc., Austin, TX
J. W. Griffith, Eco Waste Technologies, Inc., Austin, TX

IWC-95-52

KEYWORDS: Supercritical, water, oxidation, hazardous waste

SUMMARY: The first commercial supercritical water oxidation (SCWO) waste processing facility was commissioned in May 1994. The unit is located in Austin, TX and is owned by Huntsman Corporation (formerly Texaco Chemical Company). Eco Waste Technologies designed and constructed the Huntsman SCWO facility and, in addition, performed the initial plant commissioning, start up, and verification runs on the completed unit. The effluent quality surpassed all design specifications. The performance of this first commercial SCWO hazardous waste treatment plant demonstrates the large scale commercial viability of the process.

BASIC PRINCIPLES OF SUPERCRITICAL WATER OXIDATION (SCWO)

Supercritical water oxidation, sometimes known as hydrothermal processing, uses the high temperatures associated with supercritical water to accelerate the oxidation of organic wastes. As water is heated beyond its critical temperature (374°C) and critical pressure (about 22.1 MPa), the density of the water drops dramatically. Typical operating densities are 0.15 - 0.2 grams/cm^3. In addition, the dielectric constant decreases substantially.

With these changes in the physical properties of water, organics become highly soluble while ionic substances become nearly insoluble. The organic material is dissolved in an oxygen rich environment where oxidation occurs rapidly due to the high temperatures of the process.

OBJECTIVES OF THE HUNTSMAN PROJECT

The Huntsman Corporation's Austin Research Laboratories (formerly belonging to Texaco Chemical Company) are located in a mixed residential/commercial area in Austin, Texas. This laboratory consists of a number of process demonstration areas as well as some commercial production lines. A portion of the waste generated on-site is a combination of process and wash-down waters. Previously, this waste was transported to Conroe, TX, about 200 miles away, for incineration at a captive Huntsman incinerator. Huntsman officials determined that SCWO would allow them to destroy the waste on-site at a lower cost and with fewer liabilities.

DESCRIPTION OF WASTE STREAM

The waste originates from three primary streams of long-chain alcohols, glycols, and amines. Approximately 70% of the waste is process wash water containing 1 to 4 wt. % organics while another 27% contains highly concentrated organics at levels of 70% or more by weight. The remaining waste consists of a variable amount of organics that may contain amines. The mixture typically has a total organic carbon (TOC) concentration greater than 50,000 mg/L. Amine bearing compounds may represent up to 5 wt. % of the total waste stream. The waste stream flow rate after blending is 5 gpm of 10 wt. % organics.

This waste was previously stored in two 130,000 liter tanks and subsequently transported by truck to an incinerator. Under the SCWO project, these tanks are used for blending operations which maintain a consistent feed concentration. The blend tanks are alternated on a weekly basis.

REQUIRED PERFORMANCE STANDARDS

After witnessing treatability tests on the waste stream at a pilot plant located at the J. J. Pickle Research Campus of The University of Texas at Austin, the City of Austin determined that they would accept the effluent on a pretreatment basis. The effluent would be required to meet the established pretreatment standards of the city as well as those of the Environmental Protection Agency. Additionally, Huntsman desired the best possible effluent

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in the interest of the environment and the public. The resulting required performance standards are outlined in Table 1.

designation, SCWO receives a priority in reviews and permit processing by TNRCC.

Table 1 - Waste Stream and Performance

	PARAMETERS				
	Total Organic Carbon (mg/L)		Ammonia (mg/L)		Air Emissions (Tons/Year)
STREAM	Monthly	Daily	Monthly	Daily	Annually
Influent	50,000	50,000	6,908	6,908	
Effluent	<100	<150	<20	<30	4
Required Conversion Rate (%)	99.8	99.7	99.7	99.6	

OTHER ADVANTAGES

Treatment by SCWO has allowed Huntsman to decrease the quantities of waste reported under the requirements of the Superfund Amendments and Reauthorization Act of 1986 (SARA). This, in turn, has led to better public relations as well as demonstrating a legitimate effort to improve the treatment and management methodologies used for handling the hazardous waste streams.

Through the use of SCWO, Huntsman also limits the liabilities associated with transporting hazardous waste over public highways, mixing it with wastes from another company, or destroying the waste through incineration with the accompanying air emissions, scrubbing waste and potential ash disposal problems. Huntsman is coordinating additional efforts with the Texas Natural Resources Conservation Commission (TNRCC) to evaluate possible reuse of the treated effluent. Possibilities include use for irrigation or cooling tower make-up.

DISCHARGE PERMITTING

Discharge from SCWO can be permitted under a standard NPDES permit for direct discharge of the effluent to a natural water body, dependent upon other environmental regulations for the specific waste. However, as noted previously, Huntsman chose to obtain a pretreatment and discharge permit from the City of Austin. This allowed for direct discharge of the effluent into the City of Austin's publicly owned treatment works (POTW). Design of the unit included effluent holding tanks to enable testing prior to release into the POTW. The TNRCC has agreed with Huntsman's interpretation that treatment by SCWO is governed by EPA's Clean Water Act regulations. Furthermore, TNRCC has selected SCWO as an innovative technology. Under this

DESIGN OF THE SCWO UNIT

Key design elements for a SCWO unit include the following:

1. Pre-feed unit including blending and tankage;
2. Selection of a high pressure pump;
3. Heater selection including sizing, fuel source, and materials of construction;
4. Design of a reactor including consideration of geometry, maximum and minimum flow rates, and material selection to meet pressure and corrosion constraints;
5. Heat exchanger design including the amount of energy to be transferred and the materials of construction;
6. Other elements of the energy removal/handling system to allow for letdown to ambient conditions;
7. Type and phase of oxidant to be used along with the delivery method;
8. Management of the energy throughout the SCWO unit including control of both pressure and temperature;
9. Any required effluent tankage;
10. Emergency shut-down systems;
11. Method of handling off-specification liquids or gases; and
12. Control systems to allow simple, efficient, and consistent operation of the unit.

These elements are all functions of the basic design concept, materials availability and cost, the methodology for handling energy, and the process control philosophy. Figure 1 is a simplified SCWO process and flow diagram.

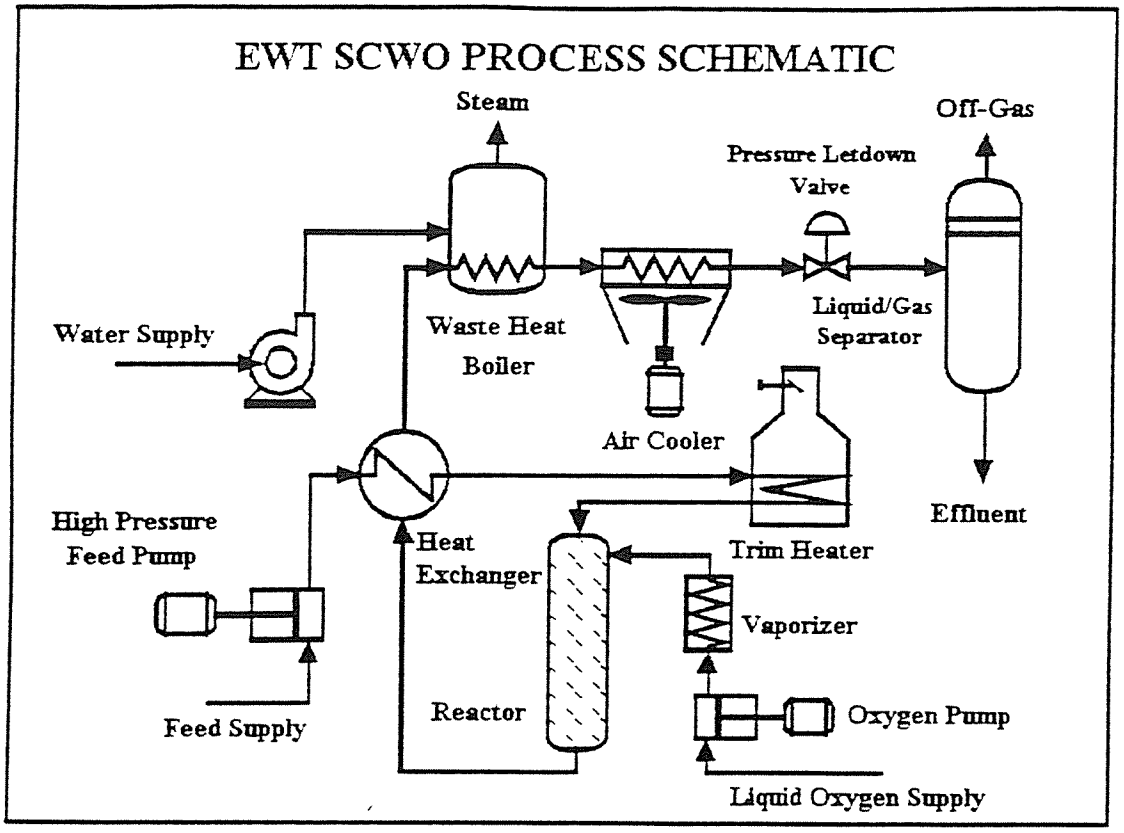

Figure 1 - SCWO Process and Flow Diagram

BASIC SCWO DESIGN CONCEPT

In this design, a positive displacement pump pressurizes the feed to above 24.8 MPa. The feed then passes through the tube side of a double-pipe heat exchanger and into the process heater. When oxygen is added to the heated feed, the temperatures within the reactor rise to 538°C - 650°C. The reactor effluent then flows into the heat exchanger shell, though a heat recovery boiler, and through an effluent cooler. Finally, a control valve lowers the effluent pressure to atmospheric pressure and a liquid/gas separator separates the effluent into liquid and gas phases. The liquid effluent consists of water saturated with CO_2 while the gas phase is composed of 90-95% CO_2 and 5-10% oxygen.

EWT typically examines several design alternatives for each potential waste stream. In the Huntsman design, the most significant issues were materials of construction, the energy balance, process control, and ammonia destruction.

Figure 2 is a picture of the Huntsman unit. The heat exchanger, reactor, and heater all appear in the foreground. The letdown skid is to the far right. The entire unit is located on a 30' by 60' slab.

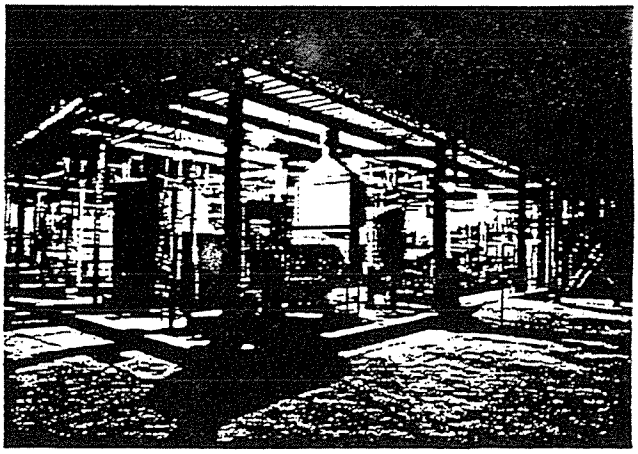

Figure 2 - Photograph of the 5 gpm Huntsman SCWO Unit

Materials of Construction

Certain conditions and types of feed may dramatically affect the corrosion rate in a SCWO reactor. The Huntsman Corporation waste stream was not expected to present special corrosion difficulties. The University of Texas' pilot plant, which was used for demonstration treatment of the waste streams, was constructed entirely of stainless steel (316 or 316L) and showed little

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evidence of corrosion over the test period. However, in order to address potential stress corrosion cracking problems resulting from chlorides in the feed water source, EWT chose a high nickel alloy for the Huntsman reactor system.

During subsequent corrosion testing performed at the pilot plant, EWT unexpectedly discovered that severe and rapid corrosion occurred in some of the nickel alloys initially selected for the Huntsman waste streams. During one 70-hour continuous experiment, C-22 thermocouple sheaths were severely corroded. As a result of these corrosion tests, new materials were selected for the commercial plant and verified by subsequent corrosion testing.

The alloy selected for the Huntsman facility has performed well during actual plant operations. The level of heavy metals in the effluent, typically an indicator of general corrosion, was very low. Initial chromium and nickel concentrations in the effluent were <0.05 mg/L and 0 to 0.23 mg/L, respectively, and are well below discharge limits. Visual inspections of the internal reactor surfaces indicate excellent general corrosion resistance. Metallurgical examinations, which included photomicrographs and sectioning of sample coupons taken from the reactor after several months of operation, demonstrated excellent corrosion resistance to both general and localized corrosion.

Energy Balance

Like any plug flow reactor containing an exothermic reaction, the operation of a SCWO unit depends on a carefully maintained thermal balance. With low external heat input or a low release of energy during reactions due to a low influent organic concentration, the temperature profile can decline rapidly through the SCWO reactor resulting in lower conversion rates. High external heat input or excessively high organic concentrations in the feed may lead to temperatures in excess of temperature design limits.

The system controlling the commercial reactor temperature must be sufficiently flexible to allow for variations in organic loading while preventing temperatures higher than design limits. Plug flow reactors are difficult to heat or cool precisely and are generally unable to accommodate variations in reactor inlet temperature and inlet organic concentration. In SCWO, the inlet feed must be preheated to some minimum temperature to initiate the oxidation reaction. The small temperature range between the required minimum reactor inlet temperature and the maximum design temperature limits the degree to which the process fluid can act as a heat sink and absorb the energy released during the oxidation reaction.

Typically, the organic concentration in the feed for a SCWO unit is limited to about 4 to 5 wt. %. The EWT SCWO process uses a proprietary method to control the reactor exotherm and allow variations in the influent feed organic concentration from less than one weight percent to 20 or greater weight percent.

Process Control

The process control scheme is designed to maintain reactor temperatures near 538°C at a pressure of 24.8 to 27.6 MPa. Excess oxygen measured at the liquid/gas separator is used to control the oxygen injection flow rate. A single stage pressure control valve maintains the system pressure to within about $\pm$ 0.07 MPa. The control system is a key element in the success of the commercial unit and required detailed design in order to provide stable reactor operation within a safe overall operating system. While the internal control scheme might be considered complex for a process unit of this size, the operator interface is straightforward and designed in a manner to shield the operator from the internal complexities of the system control.

An initial assessment of SCWO by a potential user often points to the potential dangers of high pressure/high temperature systems as well as dangers from the use of high pressure oxygen. A complete evaluation shows that these dangers are typically no greater than those normally expected in industrial settings. Oxygen is routinely generated and stored on nuclear submarines under similar pressure and some polyethylene reactor systems operate at similar temperatures and significantly higher pressures. However, to ensure a high level of safety at the SCWO unit, EWT developed an alarm/shutdown system strategy that incorporates both a computer-controlled shutdown set point system and a hard-wired shutdown system. Automatic unit shutdown events include heater shut-off, oxygen shut-off, and unit depressurization. Any of these three actions will stop the reaction and limit any temperature excursions. A number of other control systems are in place including several relief valves located throughout the system. Off-specification liquid effluent at the Huntsman unit is automatically diverted back to the blending tanks for reprocessing. When the control system senses off-specification effluent, the air emissions are also diverted to a flare located at the plant. All liquid effluent is held and sampled prior to release to the City of Austin's POTW.

PERFORMANCE OF THE SCWO UNIT

The Huntsman SCWO unit's effluent has exceeded all performance requirements. A demonstration run conducted in May 1994 was required prior to EWT receiving final payment for the unit. Results from that demonstration run, along with subsequent testing, are included in the following discussion. These results are considered to be conservative since the plant operations have been substantially fine-tuned since that time.

LIQUID EFFLUENT CHARACTERISTICS

Since no significant level of ammonia has been observed and air emissions are far below the allowable under the permit exemption process, primary emphasis on testing for the process is on total organic carbon (TOC). Huntsman periodically tests for heavy metals and other organic constituents in the liquid stream.

In a typical start-up, the unit is heated for approximately 1 1/2 to 2 hours using plant water as a feed supply. Once a reasonable temperature profile is achieved throughout the unit, the waste and oxygen feed are started. The unit has been operating at levels such that Huntsman now considers effluent with a TOC above 50 mg/L to be off-specification. Typically, the effluent TOC drops below 50 mg/L within 30 minutes of the start of oxygen injection. The effluent TOC drops steadily over the next 5 hours and then levels at a TOC of 0 to 10 mg/L. Previous testing indicates that nearly all of the residual TOC is attributable to acetic acid or other simple organic acids that tend to be more difficult to oxidize than the original feed.

Detailed testing of the effluent from the demonstration run in May 1994 yielded the results shown in Table 2.

Table 2 - Selected Results From the May 1994 Demonstration Run

PARAMETER (all values in ppm)	PERMIT OR CONTRACT LIMIT	DETECTION LIMIT	SAMPLE
Alkalinity, Total as $CaCO_3$		10	11,400
Bicarbonate, Total (HCO_3)		10	13,900
Carbonate, Total (CO_3)		1	20
Chemical Oxygen Demand (COD)	267	2	16
Ammonia (NH_3)	20	0.01	2.7
Ammonia - N		0.01	2.3
Nitrate (NO_3)		0.5	6.4
Nitrate - N		0.1	1.5
pH	6-9	0	7.5
Total Dissolved Solids		1	130

The bicarbonate levels were not surprising when one considers that these samples were not allowed to degas prior to testing. The effluent is saturated with CO_2 due to the oxidation of the organic material. A sufficient aeration time would allow the carbonates to reach equilibrium conditions. This would result in a lower concentration of bicarbonates due to the evolution of CO_2 from the effluent.

The unit is now operating at higher efficiencies but even in this earlier testing the COD was only 16 mg/L. Assuming that the COD is associated with acetic acid results in a TOC of 6 mg/L. This is well below the initial target of 100 mg/L expected on a monthly average. Later TOC testing done in-house, in support of the process operations, indicates that TOC's are commonly below 6 mg/L after the unit has been in operation for several hours. Ammonia concentrations for this run were found to be 2.7 mg/L. This is well below the acceptable 20 mg/L monthly average. Later tests for ammonia have found it to be consistently below 1 mg/L in the effluent. Nitrogen as nitrate was within generally acceptable levels at 6.4 mg/L.

These results indicate conversions of 99.988% and 99.929% for TOC and organic nitrogen, respectively. Earlier runs on the pilot plant had produced approximately 99.6% carbon conversion and only about 70% conversion of the nitrogen.

Total dissolved solids are a reasonable indicator of the inorganic concentration in the effluent. SCWO normally oxidizes inorganic matter to its highest oxidation state but this material will remain in the effluent. The dissolved solids in the Huntsman effluent consist primarily of sulfate, chloride, potassium, and sodium salts.

AIR EMISSIONS

Huntsman Corporation had an extensive study of exhaust emissions from the demonstration run performed by an outside contractor. Results of this study are shown in Table 3.

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Table 3 - Exhaust Emissions From 48 Hour Run

PARAMETER	TEST R-1	TEST R-2	TEST R-3
Nox (ppmvd)	0.8	0.1	0
CO (ppmvd)	65	52.5	61
O_2 (%)	8.75	11	9.38
CO_2 (%)	25.0	25	25
THC (ppmvd as Methane)	237	168	205
SO_2 (ppmvd)	0.1	0.1	0.15
NH_3 (ppmvd)	8.9	8	5.7
O_3 (ppmvd)	0.48	0.76	0.33
Moisture (%)	11.28	10.92	7.34

Three components were present in sufficient concentration to be measured in percentages: CO_2, O_2, and water. Excess oxygen ranged from 8.75% to 11.00% while moisture comprised 7.34% to 11.28% of the exhaust emissions. The high scale limit for the CO_2 analyzer was 25%. This was well below the actual CO_2 concentration. By subtraction, the CO_2 concentration ranged from 78% to 83% of the exhaust emissions.

As anticipated, this testing indicates no problems with NO_x or SO_x emissions. Total regulated exhaust emissions were less than 0.288 tons/year, or about 7.2% of the quantity allowed under the State of Texas' air permit exemption requirements.

MECHANICAL PERFORMANCE

There were no major difficulties in the start-up of the unit. Special efforts during this period included fine-tuning of control algorithms, modifications of the oxygen delivery system (which was designed and provided by a supplier), screening of unexpected particles in the plant water, modifications to part of the reactor to prevent partial plugging from scale flaking in the heat exchanger, and selection of different pump seals for the high pressure pumps. Longer term operation revealed the need for high pressure pump modifications to enable extended continuous operation.

The SCWO unit was designed for 24-hour per day, 320 day/year operations. The initial year of operation, of course, contained more startup and shutdown events than would be expected for subsequent plant operations. These first year down time periods were the result of operator training, operator scheduling, and necessary equipment modifications. The down-time anticipated for the future will be primarily for descaling performed approximately every 3 weeks. The descaling process uses a solution of nitric acid to remove carbonate scale accumulated in the heat exchanger.

To date, the operational challenges of the unit have been standard issues not related to unique SCWO conditions or control. The unit's problems have involved mechanical equipment such as pump seals and packing and descaling operations rather than the process and operational problems one might have expected in this first commercial SCWO unit. No problems have been encountered with the system control and reactor operation. After one year of operation by Huntsman, no safety related incidents have occurred with either the SCWO unit or the oxygen supply system.

OTHER APPLICATIONS FOR SCWO

The Huntsman SCWO unit demonstrates the application of this technology to destroy basic C-H-O-N compounds that contain low solids. Similar results would be expected for any other similar waste streams. However, there are many other streams that are quite different from the Huntsman stream. Some of the properties that are particularly relevant include the following:

1. Organic concentration;
2. Total solids, both on a dissolved and suspended basis;
3. Halogen concentration;
4. Concentration of salts (This number would typically be reflected in the total dissolved solids.); and
5. Flow rates.

Each of these properties has a significant impact on the design, cost, and economics of a SCWO unit. The ability of a unit to handle variations in each of these properties also determines the types of waste streams that may be treated by a SCWO unit.

OPERATING ENVELOPE FOR EWT'S SCWO UNITS

EWT's research of SCWO is a continuing effort and includes efforts with The University of Texas at Austin (UT) as well as other companies and federal research facilities. With advances in research, operating envelopes may be expanded.

EWT, in conjunction with The University of Texas, has completed the rebuild of the prior UT pilot plant facility. The new pilot plant was designed for more extensive investigations of corrosion, salt handling, and the destruction of solids. Specifically, the plant is designed to process all types of sludge waste. The previous pilot plant had successfully treated municipal sludge and various industrial sludges with solids concentrations of about 10%. The new pilot plant should be able to treat wastes with up to 20 - 30% solids. The modifications incorporate process improvements made during the

design and construction of the Huntsman unit as well as unique equipment to handle high pressure, high solids slurries. This unit will also be used to validate SCWO methods for processing highly halogenated and salt-containing wastes.

EWT has also considered several design options for larger units. Preliminary designs have been completed for a single treatment train of up to 50 gpm. Higher flow rates can be accommodated by the use of a multiple-train design.

POTENTIAL TARGET WASTE TYPES

The Huntsman unit has provided a working knowledge of day-to-day destruction of C-H-O-N compounds. This category of compounds covers a wide range of waste streams from the chemical industry that may be efficiently destroyed by SCWO. Nitrogen compounds are of particular interest since the nitrogen is often a source of NO_x when burned in incineration or the source of nitrification/denitrification problems when treated biologically.

Tests over the last year demonstrated the ability of the previous SCWO pilot plant to destroy thickened primary and secondary municipal sludges. Further testing successfully destroyed a chemical industry's hazardous biological secondary sludge. Biological wastewater plants are generally relatively efficient in removing BOD and COD but much of the carbon is removed from sludges in a form that still constitutes a disposal problem. SCWO might well be a vehicle for true final disposal of this carbonaceous matter. Figure 3 is a picture of the resulting effluent from the destruction of the municipal sludge fed at 8% solids. The remaining solids at the bottom of the test tube are silt and clay particles.

Figure 4 depicts the original feed and the resulting effluent from a chemical industry secondary sludge. The waste was fed at approximately 5% solids. The residue in the tube bottom is primarily made up of silt, sand, and clay particles along with other inert and inorganic matter.

Other recent testing involved the destruction of an API separator sludge. Oily sludges typically provide a large amount of energy and a mixture of silt and other debris. However, supercritical wet oxidation is an effective tool for destroying these wastes.

One of the greatest assets of SCWO is its ability to handle a wide range of waste mixtures. Waste streams may contain a wide range of different organic material

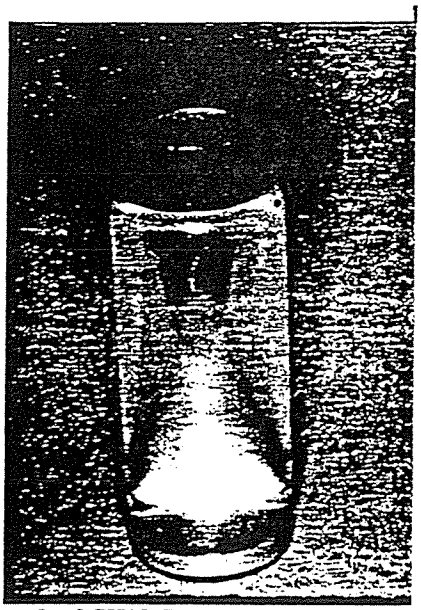

Figure 3 - SCWO Effluent from Undigested Municipal Sludge

and a large amount of inerts and inorganic material. The organics are fully converted with no apparent antagonistic effect from other organic material, the inerts, or inorganic substances. Thus, the ability of SCWO to handle sludges and similar material places it in a relatively unique position.



Figure 4 - Feed and Effluent for Chemical Industry Sludge

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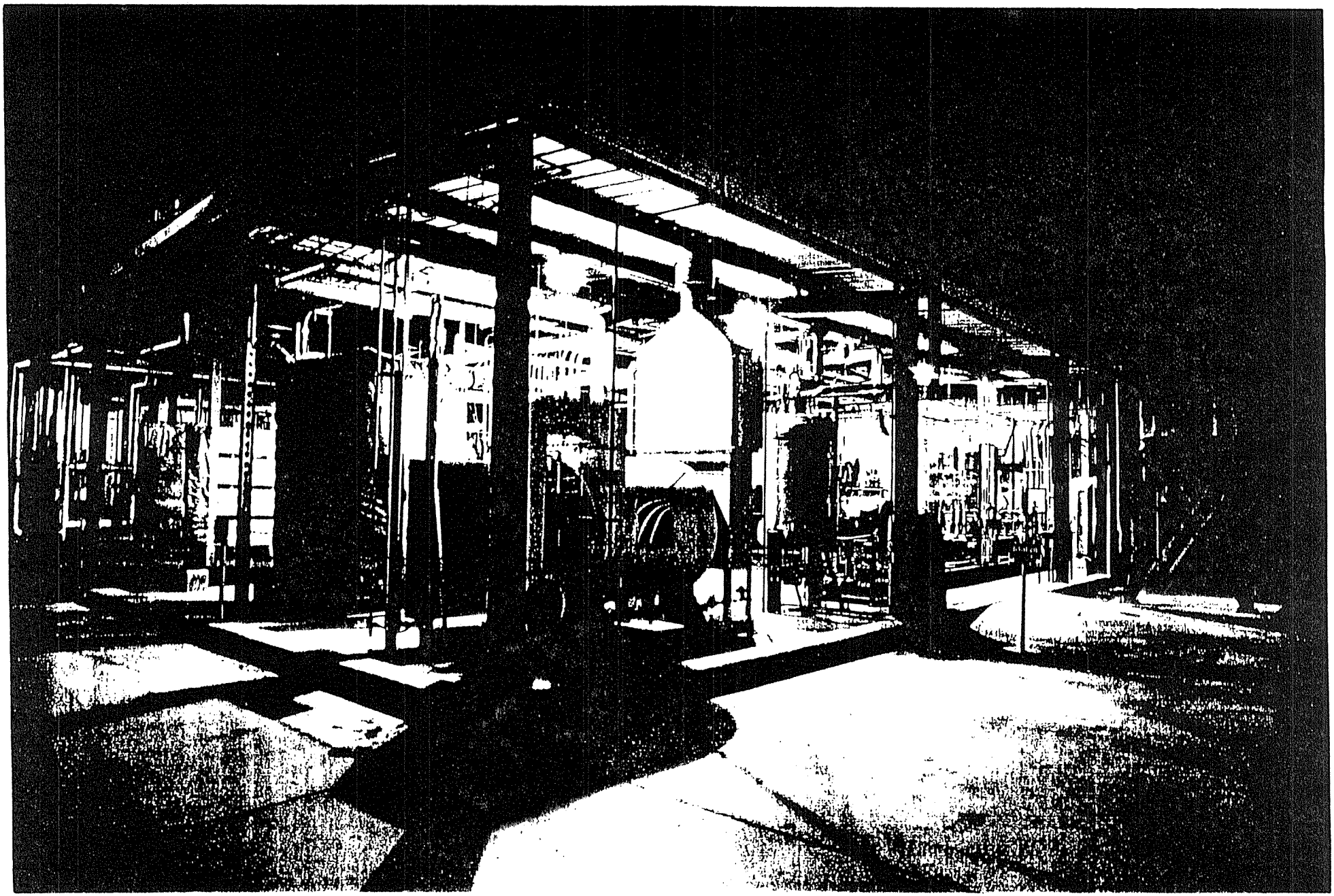

HUNTSMAN FACILITY

AIR EMISSIONS FROM SCWO FACILITIES

Roy McBrayer, P.E., Director of Process Development, Eco Waste Technologies, Inc., Austin, TX
Virginia Morris, Senior Consultant, Arthur D. Little, Inc., Cambridge, MA

Introduction. In the development of supercritical wet oxidation (SCWO), researchers have reported detailed experimental results demonstrating SCWO's ability to produce liquid effluent meeting the most stringent water standards. However, little has been written concerning the gas emissions from the process. Since SCWO can be a direct competitor with incineration, many regulators familiar with incineration permitting are concerned more with off-gas permitting than with the liquid effluent quality. This paper provides a brief description of the potential air emission regulations which may apply to a SCWO facility as well as SCWO air emission results from a pilot facility located at The University of Texas and from the first commercial SCWO facility.

Regulatory Requirements. Regulatory requirements are written for specific technologies and processes. As an emerging technology, there are currently no federal, state or local regulations written that apply to SCWO. However, prior to initiating construction of a commercial or demonstration system, the system must be evaluated for its potential to generate air pollution by the cognizant regulatory agencies. Permits to construct and operate the SCWO system will be required if the system has the potential to generate threshold levels of air pollutants. The threshold level of some air pollutants will vary as a function of the geographic location of the planned site for the SCWO system. The regulatory requirements will not only establish the maximum concentration of air pollutants allowed, but will also establish requirements for monitoring of process parameters and selected pollutants, record keeping and SCWO plant operation.

In order to define the *most probable* air emissions limitations that would be imposed on an SCWO facility, a review of the applicable federal, state and local regulations was conducted. The results of that review are discussed in the following sections.

Federal Regulations. Air pollution is regulated at the federal level under the 1990 Clean Air Act Amendments (CAAA). There are eleven titles under the CAAA. Three of these titles potentially will apply to SCWO waste treatment:

- Title I: Attainment and Maintenance of National Ambient Air Quality Standards (NAAQS)
- Title III: Hazardous Air Pollutants
- Title IV: Acid Deposition Control

Titles I and IV specify regional standards for ambient air quality and provide the framework for regulations for control of criteria pollutants. Criteria pollutants are:

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- Carbon monoxide (CO)
- Oxides of Nitrogen (NO_x)
- Oxides of Sulfur (SO_x)
- Ozone (O_3)
- Lead (Pb)
- Particulate Matter (PM and PM_{10})

Ozone is regulated by control of air emissions from organic compounds that are known to be precursors to photochemical smog. Criteria pollutants are regulated at different levels as a function of geography. The US EPA has characterized regional areas in the US with respect to their overall ambient air quality and their attainment with NAAQS for each criteria pollutant. Regions that are not in attainment with the NAAQS have designations that specify their degree of non-attainment. This classifications are: marginal, moderate, serious, severe and extreme. Stationary sources located in regional areas designated as extreme will be subject to more stringent requirements than those sources located in marginal areas. This variation in the stringency of regulatory requirements for criteria pollutants complicates establishing the regulatory requirements that a SCWO system must meet.

In addition to the criteria pollutants, Title III regulates the generation of hazardous air pollutants (HAPs), those chemical species that are believed to cause cancer or other serious human or environmental health effects. There are 189 chemical species identified under Title III. Species included under Title III are some heavy metals (mercury, hexavalent chromium, nickel, etc.), inorganic materials (asbestos, fine mineral fibers, cyanide compounds, coke oven emissions, etc.) and organic compounds (dioxins, furans, polycyclic organic compounds, etc.). Compounds designated as air toxics apply equally to all geographic locations and are regulated equally for all stationary sources. Because of their potential to cause long-term and acute heath effects, HAPs are regulated much more stringently than criteria pollutants.

The requirements of the CAAA have been translated into specific process and technology requirements in 40 CFR Part 60, "Standards of Performance for New Stationary Sources" and 40 CFR Part 264, "Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities".

State Regulatory Requirements. Each state must develop a plan to achieve attainment with the federal regulations. The state regulations may be more stringent than the federal requirements, but cannot be less stringent. This plan divides the state into air quality regions, based upon the severity of the pollution within a region. Consequently, the regulatory requirements within a state can vary. For instance, in California the South Coast Air Quality Management District (SCAMD) establishes the regulations for the Los Angeles area, which is the only region in the US designated as Extreme with respect to attainment with the NAAQS. These regulations will differ from those in San Diego, whose requirements are established by the San Diego Air Pollution Control District (SDAPCD), which is designated as Serious with respect to NAAQS attainment.

Different states use different procedures to establish air emissions limitations, and subsequent permit restrictions, for new and emerging technologies. Generally, if a similar

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technology exists, the emissions limits used for this technology will serve as a guideline for the emerging technology. The "potential to emit" for specific regulated pollutants will be modeled, using dispersion modeling, and specific analytical measurements will be required during operation of the emerging technology. Modeling techniques are notoriously conservative and usually overestimate the amount of pollutants generated. The use of modeling techniques for emerging technologies can be risky, as the pollutant discharges are unknown and the imposition of stringent requirements based upon the lack of analytical data can add cost (add-on pollution abatement) and system operation constraints. The actual analytical characterization of the air emissions from SCWO operation, although costly, will result in establishing a foundation for reduced permit limitations, thus reducing the constraints on the SCWO operation.

Air Emissions Requirements for SCWO. Because of the state and regional variations in air emissions requirements and the unknowns associated with SCWO air emissions, several assumptions were made to establish the *most probable* air emissions limitations for SCWO operation. These assumptions (Table 1) were developed following discussions with regulatory personnel at the US EPA and in Massachusetts (MADEP), Texas (TNRCC) and California (both SCAQMD and SDAPCD). Massachusetts and Texas were selected because there were existing SCWO pilot plants (both Texas and Massachusetts) and a commercial SCWO facility (Texas) that had undergone regulatory review for permits and operating constraints. California was selected because they have the most stringent air emissions regulations in the US because of the Extreme designation of the SCAQMD region.

Table 1 - Assumptions to Establish Air Emissions Requirements for SCWO

• Of the existing regulations, those for incineration of hazardous and non-hazardous wastes and municipal waste combustors would most likely provide analogous requirements for SCWO. A difference between the two technologies is SCWO is an enclosed system, while incineration is an open system. Therefore, particulates (PM and PM_{10}) were not considered a probable problem.
• The most stringent air emissions regulations would be used as the initial baseline. If the air emissions were characterized and met the most stringent regulations, the variation in state requirements would not be an issue in the design of future SCWO systems.
• Since SCWO is an emerging technology, it will be regulated under the more stringent New Source Performance Standards (40 CFR Part 60).
• Based upon recommendations from the US EPA, pending regulatory requirements were used to establish the air emissions baselines. The federal requirements for waste treatment using incinerators and kilns is currently undergoing revision to impose more stringent air emissions limitations.
• Based upon recommendations from the SDAPCD and SCAQMD, the hazardous air pollutants that were of the greatest concern were dioxins, furans, polychlorinated biphenyls (PCBs), acetaldehyde, formaldehyde and polycyclic aromatic compounds. These compounds are the by-products of incomplete oxidation of organic materials. These compounds were measured using California Air Resources Board methods: (1) Method 428 for polychlorinated dibenzo-p-dioxins (PCDD), polychlorinated dibenzofurans (PCDF) and polychlorinated biphenyls (PCB), (2) Method 429 for polycyclic aromatic hydrocarbons and (3) Method 430 for formaldehyde and acetaldehyde.

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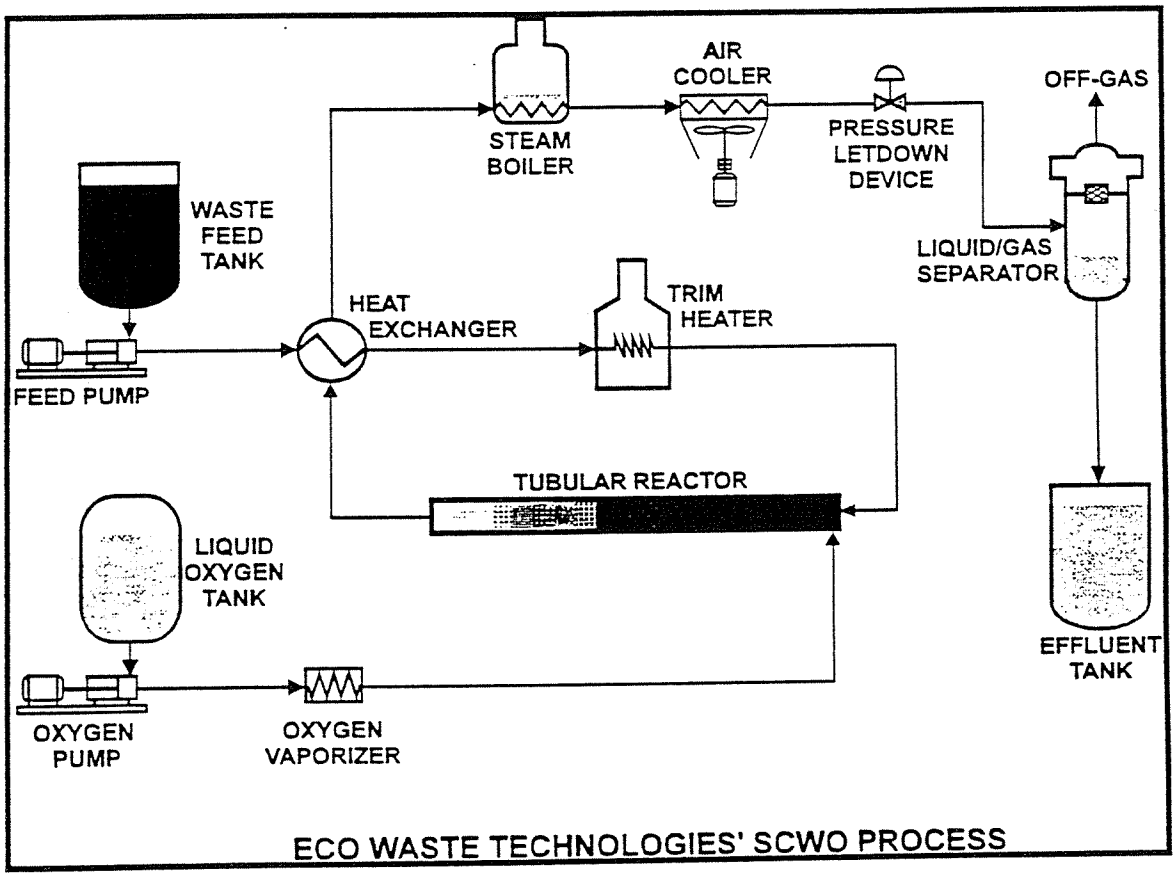
design of the SCWO system and the cool-down procedure employed prior to off-gassing, it was considered highly improbable that the metals could enter the atmosphere. However, since this is a requirement for incinerators and kilns, these emissions limitations have been included for reference.

Table 2 contains what are believed to be the most conservative estimates of air emissions requirements for SCWO operations. There will, undoubtedly, be additional requirements for record-keeping and system operation. Potential system operation requirements may include certification of the system operators and supervisors, documented operation manuals, temperature and pressure constraints and requirements for manual or continuous emissions monitoring of specific air pollutants.

Air Emissions from Pilot and Commercial Facilities. The SCWO process, generically shown in Figure 1, has several features which result in significantly lower regulated emissions compared to the emissions produced from an incineration process.

Figure 1 - Simplified SCWO Process



The process is self-scrubbing. No exhaust gas scrubbing is needed since, upon cool down, the gas and liquid water are in intimate contact. The effluent gas produced during steady state conditions contains CO_2, N_2, O_2 and trace amounts of CO although off gas composition during unstable conditions, during low temperature conditions, or with insufficient oxygen can contain significant levels of CO, H_2, and low molecular weight hydrocarbons such as methane, ethane or propane.

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40 CFR Part 60.50, Subpart E, "Standards of Performance for Incinerators" and 40 CFR Part 60.50a, Subpart Ea, "Standards of Performance for Municipal Waste Combustors" were used to establish the baseline air emissions requirements. Table 2 contains the summary of these requirements. Both of these regulations are undergoing regulatory review by the US EPA to reduce the allowable emissions limits of the regulated constituents. These proposed, more stringent requirements are included in Table 2.

In addition to the new source standards established in 40 CFR Part 60, the standards established in 40 CFR 264.340, Subpart O, "Owners and Operators of Hazardous Waste Treatment, Storage and Disposal" were reviewed for additional requirements. Subpart O sets the standards for waste treatment system performance. The standard requires a destruction removal efficiency (DRE) for waste treatment of 99.99 percent for each principal organic hazardous constituent (POHC) and 99.9999 percent for each POHC designated as a hazardous air pollutant. If the hazardous air pollutants are regulated under Part 60 for new sources (i.e., dioxins, furans, PCBs, etc.), the more restrictive regulation will apply.

Table 2 - Most Probable Air Emissions Limitations for SCWO Operation

Pollutant	Unit	Probable Limits
Priority Pollutants		
CO	ppmv	100
Total hydrocarbons (ozone precursor)	DRE (%)	99.99
NOx	ppmv	180
SOx	ppmv	30
Hazardous Air Pollutants		
Dioxins	ng/DSCF	0.2
Furans	ng/DSCF	0.2
PCBs	ng/DSCF	0.2
Polyaromatic hydrocarbons (PAHs)	DRE (%)	99.9999
Acetaldehyde	DRE (%)	99.9999
Formaldehyde	DRE (%)	99.9999
Mercury	µg/DSCF	50
Total chlorine ($HCl + Cl_2$)	ppmv	67
Low volatility metals (such as antimony, beryllium and chromium)	µg/DSCF	60
Semi-volatile metals (such as cadmium and lead)	µg/DSCF	62

Most of the regulatory personnel felt there would be no requirements to monitor or characterize the air emissions for low volatility and semi-volatile metals. Because of the totally enclosed

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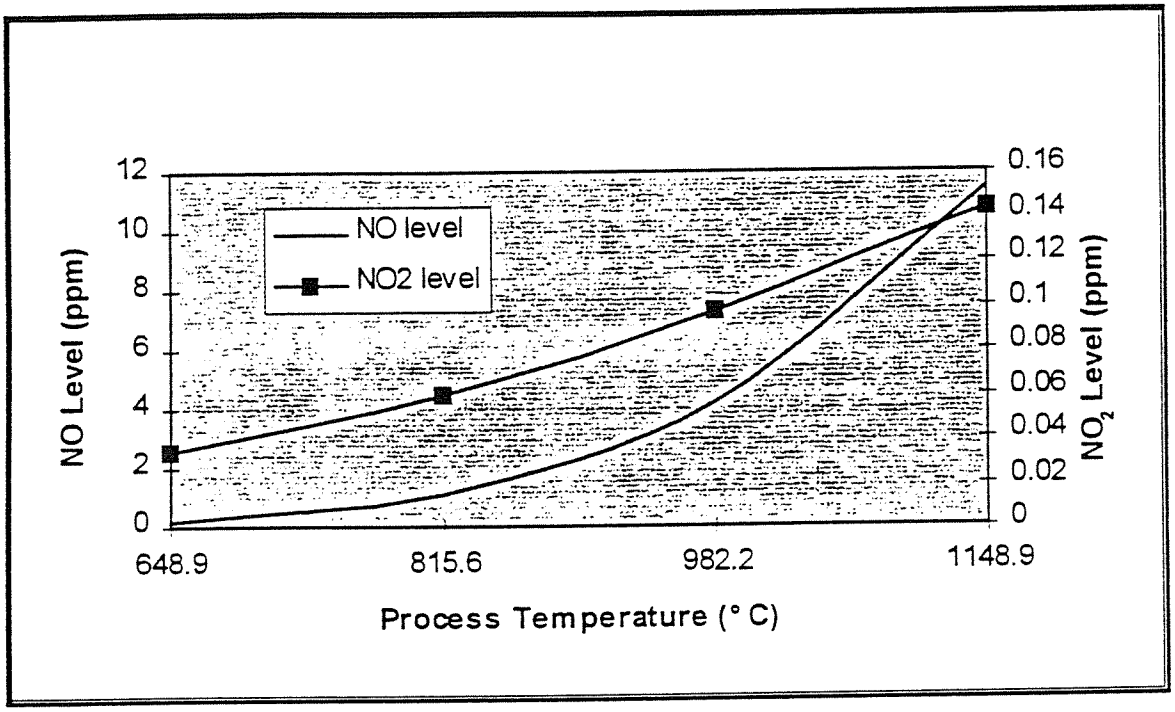
Even without the scrubbing effects during steady state operation, the levels of NO_x and CO generated by the process are minimal. Figure 2 presents the equilibrium levels of NO_x expected in the process based on Gibb's free energy calculations performed by Hysys, a chemical process simulator. The temperatures used in the calculations are above the normal operating temperatures of SCWO units and, as such, represent worst case conditions.

Figure 2 - Theoretical NO_x Concentrations



The feed stream used to calculate the data in Figure 2 consisted of 5.15 wt. % Methyl Ethyl Amine, 9.25% oxygen, and 85.6% water. The mixture was introduced into a simulated isothermal Gibb's reactor at the process temperatures indicated. Thus, it is apparent that little NO_x is formed even at very high SCWO reaction temperatures. Conversely, the equilibrium NO_x concentration present in air at 1093° C, such as could be found in an incinerator, is calculated to be 657 ppm. Both the lower temperatures and the lower nitrogen concentration found in an oxygen-fed SCWO process reduce the equilibrium NO_x concentration. Any SO_x formed is automatically scrubbed into the liquid phase; therefore, the off gas contains almost no regulated nitrogen or sulfur oxides. Small amounts of nitrous oxide, however, may be formed. This compound is very stable and is not included in the standard regulatory group of nitrogen oxides.

Pilot scale and commercial air analysis confirms that the exhaust gas from a steady state SCWO unit is extremely clean. Table 3 presents off-gas analysis of pilot plant runs performed in May and June 1992 on a waste feed generated by Texaco's Austin Research Laboratories (now Huntsman Corporation). The tests were performed in preparation for the construction of Huntsman's commercial SCWO facility.

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Table 3 - Pilot Plant Air Emissions from Huntsman Design Testing

Date/Time	Total Hydrocarbons (as methane ppm)	CO (ppm)	CO_2 (%)	O_2 (%)
5/11/92	2.0	22	67.3	33
5/13/92	4.2	29	76.9	21.1
6/27/92 0300	273	8.3	77.5	21.5
6/27/96 1930	11.5	5.4	87.4	25.1
6/27/96 2300	12	15.9	74.3	25.1

Table 4 presents the actual gas analysis data taken from a trial run during the commissioning of the Huntsman facility on May 3, 1992.

Table 4 - Commercial Air Emission Results from Huntsman Commissioning

Parameter	16:31 to 17:31	17:43 to 18:43	19:03 to 20:03
NO_x (ppmvd)	0.8	0.1	0.25
CO (ppmvd)	65	52.5	61
O_2 (%)	8.75	11	9.38
THC (ppmvd)	237	168	205
SO_2 (ppmvd)	0.10	0.10	0.15
NH_3 (ppmvd)	8.9	8	5.7
O_3 (ppmvd)	0.48	0.76	0.33
Moisture (%)	11.28	10.92	7.34

The waste stream consisted of a 14.8 weight percent organic stream containing 0.614 % amines. This data was taken before the optimum operating parameters were established for the commercial facility; therefore, some parameters such as total hydrocarbons and CO were higher than those observed during steady state pilot plant testing. In addition, the size of the liquid gas separator significantly affects the purge time required to obtain representative gas samples after a process upset. The Huntsman unit has a large vapor space and requires a significant purge time to reach equilibrium. Subsequent to the time of this analysis, the effluent water quality has improved considerably (0-10 ppm TOC compared to 50-75 ppm TOC) and it is probable that the THC values are now similar to the pilot plant test values given in Table 3. CO values, as read by the installed CO analyzer and measured after fine tuning the plant operation, are consistently between 0 and 10 ppm. However, even the higher values of THC and CO were sufficient for meeting the Huntsman unit air emission requirements.

The most extensive and recent evaluation of air emissions from the SCWO pilot located at the University of Texas was performed by Eco Waste Technologies, Inc., under sub-contract to Arthur D. Little, Inc. for the Naval Facilities Engineering Service Center in Port Hueneme,

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California. The waste treated during this evaluation was a composite mixture of several naval wastes including paint sludge, adhesive sludge, mixed greases, non-chlorinated and chlorinated oils, paint liquids, aqueous fire fighting foam, and citric acid/triethanolamine (TEA) cleaning solution. The testing was significant in that California Air Resources Board methods, specifically CARB 428, CARB 429, and CARB 430, were used for the determination of dioxins, furans, PCB's, polycyclic aromatic hydrocarbons (PAH), fomaldehyde and acetaldehyde. The CARB tests require special gas extraction methods in which resins are used to absorb constituents of interest over a period of several hours. The results are given in Table 5.

Table 5 - Pilot Plant Air Emission Results from Mixed Navy Wastes

Air Species Monitored	Results	Regulatory Requirements
CO_2 (%)	23	Not Required
CO (ppmv)	<10 during steady state	100[1]
O_2 (%)	12	Not Required
NO_x (ppmv)	0.5	180[1]
O_3 (ppmv)	110	Not Required
THC (ppmv)	160	Not Required
Moisture (%)	2.0	Not Required
PCDD, Total (ng/DSCF)	0.005	0.2[1]
PCB's, Total (ng/DSCF)	None Detected	0.2[1]
PCDF, Total (ng/DSCF)	0.007	0.2[1]
PAH (ng/DSCF)	14,850 DRE=99.9985%	99.9999%[2]
Acetaldehyde (ng/DSCF)	1,690 DRE=99.9998%	99.9999%[2]
Formaldehyde (ng/DSCF)	1,511 DRE=99.9999%	99.9999%[2]

Note 1: 40 CFR 60.50, updated with new proposed UPEPA standards found in Reference

Note 2: 40 CFR 264.340, "Standards for Owners/Operators of Hazardous Waste treatment, Storage and Disposal", Subpart O, Incinerators.

Note 3 Balance of gas was nitrogen from a nitrogen purge on the liquid gas separator and destruction of organic nitrogen.

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The results in Table 5 were affected by several factors. First, measurements in the ng/DSCF level are greatly influenced by off-specification gas created during upset conditions. Extremely long purge times following on specification operation are necessary to purge the liquid/gas separator's contaminated vapor space if pre-existing contaminant levels are to be reduced to the ng/DSCF level. Ideally, as we discovered during testing, a separate, clean liquid/gas separator should be used for gas collection after the on specification condition has been achieved. In the case of this test sequence, these facts were unknown; therefore, sampling was commenced when the system was judged stable after only a limited purge of the liquid/gas separator. Thus, the levels of acetaldehyde and formaldehyde are most likely residual levels from a prior off spec condition. Since the CARB tests are adsorption tests based on a 3 hour cumulative sample, it is not possible to determine the difference between contaminant levels at the beginning and at the end of the sampling period. In addition, the CARB analysis require off-site evaluation and do not present real time results. Thus, at the time of the testing, the plant operators were unaware of the need for longer purge times with the existing separator. Future CARB testing on systems which have a significant vapor space in the liquid/gas separator need to account for the necessary purge times or should use a separate pre-purged liquid/gas separator. This would allow for a more accurate evaluation of steady state values.

The higher THC and O_3 values may be accounted for by the fact that the plant operation was not optimized for this waste. Temperature profiles within the reactor were somewhat unstable due to organic pumping problems as well as an inert deposit which gradually accumulated in the reactor. The THC values obtained from previous pilot plant operation, given in Table 1, reveal that THC levels from 2 to 11 ppm are expected during steady state operation. Ozone levels from the Huntsman commercial facility likewise indicate that normal levels are less than 1 ppm. Based on this data and the purge issues discussed above, SCWO will have little difficulty in meeting the most stringent air emissions criteria on a properly designed, stable plant. However, additional off-gas testing using standard methods should be performed on specific feed stocks prepared with known amounts of specific constituents such as PCB's, PAH, dioxins, etc. This testing would clearly demonstrate the capability of SCWO to produce clean air emissions for feeds which contain a wide variety of compounds tightly controlled by air emission regulations. State and federal regulators are satisfied that SCWO produces extremely clean water. Our challenge is to develop a database as extensive for air emissions as that which currently exists for the liquid effluent.

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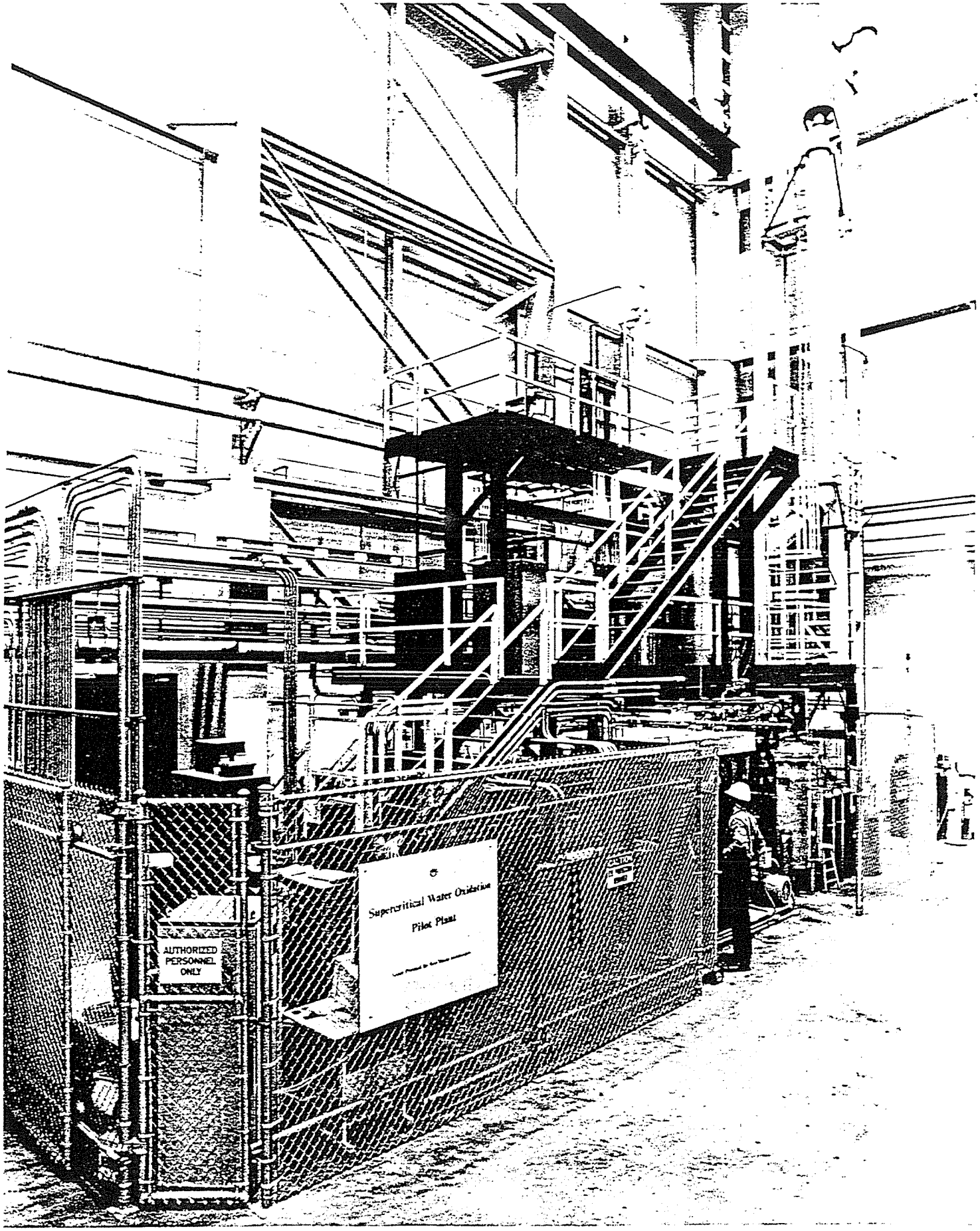

SCWO PILOT PLANT

BIOGRAPHICAL DATA
Richard C. Lyon

EXPERIENCE HIGHLIGHTS

- Thirty plus years of experience in the business strategy and corporate development, marketing/sales, and management of technology projects.
- President of Eco Waste Technologies (EWT) since 1992.
- Successful in negotiation and closing mergers, process sales and large ticket business transactions, technology development and commercialization, patent acquisitions, and licensing.
- Established EWT as leader in commercialization of Supercritical Water Oxidation (SCWO) technology.
- Coordinated development and sale of first commercial SCWO unit to Huntsman Corporation.
- Two year track record of customer satisfaction with EWT's support of commercial SCWO unit.
- Coordinated long term sponsored research activities with investigator at the University of Texas at Austin.
- Long and successful record as consultant in a variety of development and re-engineering assignments.

RELEVANT PROFESSIONAL EXPERIENCE

1992 to Present
President of Eco Waste Technologies (EWT), Austin, TX.

- Built EWT's leadership position in SCWO technology, an advanced system for treating wastewater and organic sludges.
- Managed sponsored research and development activities leading to negotiation and sale of first commercial SCWO waste treatment facility, which has won an award for environmental excellence.
- Directing an extended technical development and commercialization program to business and federal agency prospects.
- Leading a complete intellectual property program, including patents, licensing and development of strategic partnership, with success to date in Europe and Canada.
- Direct marketing and operations strategy, publications and public relations.
- Prompted company focus on wastewater treatment industry-specific; process development, full-scale process commercialization directed toward needs of industrial/municipal clientele.

1977 to 1986
Vice President of Rollins, Inc., Atlanta, GA.

- Directed corporate planning and development, mergers and acquisitions.
- Identified an unexpected of oil field services industry downturn and reacted with cost reduction/re-engineering program. Annual saving of $18 million. Impact realized within 60 days.
- Identified, negotiated and closed a major acquisition in the protective service industry. Integrated acquired division into parent company, turning $6 million annual loss into profit position within 10 months.
- Developed complete annual corporate planning and budgeting system, including performance review of operating units.
- Reorganized payroll and personnel records for 7000 employees into a single processing unit, eliminating chaotic and inefficient operations.

1962 to 1992 (Various times)
Consulting Assignments - Detroit, MI., and Cleveland OH.

- As Manager with Touche Ross & Co., Managing Principal with Case & Co., and as individual consultant, has been called on to complete a variety of development or trouble shooting assignments.
- Determined feasibility, developed plan and directed startup of a large bank service company processing consumer credit for major banks. Managed supplier negotiations, member recruitment, and organization development. Concept to operation in nine months.
- Redirected business strategy of a mining equipment manufacturer away from high risk $20 million plant expansion to new and previously untapped profit opportunities.
- Performed market assessment of a new antimicrobial product for chemical manufacturer. Assessed market potential and developed focused and niched market strategy. Was required to successfully sell the finding that market potential was not as broad and large as the developer originally thought is was, and the developer was not the best equipped party to realize the significant potential that existed.

-CONTINUED-

PROFESSIONAL EXPERIENCE

Technical Representative for Union Carbide Corporation, Cleveland OH.

- Developed new applications for plastics and resins in the coatings, adhesives and compounding markets.
- Familiar with extrusion and injection molding processes, rotational casting, surface coating and adhesive formulation, and a variety of coating application techniques.

EDUCATION AND ASSOCIATIONS

BS, Chemical Engineering, Purdue University
MS, Industrial Administration (With Distinction), Carnegie Mellon University

Member, American Institute of Chemical Engineers, AIChE.
Member, Technical Association of the Pulp and Paper Industry
Presentations to various professional and technical associations, including the American Chemical Society, The American Management Association California and Ohio Bankers Associations, The Institute of Management Sciences, and specialized technical forums on advance oxidation technologies.

FORENSIC RESIDENTIAL SAMPLING

"A Little Dab'll Do Ya"

HERNDON WILLIAMS

RADIAN INTERNATIONAL LLC

Ninth Annual Texas
Environmental Superconference
Austin, Texas

Forensic Residential Sampling

C. Herndon Williams
Walter L. Crow
Radian International LLC, Austin

Ronald G. Draftz
IIT Research Institute, Chicago

31 July 1997

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1.0 Introduction

Forensic residential sampling is a strategy for environmental measurement that addresses current and past exposures to chemicals and microorganisms in a residential (community) environment with the objective of determining the extent of the exposure and the source(s) of the exposure agents. This approach has been used effectively when there are allegations of health effects, nuisance or property damage due to the airborne transport of agents from a source into a residential community.

Forensic residential sampling make use of a broad range of physical, chemical and biological methods that are integrated into a testing approach tailored to elucidate the issues that are central in toxic tort litigation. Forensic residential sampling can provide hard data to replace allegations, conjecture, opinions, and emotion.

Forensic residential sampling takes the direct approach of measuring the actual total exposure in the community and then apportioning the exposure into its contributing sources. This approach has often served to document the common observations that indoor air is usually more "polluted" than the outdoor ambient air and that calculations of ambient air pollutant concentrations by air dispersion modeling tend to overestimate the community's exposure.

Radian has collaborated with other experts and with attorneys in the development of this testing approach and its value has been trial-proven. This presentation will give an overview of the scope and the testing approach, along with several case studies.

2.0 Objectives and Scope

The forensic residential sampling approach can address one or more of the following objectives:

- To measure the actual exposures of the residents in their homes to chemical and biological agents in the air and on indoor surfaces;
- To reconstruct prior exposures or to evaluate alleged property damage by the testing of dust and residue deposits on indoor and outdoor surfaces;
- To compare the measured exposures with standards and guidelines regarding the probability of health effects, property damage or a nuisance (e.g., odor); and
- To apportion the sources of the actual exposures due to indoor factors (e.g., smoking, combustion sources, pesticides, pets, mildew, etc.) versus outdoor factors (e.g., ambient air quality, wind directions, multiple emission sources).

The scope of this approach can be both broad and detailed. A typical physical setting for forensic residential sampling is shown in Figure 1. In this generic scenario, the residential community is downwind of a potential source of air contaminants and monitoring could be done at several downwind (as well as upwind) locations. The routine operation of the facility (a chronic exposure scenario) could as well be replaced by a release episode, such as a fire (an acute exposure scenario). The broad scope of the approach is suggested by the range of parameters in Table 1.

The duration of exposures and monitoring is seen to vary from acute to chronic. Monitoring has been carried out on a real-time continuous basis, short-term (within one day or one week) or on a long-term basis, e.g., periodically over one year. Previous exposures (prior to sampling) can be inferred from the analysis of surface dust residues or surface soil samples.

The range of target agents includes both chemical and biological vectors. A very comprehensive list of hundreds of toxic chemicals can be determined by validated environmental methods. The allergens include mold, fungus, pollen, dust mites, animal dander, insect parts and building materials. The pathogens include viable organisms such as legionella, coliform, bacteria, and aspergillus.

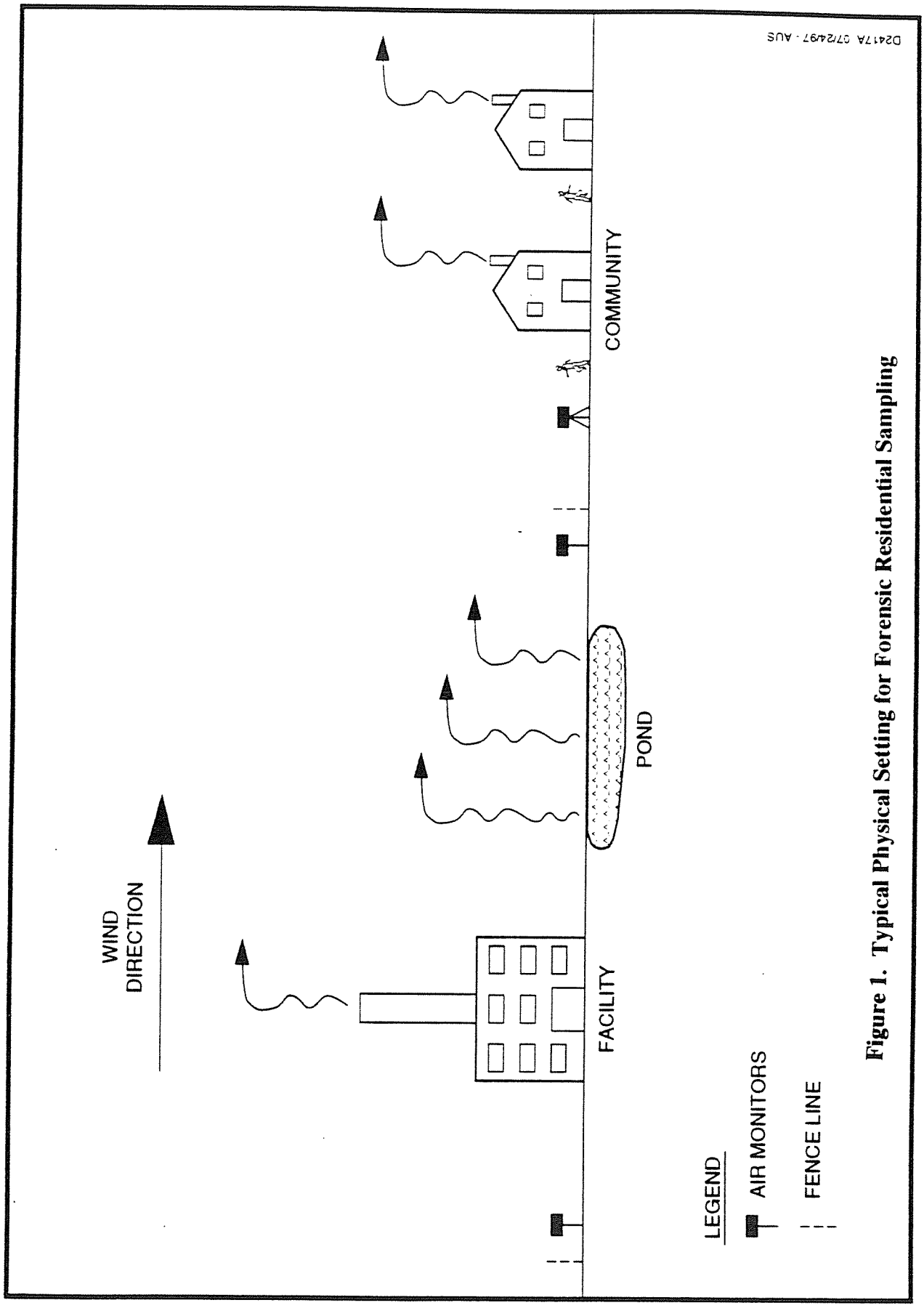


Figure 1. Typical Physical Setting for Forensic Residential Sampling

Table 1. Scope of Forensic Residential Sampling Approach

1. **Duration of Exposure or Monitoring**
   - Continuous (real time)
   - Short-term ($\leq$ 1 hour); acute exposure
   - Long-term ($\geq$ 24 hours); chronic exposure
2. **Sources of Exposure**
   - Routine emissions from an industrial facility
   - Uncontrolled release in an event
   - Fugitive emissions, e.g. hazardous waste site
   - Vehicular sources
   - Indoor, anthropogenic sources
   - Life style (smoking, pets, etc.)
3. **Target Agents**
   - Chemical gases and vapors
   - Airborne dusts
   - Hazardous materials (e.g., lead, asbestos, pesticides)
   - Combustion products
   - Allergens
   - Pathogens
4. **Sampled Medium**
   - Ambient air, indoor air
   - Outdoor particle (dust) deposition
   - Indoor dust, carpet dust
   - Indoor/outdoor surface samples
   - Surface soil
5. **Target Receptor Effects**
   - Staining, soiling, corrosion
   - Odors, noise
   - Damage to vegetation
   - Health effects, acute and chronic

3.0 Testing Methods

The testing methods used are selected to characterize the nature and extent of airborne contamination, whether chemical or biological in origin. The strategy for the methods to be used will depend on the specific issues in the exposure. Two of the major testing/analytical methods are described below. These two testing approaches can be complemented by a wide range of other techniques as required: air dispersion modeling, tracer gas release, meteorological measurements, noise monitoring, odorography, structural analysis, material science, and toxicology.

3.1 Chemical Analysis

Forensic residential samples have been analyzed for a comprehensive range of target chemicals, including: benzene and other volatile organic compounds (VOCs); semivolatile organic compounds (SVOCs) including pesticides, PCBs, and chlorinated dioxins/furans; arsenic, lead, mercury, and other heavy metals; asbestos and regulated air pollutants such as ozone, carbon monoxide, and the oxides of sulfur and nitrogen. These analyses have been carried out with both real-time, on-site instruments, as well as with laboratory-based instrumental methods, usually with limits of detection in the part-per-billion range, or lower.

3.2 Polarized Light Microscopy and Other Microscopies

Forensic residential samples that consist of fine dust particles can be identified by particle morphology using polarized light microscopy (PLM). The dust particles can be collected from the air on filters or on dry deposition plates. Dust particles deposited on residential interior or exterior surfaces can be removed as transparent tape lift-off samples. By PLM, particles can be identified that are in the size range: < 1 micrometers (e.g., bacteria, tobacco smoke) to > 100 micrometers (e.g., pollen, road dust). This identification of dust particles allows the source of the particle to be known. PLM is a very powerful technique for distinguishing between natural and anthropogenic dust particles. PLM can be augmented by other microscopies that provide chemical analysis information (e.g., x-ray fluorescence) or higher levels of magnification (e.g., electron microscopy).

4.0 Case Studies

Several examples of the application of the forensic residential sampling approach will be presented. One application of this approach involved the investigation of a dark stain on the exterior of several houses near an oil refinery. The residents thought that the discoloration was an "oil stain". PLM analysis of transparent tape lift-off samples showed that the discoloration was due to a mold growth.

Another application involved a study of the airborne dust particles deposited in a neighborhood adjacent to an industrial facility (and a freeway). The majority of the dust particles were found to be mineral dust and rubber tire particles.

Ambient air monitoring in a neighborhood with a mobile FTIR system showed that one of the major sources of air pollution was a gasoline-powered lawn mower, in addition to the hydrocarbon background from vehicular traffic.

5.0 Benefits and Costs

The potential benefits of the forensic residential sampling approach are:

- credible evidence for use in litigation involving allegations of health effects, property damage and nuisance due to airborne transport of pollutants;
- expert testimony by scientist and engineers, using advanced computer graphics for courtroom exhibits;
- an objective basis for a settlement or for evaluation by other experts such as physicians, toxicologist, appraisers, etc.

The approach is cost-effective and its value has been demonstrated in the courtroom. The approach can be tailored to address the issues of any specific case of toxic tort litigation. Disadvantages, besides the time and cost to conduct the measurements, include: a limited ability to recreate some exposures in the past and a limited ability to delineate all the sources that could contribute to an exposure.

RADIAN INTERNATIONAL LLC

Biography

C. Herndon Williams

Principal Scientist and Senior Project Manager at Radian International in Austin, where he has been since 1977.

Most of his projects involve making exposure measurements in the community and in the industrial workplace.

At Radian and previously, he has served as a laboratory director for environmental and occupational chemistry.

He has a PhD in physical chemistry from Brown University.

Ninth Annual Texas
Environmental Superconference

Environmental Management



STRATEGIC ENVIRONMENTAL MANAGEMENT

"It's Not Nice To Fool Mother Nature"

BILL WILDER

Where are we? And How Did We Get Here? The Evolution of Environmental Management Systems

William R. Wilder, Ph.D.

Executive Vice President

Axis Environmental Services, Inc.

The Challenge

- **In the 1990's businesses are increasingly being challenged to demonstrate environmental responsibility. For Example:**
  - Government is increasing the level and scope of environmental regulations and associated civil and criminal penalties
  - Consumers are increasingly buying products that are perceived to be environmentally friendly
  - Stockholders are requiring disclosure of environmental risks which may impact financial performance
  - Unions and employees are demanding disclosure of environmental information relating to the workplace
  - Broadcast and print media are highly publicizing environmental incidents
- **Against this backdrop, corporate managers must balance the need for environmental protection with the competitive realities of running a business if they are to survive, much less prosper.**

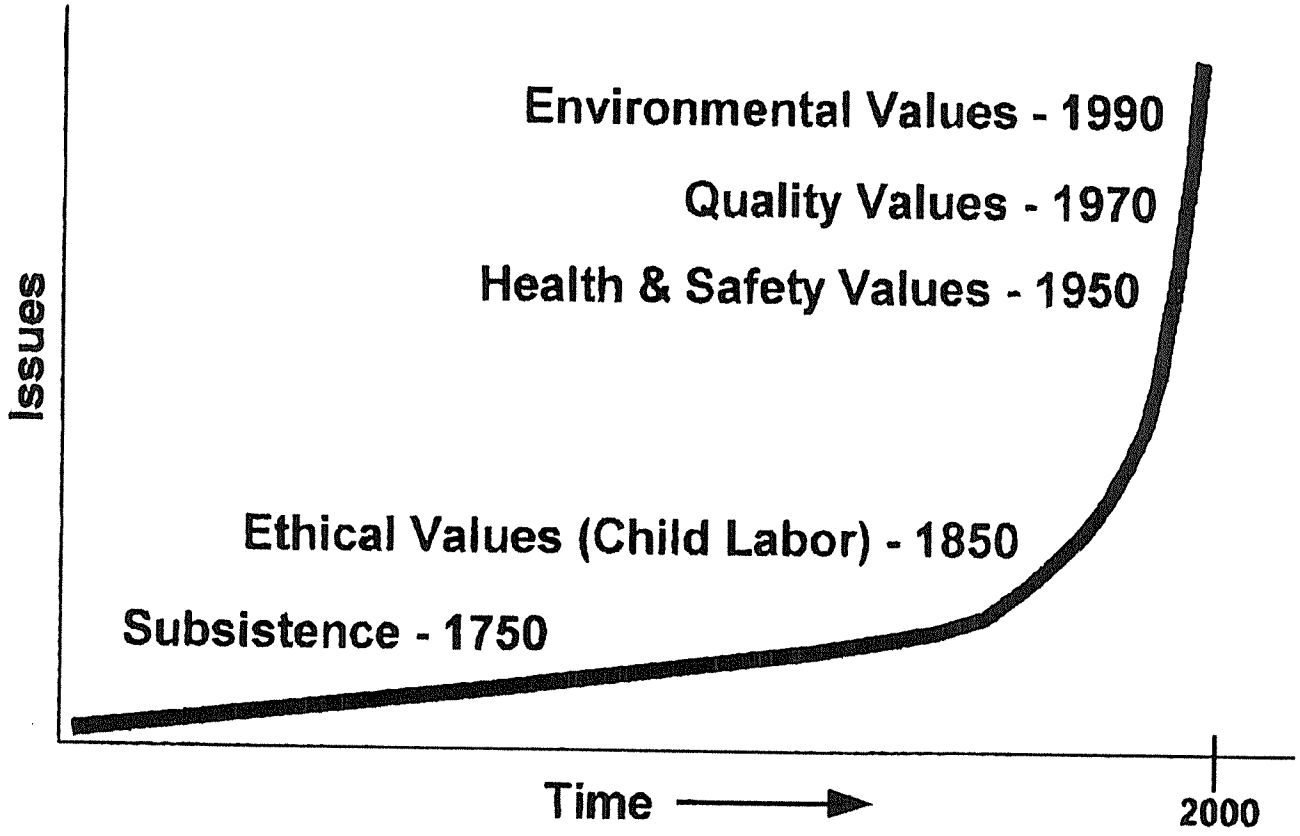
What Does It All Mean?

- **Environmental management is no longer solely a technical concern. It is one of the most important topics of annual BOD and shareholder meetings**
- **Need to provide corporate officers and directors with assurance regarding the effectiveness and efficiency of environmental management efforts**
- **Companies must evaluate environmental decisions as an integral part of the firm's competitive strategy**
  - 1991 Dow Chemical voluntarily agreed to reduce chemical emissions by twice the amount mandated by the EPA

    Result: The stock price rose 13%
  - Digital Equipment Corp. announced research efforts to develop technology to study global environmental change through the year 2000

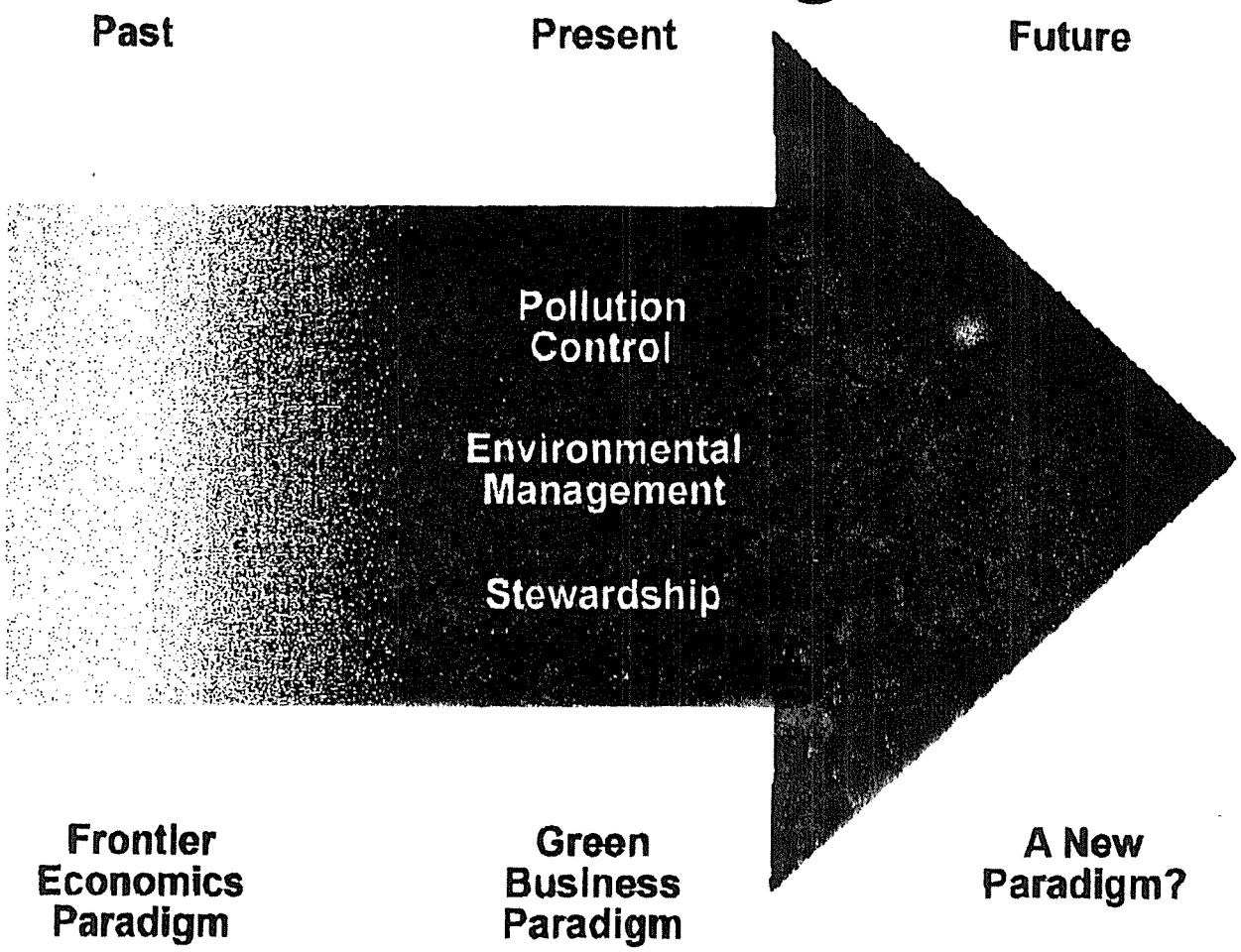
    Result: The stock price rose 13% in five days

Business Evolution



Source: Excel Partnership

The EMS Paradigm?

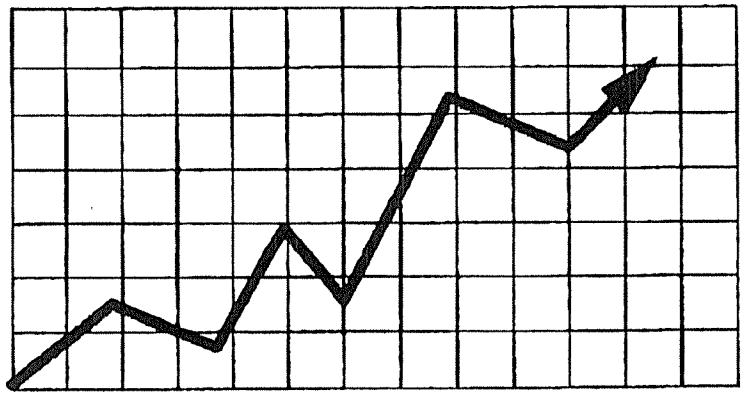


Eco-Efficiency is the New Frontier for Successful Business

- The members of the Business Council for Sustainable Development (BCSD) are the CEOs of 48 international corporations. It is clear in their minds that the successful company of the future will be eco-efficient, a company that adds value to its product while using raw materials and energy more efficiently
- Eco-efficiency demands that companies go far beyond compliance, pollution control and cleanup
- Internalizing environmental costs will spur innovation. It is from such creative problem solving that competitive advantage will be realized. The historic factors of labor costs, interest and exchange rates are less likely to effect such change

A Fundamental Equation of Corporate Value

Economic Value Added (EVA) = After-tax Operating Profit – Cost of Capital



EVA is strongly correlated to stock price

Contribution of Environmental Excellence to Corporate Value

Economic Value Added (EVA) = After-tax Operating Profit − Cost of Capital

- Eco-efficient production
- Pollution prevention
- Resource conservation
- Recycling and recovery
- Product differentiation

- Process simplification
- Toxic Use reduction
- Design for disassembly
- Supplier partnerships
- Efficient asset utilization

EMS - An Idea Whose Time has Come

- A growing number of national and international organizations have, for some time, been actively engaged in the development of environmental management standards and guidelines.
- The underlying objective of these initiatives is to balance the goals of environmental protection with the economic and competitive realities of running a business

The Method

- **A Systems Approach to EMS through the evaluation of:**

  - Management Direction
  - Relevance
  - Appropriateness
  - Achievement of Results
  - Acceptance
  - Secondary Impacts
  - Costs & Productivity
  - Responsiveness
  - Monitoring and Reporting

The Method (cont.)

- **In the evaluation of a corporate environmental management program, the systems approach facilitates assessment by asking questions such as:**
  - In what ways have corporate objectives of the program been laid out for employees?
  - What groups within the corporation have been assigned the responsibility to meet environmental management objectives?
  - How well are the objectives of the EMS program well understood by staff and other interfacing groups and have they been well communicated?
- **The systems approach helps ensure thoroughness in EMS audits and assessments.**

William R. Wilder, Ph.D., Executive Vice President of Axis Environmental Services, Inc., in Houston, TX, has been active in the environmental consulting and hazardous waste management industry for over seventeen years. His expertise includes fate and persistence studies, remediation technology application and evaluation, natural resource damage assessment, and rapid deployment/emergency response remediation actions. Dr. Wilder has served as an expert witness in both regulatory hearings and trial proceedings. His past activities have included CERCLA site investigations and remediation, RCRA investigations and remediation, risk based closure programs, emergency response, and international technology transfer programs. Previously, Dr. Wilder has been Branch Manager of Golder Associates Inc. (Houston); Corporate Director of Environmental Assessment for Southdown, Inc. (Houston); Regional Technical Director for OHM Remediation Services, Inc. (Houston, Austin, TX and Atlanta, GA); Principal Scientist for Entrix, Inc. (Houston); and Environmental Toxicologist for ERM-Southwest, Inc. (Houston). He received his B.A., M.A. and Ph.D. from Rice University.

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Litigation Issues in Environmental Law



STRATEGIES FOR TOXIC TORT LITIGATION -

"I Love This Game"

Plaintiffs' Position

"You Can Pay Me Now, Or You Can Pay Me Later"

KAY GUNDERSON REEVES

TRENDS IN TOXIC TORT LITIGATION FROM THE PLAINTIFFS' PERSPECTIVE:

YOU WIN SOME, YOU LOSE SOME.

I. Trendy no more--"Settlement Only" Class Actions

> If the court had gone the other way, I don't think we would ever again see people with latent injuries have the opportunity to get access to the civil justice system and jury trials, because industry would always be able to find a shill of a plaintiff's lawyer who would make a bad deal in the interest of significant attorney's fees. I hate to say that about my brother lawyers, but it's true.[1]

> We tried to do the right thing...We knew when we went into this that we were pioneers. Sometimes, pioneers get show with arrows in their butts. We'll pick the arrows out and keep moving west.[2]

When Rule 23 class actions made their debut on the toxic tort scene, one generally saw plaintiffs seeking to certify a class in order to resolve large numbers of claims against a given defendant, with that effort being firmly resisted by the defendant companies.[3] During the 1990's, however, the worm has definitely turned, as defendants facing potential claims numbering in the thousands turn to Rule 23 in hopes of crafting one global solution to address all of their potential

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[1] Fred Baron, plaintiff's lawyer representing individuals objecting to a nationwide asbestos class action recently rejected by the U.S. Supreme Court, as quoted in "U.S. Justices Toss Out Deal in Decades-Old Asbestos Case Litigation: High Court Says Controversial Settlement Couldn't Cover Diverse Group of Claimants and Would Shortchange People Who May Develop Illnesses Later," by Henry Weinstein, *Los Angeles Times*, June 26, 1997 at 1.

[2] Ron Motley, plaintiff's lawyer and class counsel in nationwide asbestos class action recently rejected by the U.S. Supreme Court, also quoted in "U.S. Justices Toss Out Deal in Decades-Old Asbestos Case Litigation: High Court Says Controversial Settlement Couldn't Cover Diverse Group of Claimants and Would Shortchange People Who May Develop Illnesses Later," Henry Weinstein, *Los Angeles Times*, June 26, 1997 at 1.

[3] See, e.g., *In re Agent Orange Product Liability Litigation,* 100 F.R.D. 718 (E.D. N.Y. 1983); *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986).

liability. Particularly popular have been settlement class actions--classes never intended to be litigated in an adversarial process, but filed in the hopes that both present and future liabilities against a company can be resolved in one fell swoop. During the past few years we have seen several nationwide, settlement classes filed--actions to resolve asbestos liabilities, liabilities to workers exposed to pesticides, liabilities to persons addicted to tobacco products, and liabilities to communities environmentally exposed to arsenic.

A recent U.S. Supreme Court opinion may signify the end of the trend, however. On June 25, 1997, the Court decided *Amchem Products, Inc. v. Windsor*, a class action certified by the U. S. District Court in the Eastern District of Pennsylvania in the face of vigorous opposition by a group of objectors, and later overturned by the Third Circuit. The class action settlement purported to resolve all present and future liabilities faced by a group of asbestos products manufacturers known as the Center for Claims Resolution, or CCR.[4] Much to the dismay of the proponents of the class, the Supreme Court affirmed the Third Circuit's decision that the class should not have been certified because it failed to meet the requirements imposed by Rule 23.

A. *Amchem Products, Inc. v. Windsor*: A Case History

Amchem was a case in which a group of plaintiffs filed a class action complaint seeking to certify a nationwide opt-out class under Rule 23(b)(3). The complaint was filed on January 23, 1993. The putative class included all persons who had been exposed to asbestos products manufactured by the CCR defendants, but who had not filed a lawsuit as of January 15, 1993. It also included the spouses, parents, children and other relatives of such persons. All class

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[4] *Amchem Products, Inc. v. Windsor*, 1997 W.L. 345149 (June 25, 1997), slip. op. A copy of the opinion is attached to this paper as Exhibit A.

members were represented by the same class representatives and the same group of counsel. On the same date that the class action complaint was filed, the CCR defendants answered the suit, and the parties filed a joint motion seeking conditional class certification for purposes of settlement. The motion was accompanied by a stipulation of settlement.[5]

The stipulation of settlement purported to settle the claims of between 250,000 and 2,000,000 persons exposed to asbestos products manufactured by the CCR defendants.[6] Because the class was defined broadly to include all persons who had been exposed to the CCR defendants' products, the agreement would, if approved, affect a settlement of both the claims of both those persons currently suffering from asbestos-related disease, as well as the "claims" of those exposed persons who had yet to develop any symptoms of disease. In other words, the rights of persons who had no presently accrued claims were to be settled in this nationwide class action. District Judge Lowell Reed approved the settlement and finally certified the class on August 16, 1994.[7] That decision was issued over the vigorous protests of various groups of objectors who appealed the decision to the Third Circuit.[8]

The complaints raised by the *Amchem* objectors on appeal are typical of those made in opposition to these settlement class actions generally, and included several arguments of constitutional dimension. For example, the objectors claimed that because the case was filed and

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[5] The Third Circuit's opinion vacating the district court's decision to certify the class contains a helpful description of the history of this class action. See *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 618-622 (3rd Cir. 1996).

[6] *Georgine v. Amchem Products, Inc.*, 83 F.3d at 617.

[7] *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994).

[8] Some of the objectors were represented by my firm, Baron & Budd, P.C.

apparently settled on the same day (or earlier), no case or controversy existed; therefore, the Court lacked Article III jurisdiction. They also claimed that class members with no present injuries lacked standing to assert claims in the district court, and that these exposure-only claimants could not satisfy the $50,000 minimum dollar amount in controversy required to invoke the court's diversity jurisdiction. Finally, they claimed that adequate notice could not possibly be provided to class members with no present injury, and that those future claimants' due process rights had been compromised.[9] In addition to the constitutional arguments, objectors claimed that the settlement class could not meet the requirements of Rule 23, an objection that District Judge Reed was able to overcome because he concluded that those requirements were more "readily satisfied in the settlement context."[10]

This last conclusion proved problematic for the Third Circuit, which issued its opinion to remand the case back to the district court with directions to decertify the class on June 27, 1996. The Third Circuit declined to reach the constitutional issues,[11] deciding instead that the class did not pass muster because it failed to satisfy the typicality and adequacy of representation requirements of Rule 23(a), and the predominance of common questions and the superiority requirements of Rule 23(b)(3). The Third Circuit rejected the notion that the existence of a settlement lightens the burden imposed by Rule 23.

The U.S. Supreme Court granted review of *Amchem* to decide, among other things, how

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[9] *Georgine v. Amchem Products, Inc.*, 83 F.3d at 622.

[10] *Georgine v. Amchem Products, Inc.*, 157 F.R.D. at 315.

[11] Although the Court in *dicta*, noted that the existence of jurisdiction and justiciability were not "free from doubt," and that it had "serious concerns" about the constitutional adequacy of the class notice. *Georgine v. Amchem Products, Inc.*, 83 F.3d at 623.

the existence of the settlement ought to factor into the Rule 23 analysis. The Third Circuit had stated that each of the requirements set forth in Rule 23(a) and 23(b)(3) "must be decided *without taking into account the settlement*, and as if the action were going to be litigated."[12] This was the second time the Third Circuit had ruled that settlement classes could not be certified if certification for trial would be unwarranted,[13] a holding that conflicts with opinions issued in the past by other circuit courts. These other courts placed significant weight on the existence of the settlement agreement when evaluating whether Rule 23's requirements had been met.[14]

In *Amchem* the Supreme Court concluded that settlement agreements do have some relevance to the Rule 23 class analysis,[15] but otherwise affirmed the Third Circuit's decision, holding that--"the sprawling class the District Court certified does not satisfy Rule 23's requirements."[16] In affirming the decision the Supreme Court clearly rejected the position taken by the district courts and other circuits-- that Rule 23's standards are lower when the class to be certified is a settlement class:

> Whether trial would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), is not a consideration when settlement-only certification is requested, for the

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[12] *Georgine v. Amchem*, 83 F.3d at 626, emphasis added.

[13] See also *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 799-800 (3rd Cir.), *cert. denied sub nom. General Motors Corp. v. French*, __ U.S. __, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995).

[14] *In re Asbestos Litigation*, 90 F.3d at 975 (5th Cir. 1995); *White v. National Football League*, 41 F.3d 402, 408 (8th Cir. 1994); *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir. 1989); *Malchman v. Davis*, 761 F.2d 893, 900 (2d Cir. 1985).

[15] The Court noted that the Third Circuit's opinion "bears modification in that respect." The Court also noted that, despite the strong language in the opinion, the Third Circuit had in fact considered the settlement, and its bearing on the Rule 23 requirements. *Georgine v. Amchem*, 83 F.3d at 630-631.

[16] *Amchem*, 1997 W.L. 345149 at *2.

proposal is that there be no trial. But other specifications of the rule designed to protect absentee class members by blocking unwarranted or overbroad class definitions are of vital importance in the settlement context, for the court in such a case will lack the opportunity to adjust the class as litigation unfolds.

Federal courts...lack authority to substitute for Rule 23's certification criteria a standard never adopted--that if a settlement is 'fair,' then certification is proper." [17]

The Court agreed that the class certified by Judge Reed failed to provide adequate representation to the class members, as required by Rule 23(a)(4), and it failed to satisfy Rule 23(b)(3)'s requirement that common issues be predominant. Particularly troubling to the Supreme Court was the fact that the district court had approved a class that grouped class members with present injuries together with those not yet suffering injuries. The Court held that because the interests of these two types of class members were inherently conflicting, adequate representation could not be provided.[18]

Although the Supreme Court also declined to reach any of the serious constitutional issues raised by objectors, its *Amchem* decision is bound to slow the trend towards utilizing Rule 23 class actions or their state court equivalents to craft global settlement deals.

B. Is a settlement class action featuring both presently injured and "exposure only" claimants viable after Amchem?

At the time *Amchem* was decided, several other toxic tort settlement class actions were percolating through the judicial system, cases whose fate is now in some doubt. In point of fact,

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[17] *Amchem*, 1997 W.L. 345149 at *2.

[18] *Amchem*, 1997 W.L. 345149 at *3.

however, some commentators have concluded that there is actually very little doubt about the fate of those actions. Speaking to that issue, Boston University law professor, Susan Koniak, told the *Washington Post* that "unless someone doesn't know how to read a Supreme Court opinion, those deals are dead."[19]

Why are the deals dead? The primary basis for that prediction is the Supreme Court's conclusion that presently injured claimants and exposure-only claimants have conflicting interests, such that one group of counsel and one group of class representatives cannot adequately represent both:

> "for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future....[a] disparity ...not made insignificant by the District Court's finding that petitioners' assets suffice to pay settled claims.[20]

In order to satisfy Rule 23(a)(4), then, it would appear that at a minimum, *Amchem* requires the creation of subclasses. While the Court did leave the door open to a settlement class in which the presently-injured and the exposure-only plaintiffs are separated into different sub-classes, each with separate counsel and separate representation, it is unlikely that such a class structure will provide the benefits sought by defendant companies unless those companies are in a *true* limited fund situation. The *sine qua non* for defendants is the ability to cap their total liability--even at a large number--so that they can bring an end to the risks of litigation. Yet, it is difficult to imagine a situation in which an exposure-only plaintiff, or counsel representing an

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[19] "High Court Upholds Ruling Against Asbestos Settlement: Decision May Restrict Broad Liability Pacts," David Segal, *Washington Post*, June 26, 1997, at 1. Professor Koniak provided testimony on behalf of persons objecting to the *Amchem* class action at the Rule 23(e) "fairness hearing" presided over by Judge Lowell Reed, U.S. District Court, Eastern District of Pennsylvania.

[20] *Amchem*, 1997 W.L. 345149 at *3.

exposure-only subclass, would agree to a scheme in which the monies available to pay those future claimants are capped arbitrarily in advance. Such a plan simply has little to offer future claimants.

A prime example of a class action that would no longer be viable after *Amchem* is *Russell Price, et al. v. Ciba-Geigy*, a Rule 23(b)(3) class certified by the federal district court in Alabama.[21] The class included persons who had worked at, or lived in the vicinity of, two plants that manufactured an agricultural pesticide called Galecron. Galecron contained chlordimeform, a substance plaintiffs claimed caused bladder cancer and other diseases.

Class members included all persons residing in the United States who had been exposed to Galecron, and who had either worked in a plant manufacturing Galecron, formulated Galecron, applied Galecron, or had been otherwise exposed to the product at certain other industrial sites.[22] The class also included all spouses, parents, children or other relatives of such workers. As in *Amchem*, the class definition contained no requirement that class members currently suffer a disease that could have been caused by their exposure to Galecron. Like *Amchem*, no sub-classes were created, and all class members were represented by the same set of counsel.

In approving the settlement, the district court adopted the very analysis expressly rejected by the Supreme Court in *Amchem*. The Alabama court concluded, for example, that "[I]t is appropriate to certify a class solely for purposes of a settlement where a settlement is reached

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[21] Civil Action No. 94-0647-CB-S, U.S. District Court for the Southern District of Alabama, Southern Division. This case was settled on March 31, 1995 and final judgment entered on April 3, 1995. No appeal was taken from that final judgment. In *Price*, the parties to two class actions filed in Alabama state court reached a settlement on August 26, 1994. The parties also agreed to amend the state court petition such that diversity of citizenship was created, permitting the defendants to remove the case to federal court. Three days after the settlement agreement was reached and the case removed (August 29, 1994), the U.S. District Court for the Southern District Of Alabama conditionally certified a class for settlement purposes, gave preliminary approval to the settlement, and established an opt-out deadline.

[22] *Price*, Findings of Fact and Conclusions of Law, Appendix A (Stipulation of Settlement).

before a litigated determination of the class certification issue...It is well established that a court may certify a class for settlement purposes even where it could not certify the same class for litigation purposes."[23] The court also found that the predominance requirement imposed by Rule 23(b)(3) was satisfied because the issue of the fairness of the settlement was a predominant issue common to all class members.[24] As to Rule 23(a)(4)'s requirement that the class be adequately represented, the district court concluded that the requirement had been satisfied, and that the "best indicator" of the quality of representation was the result obtained--the settlement itself.[25] In other words, not only did the *Price* court view the settlement as relevant to the class certification analysis, the existence of the settlement was the primary basis for the court's finding that the Rule 23 requirements had been satisfied. If one thing is clear about the *Amchem* holding, it is that this line of reasoning is incorrect.

Of those class actions still in litigation, the first to "fall" is likely to be the nationwide asbestos class action settled by the Fibreboard Corporation and approved by the Fifth Circuit.[26] This class was certified as a "limited fund" action under Rule 23(b)(1)(B) because the parties proved to the district court's satisfaction that Fibreboard would have been unable to pay all valid claims against it within five to nine years.[27] Rule 23(b)(1)(B) provides for mandatory class

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[23] *Id.* at 26, 29; citing *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 173-178 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981).

[24] *Id.* at 29.

[25] *Id.* at 30-31; citing *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 547 (S.D. Fl. 1988), *aff'd* 899 F.2d 21 (11th Cir. 1990).

[26] *Flanagan v. Ahearn*, 90 F.3d 963 (5th Cir. 1996).

[27] *Ahearn*, 90 F.3d at 982.

membership, with no opt-out right. The Fifth Circuit upheld the district court's decision to certify the class as well as its ultimate conclusion that the settlement was fair, while specifically rejecting the objectors' contention that Rule 23(a)(4) could not be satisfied if presently injured claimants and exposure-only claimants were included in the same class.[28]

Objectors to the *Ahearn* class filed an application for writ of certiorari, which was still pending at the time *Amchem* was decided. Immediately on the heels of the *Amchem* decision, however, the Supreme Court granted certiorari, vacated the Fifth Circuit's decision and remanded the case with instructions to the Fifth Circuit to reconsider its decision in light of the *Amchem* decision. Because *Ahearn* also features one class including both presently-injured and exposure-only members, one would expect that the Fifth Circuit would be hard-pressed to find that the class members were adequately represented in light of the strong language of *Amchem.*

Also in peril is *Hayden et al. v. Atochem North American et al.*,[29] a class action filed in Bryan, Texas by persons owning property in the vicinity of an Atochem plant that had allegedly released arsenic into the environment. Although originally filed as a Rule 23(b)(3) class for property damage claimants, the settlement agreement eventually tendered to the court by the parties sought class certification under Rule 23(b)(2), which does not provide any opt-out rights. The new deal also contemplated a class which included both property damage and personal injury claimants. The agreement purported to settle the claims of all persons living or owning property

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[28] *Ahearn*, 90 F.3d at 981.

[29] *Hayden et al. v. Atochem North American et al.*, C.A. No. H-92-1054, U.S. District Court, Southern District of Texas.

within a defined geographic area surrounding the former Atochem plant, including persons exposed to arsenic from the plant but not yet suffering from any arsenic-related disease.

Although there were a number of issues in controversy, including whether or not the primary relief sought by the class was truly injunctive relief and not money damages, Atochem's argument in support of certification can fairly be reduced to its simplest principles: if the settlement is fair, the class should be certified and the settlement approved.[30] This, of course, is one of the arguments clearly rejected by the Supreme Court in *Amchem*. Although the class was certified by the U.S. District Court, in August, 1996, U.S. District Judge Lynn Hughes stayed the action until *Ahearn* is finally resolved and all avenues of appeal exhausted. Given the holding in *Amchem*, and its expected impact on *Ahearn*, it is unlikely that the *Hayden* class can survive.

Whether *Amchem* truly sounds the death knell for these global settlements is open to some debate, but it is difficult to see how the trend can continue with the vitality seen during the last four years. There appears to be no way to craft a class that contains both presently injured persons and persons who have been exposed to toxics but not yet manifested disease. While the creation of subclasses might permit the cases to go forward, it is difficult to imagine a set of

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[30] See, e.g., Defendant Elf Atochem North America, Inc.,'s Response to Objections to Magistrate Judge Botley's September 7, 1995 Memorandum and Order and September 15, 1995 Final Judgment:

> "Somewhere lost within the detailed arguments presented by the Objectors is the most important issue facing this Court. Specifically, the Court must decide whether the proposed settlement is fair, adequate and reasonable for the entire Plaintiff class.....[A]s demonstrated at the Fairness Hearing, this settlement is fair and, therefore, should be approved." Response at 3.
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> "...the fairness of the agreement also attests to fairness of the negotiations." Response at 36.

circumstances in which future claimants, and counsel for the exposure-only claimants, would agree to cap those future claimants' potential recovery.

II. A Trend Continues--Employer Liability

A trend that is likely to continue, although perhaps not at the pace originally anticipated, is the trend among the plaintiff's bar to press gross negligence claims brought by family members of workers who have died as a result of their exposure to toxic chemicals in the workplace.[31] This gross negligence cause of action may be the only real recourse available in cases where the employer obtains chemicals from a third party manufacturer, removes them from their original packaging and fails to pass on the warning information (if any) provided by that manufacturer. Two recent events have affected the viability of this avenue of recourse--one positive, the other negative.

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[31] Employers carrying workers' compensation insurance are insulated from tort liability for injuries suffered by those injured at the workplace. The sole remedy provided to such injured workers under Texas law is a claim for benefits under the policy.

There is, however, an "exception" to the exclusive remedy provision of the Texas Workers' Compensation Act created by the Texas Constitution. It provides that:

> Every person, corporation, or company, that may commit a homicide, through wilful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide.

Tex. Const. art. XVI, § 26. Simply put, this constitutional provision has been interpreted to provide to the survivors of a worker who has died because of an injury sustained on the job a cause of action for exemplary damages based upon the employer's gross negligence.

The negative event occurred during the 1995 legislative session. The changes to Texas tort law enacted by the legislature in 1995 clearly put a damper on these kinds of claims because the legislature both raised the standard by which plaintiffs must prove their case, and imposed statutory caps on exemplary damages. Specifically, those seeking punitive damages were to be required to prove by a clear and convincing evidence standard that the harm caused resulted from "malice."[32] Further, those meeting that heightened standard would be limited in the amount of damages they would be allowed to collect. After the 1995 amendments, successful claimants are now entitled to collect only the greater of the following options:

* two times economic damages plus the amount of "noneconomic damages" (e.g., pain and suffering) found by the jury, not to exceed $750,000;

or

* $200,000[33]

In summary, these legislative changes make it more difficult to recover a smaller amount of damages, reducing the viability of this cause of action in more difficult cases.

On the positive side of things, the gross negligence cause of action still exists in Texas, a legal conclusion challenged aggressively in the courts last year. The attack began shortly after the Texas Supreme Court's decision in *Travelers Indemnity Company v. Fuller*.[34] In the *Fuller* case, the daughter of a worker who had been employed at American Petrofina sued Travelers, the compensation carrier, for the death of her father. Fuller claimed her father's death had been

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[32] Tex. Civ. Prac. & Rem. Code §41.004; §41.001(7).

[33] Tex. Civ. Prac. & Rem. Code §41.008.

[34] 892 S.W.2d 848, 853 (Tex. 1995).

caused by his exposure to polynuclear aromatic hydrocarbons in the workplace. Because Travelers had conducted routine safety inspections at the plant, Fuller sued the carrier for gross negligence under Article XVI, §26 of the Constitution. Her theory was that this provision creates a claim for punitive damages against *any* grossly negligent entity, not just an employer. The Supreme Court rejected this contention, holding that no gross negligence claim against a workers' compensation carrier insurer was viable because neither the worker nor his heirs could ever have had a viable underlying claim for *compensatory* relief against the insurer.[35]

Employers saw an opening in this holding. If Fuller's gross negligence claim against the workers' compensation insurer was rejected because no underlying claim for compensatory relief existed, then claims brought by the families of deceased workers should also fail because those families clearly had no claim for actual damages against employers. The employers' theory was soon brought to the test in *Smith v. Atlantic Richfield Company*.[36]

Smith was a case in which the plaintiffs argued that a deceased worker had died due to his exposure to toxic chemicals in the workplace. Defendant Atlantic Richfield argued that the *Fuller* decision stood for the proposition that Article XVI, §26 did not *create* a constitutional cause of action for punitive damages, but only *preserved* any statutorily created cause of action. ARCO argued that because no such statutory cause of action for compensatory damages exists, the Smiths, like the Fullers, had no legal basis for their claim to punitive damages.[37] The trial court agreed with Atlantic Richfield and granted the company's motion for summary judgment.

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[35] *Fuller*, 892 S.W.2d at 849, 852.

[36] 927 S.W.2d 85 (Tex. App. -- Hous. [1st] 1996).

[37] *Smith v. Atlantic Richfield Company*, 927 S.W.2d. at 87.

The First Court of Appeals, however, was of a different mind. That court looked to the Texas Labor Code for authority for, or recognition of, the cause of action for punitive damages. Specifically, the Court pointed to the Texas Workers Compensation Act, which provides:

> This section does not prohibit the recovery of exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer's gross negligence.[38]

The court of appeals concluded that this provision "specifically provides for a cause of action against an employer whose gross negligence or intentional act causes the employee's death." [39] The court of appeals buttressed its opinion by pointing to *dicta* in the *Fuller* opinion, which clearly stated that punitive damage claims against an *employer* were viable, while claims brought against the compensation carrier (the defendant in *Fuller*) were not.[40] In the spring of 1997, the Texas Supreme Court denied Atlantic Richfield's application for writ of error, preserving this cause of action for future claimants.

III. "Lone Pine" Orders--Just Say "No"

A trend plaintiffs would rather do without is the trend among the defense bar to move for the entry of what have become known as "Lone Pine" orders. These orders are particularly popular in toxic tort cases, which are expert intensive, and require extensive discovery. Any

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[38] Tex. Lab. Code Ann. §408.001(b) (Vernon 1996).

[39] *Smith v. Atlantic Richfield Company*, 927 S.W.2d at 88.

[40] *Id.*

plaintiffs' lawyer filing a toxic tort case in today's legal environment can fully expect to face a motion for a "Lone Pine" order at the outset of the case. The secret to defeating these motions is to educate your judge about the differences between a toxic tort case and other kinds of products liability or tort claims.

A. What is a "Lone Pine" order?

A "Lone Pine" order typically requires that plaintiffs produce expert affidavits verifying that plaintiffs' claimed injuries were caused by exposure to toxic substances introduced into the environment in some manner by Defendants. It derives its name from an unpublished order issued by a New York State trial court in litigation arising out of toxic chemical releases from the Lone Pine landfill in that state.[41] The orders are typically sought at the outset of litigation; they compel toxic tort plaintiffs to produce proof--generally in the form of affidavits from medical doctors--that the plaintiffs were in fact exposed to toxic releases for which defendant is responsible, and that those releases were sufficient to have caused their disease. In other words, in cases where the Lone Pine order is granted, plaintiffs are required to produce at the threshold of litigation, and prior to any discovery, that quantum of proof that would be sufficient to withstand a motion for directed verdict. Failure to "abide" by the courts' order has resulted in dismissal.

[41] *Lore v. Lone Pine Corp.*, No. L 33606-85 (Superior Court New Jersey, Nov. 18, 1986), slip opinion.

B. Why Lone Pine Orders are a Problem

The entry of a Lone Pine order is a problem because it typically acts to deny claimants access to any pretrial discovery until they come forward with a *prima facie* causation case, substantiated with evidence sufficient to withstand a motion for directed verdict. Failure to do so generally means that the case will be dismissed. Lone Pine orders are particularly onerous to toxic tort plaintiffs who suffer from latent diseases. Proof of causation is always difficult in these cases, far more difficult than in the typical personal injury case. Indeed, in a car accident dispute, causation is generally the most straightforward part of the case--presenting an affidavit from a doctor attesting to the fact that being hit by a car caused a plaintiff to suffer a broken leg, for example, will generally not be difficult. In the car accident case, proof of *liability* is generally the more difficult task.

The opposite is true in a toxic tort case. While proof of liability is never easy, toxic tort cases often arise after a government enforcement action or other controversy has occurred, notifying the public of a problem. There will often be some evidence of liability in the public domain long before the first claim is filed. The causation portion of the case is almost always the most difficult part of the case to prove. This is because plaintiffs are often exposed to relatively small amounts of a toxin over a long period of time, with manifestation of disease occurring many years after the last possible exposure. Additionally, it is not unusual for those releases to occur without detection or measurement by the defendant company. In such cases, it is often necessary to "reconstruct" the dose to which your claimant was exposed, a task requiring access to the defendant company's historic records.

Despite the fact that toxic tort claimants have a clear need for, and a clear right to, discovery, defendants seeking to avoid the costs of defending the case have taken to arguing that discovery should be denied because all of the information necessary to prove a causation case is available to claimants, either in the public domain or by sampling current levels of toxins in soil, air and water. This premise is incorrect, however. Dose reconstruction can rarely be done based on data typically available in the public domain, or by relying on present-day environmental sampling alone. Rather, a successful dose reconstruction generally requires that plaintiffs gain access to information about the operations conducted by the defendant over a period of years, as well as internal records documenting both the amount and type of toxic chemicals used at the facility over the years, and the documented releases of these toxics.[42] This information is, by and large, only available from defendant companies by way of the discovery process.

Defendants often ask for Lone Pine relief in the guise of a motion for a protective order or a motion to set a pretrial schedule. Such motions can be successfully defeated, but plaintiffs must take steps to educate the judge about the scientific issues that make toxic tort cases different from other personal injury cases. A case brought by plaintiffs living in the vicinity of the Rocky Flats nuclear weapons production facility contains a helpful discussion of the difficulty Lone Pine orders can impose on claimants in toxic tort cases.[43]

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[42] See, e.g., Radiation Dose Reconstruction for Epidemiologic Uses, National Research Council, National Academy Press (1995), at 17 (Noting that there are three ways to estimate the "source term," or amount of radionuclides released from a site to the environment over a period of time: 1) engineering estimates of what the operation was expected to release; 2) historic reports of measured releases; and 3) use of independent measurements of the amount of radionuclides in the environment.)

[43] *Cook v. Rockwell International Corp.*, 147 F.R.D. 237 (D. Colo. 1993). In addition, several responses (or excerpts of responses) in opposition to Lone Pine orders are attached to this paper as Exhibit B.

In addition to educating the judge on the scientific issues, there are several powerful procedural arguments that should be raised. Most importantly, plaintiffs should point out that granting a Lone Pine order at the outset of litigation is tantamount to ruling that proper commencement of a lawsuit according to applicable rules of procedure is no longer sufficient to entitle parties to utilize the discovery process. Preventing claimants from obtaining evidence through discovery until they meet a standard higher or different than that imposed by Federal Rules 8 and 11 (or their state law counterparts) constitutes nothing less than a "back door" amendment of the rules of civil procedure. While a trial court certainly has the authority to take steps to control its docket and the scheduling of cases, denying all discovery is beyond the scope of its authority. Similarly, entering a Lone Pine order prior to any discovery is tantamount to granting a defense motion for a protective order without the movant having to meet the burdens imposed by the rules of civil procedure relating to such protective orders.

Although Lone Pine orders are draconian, toxic tort claimants should be prepared to address the concern that both judge and defendants will share--that plaintiffs will want to engage in unending discovery that is expensive for the defendant, delaying the ultimate day of reckoning. There are many ways to address this complaint--by pointing out that defendants can protect themselves by making use of the summary judgment process once discovery has been allowed to progress, that the court can require that the parties be prepared to go to trial within a given period of time or risk dismissal for want of prosecution, etc. However, when resisting Lone Pine orders, plaintiffs are always well advised to present to the court their own pretrial scheduling order, one that is reasonable and that plaintiffs can work with. This communicates to the court that the

claimants are anxious to have the case prepared and ready for trial, and that their opposition to the Lone Pine order is not simply an opposition to being put to their proof.

Unfortunately, toxic tort plaintiffs can expect to see defendants raise Lone Pine motions with increasing frequency in the future because there is just no down-side for defendants. However, the motions can be successfully resisted in a manner that also provides plaintiffs' counsel with an opportunity to educate the judge about the complexities inherent in toxic tort litigation.

IV. More Information, Less Regulation--the Trend Continues

Over the past decade, state and federal agencies have directed increasing attention to regulatory schemes that are less enforcement intensive and punitive, schemes that feature both the flexibility sought by business and incentives for voluntary compliance. As part of this campaign, regulators have increased some public information reporting requirements. Regulators hope to increase corporate accountability to local citizens by placing information about the kind of toxins that may be released in the hands of that community before a problem develops, so that more conflicts can be resolved at the local level, and so that appropriate accident prevention steps can be implemented on the local level. Such information can also be very useful to plaintiffs' lawyers, however, as they investigate the viability of potential claims their clients wish to file. The trend towards increasing the amount of information that must be submitted to the government appears to be continuing.

One example of this push towards generating more public information in the interests of enhancing corporate accountability is the Emergency Planning and Community Right-to-Know Act enacted by Congress in 1986. That Act requires that operators of certain types of facilities file what is known as a Toxic Chemical Release Form with the EPA. The form must list annual releases of each toxic chemical on a list entitled "Toxic Chemicals Subject to Section 313 of the Emergency Planning and Community Right to Know Act of 1986.[44] The release form must specify the annual quantities of each toxic chemical released to each environmental medium (air, water, land). This data is compiled into what is known as the toxics release inventory (TRI), a data base that provides helpful data to citizen groups. The data is also useful to plaintiffs' lawyers seeking to learn what chemicals personal injury claimants may have been exposed to by which local business.

On May 1, 1997, EPA published a final rule imposing toxic release reporting obligations on seven additional industry groups, including metals mining, coal mining, electric utilities, commercial hazardous waste treatment facilities, wholesale chemicals and allied products facilities, wholesale petroleum bulk terminals, and solvent recovery services.[45] Facilities in these industry groups must submit their first release forms by July 1, 1999.

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[44] 42 U.S.C.A. §11023; the list of chemicals is found in Committee Print 99-169 of the Senate Committee on Environmental and Public Works.

[45] 62 Fed. Reg. 23834, May 1, 1997.

In addition, EPA has also issued an Advance Notice of Proposed Rulemaking, announcing its intentions to expand the Right-to-Know Act again by increasing the types of information that must be reported by all industry groups subject to the act.[46] EPA specifically intends to increase the amount of information available to the public about chemical use and "through-put." If EPA issues a final rule in this area, companies may well be required to disclose details about materials accounting-- how much of a chemical came into the facility, how much was transformed into products and/or waste, and how much ultimately left the facility site. This information will be useful in "double-checking" the accuracy of the annual reports already disclosed by subject facilities, and will present a more comprehensive picture of chemical losses or releases in a community.[47]

V. The Audit Privilege--Still Going Strong

In stark contrast to the trend toward increasing the amount of public information that must be submitted to the government is the trend towards enacting and strengthening audit privileges, which insulate from discovery and disclosure facts about environmental compliance discovered by companies as they seek to determine whether they are complying with applicable statutory requirements. The Texas Legislature first enacted an audit privilege bill in 1995 when it passed House Bill 2473. That bill created a statutory self-evaluative privilege for companies conducting

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[46] 61 Fed. Reg. 51322, October 1, 1996; 62 Fed. Reg. 365, January 3, 1997.

[47] Authority for this rule is derived not only from the Emergency Planning and Community Right-to-Know Act, but also from the Toxic Substances Control Act, §8(a), which permits EPA to require manufacturers, importers and processors of chemical substances to submit such reports as may reasonably be required.

voluntary compliance audits of their operations.[48] Specifically, HB 2473 provided that "audit reports" prepared by regulated entities could be insulated from discovery, and could not be introduced as evidence in any civil, criminal or administrative proceeding.[49] The bill also prohibited employees of state agencies from reviewing, or even requesting a copy of an audit report when conducting an inspection of a regulated facility.[50] Companies that choose to submit audit reports to the government may do so under the terms of a confidentiality agreement; any employee disclosing an audit report in contravention of a confidentiality order could be convicted of a Class B misdemeanor.[51] Finally, the bill provided that any regulated entity or person making a voluntary disclosure of a violation of an environmental or health and safety law would be immune from administrative, civil or criminal penalties for the violations disclosed.[52] As of February, 1997, 20 states (including Texas) had adopted such legislation.[53] Audit privilege legislation was being considered in the state legislatures of an additional eleven states.[54]

Not surprisingly, audit privilege laws are not greeted with enthusiasm in the plaintiffs' bar. The laws cloak documents bearing directly on the issue of a defendant's liability and knowledge

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[48] Tex. Civ. Stat. Art. 4447cc (Vernon (1995).

[49] Tex. Civ. Stat. Art. 4447cc, §5(a), (b).

[50] *Id.* at §5(e).

[51] *Id.*, §5(b)(2), (d).

[52] *Id.*, §10(a).

[53] Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia, and Wyoming.

[54] Alaska, Delaware, Hawaii, Missouri, Montana, Nebraska, New York, Oklahoma, Pennsylvania, Tennessee, and Virginia.

from discovery. Worse, the laws prevent plaintiffs from using such documents if obtained from a source outside of the formal discovery channels. In addition, the fact that criminal penalties may be imposed on state employees who disclose information in audit reports submitted under a confidentiality agreement may well have a chilling effect on a state employee's willingness to divulge *any* documents, even those which ought to be disclosed under state open records acts.

Those representing citizens in the regulatory process had even less to be excited about than tort claimants, given that many audit privilege laws (including Texas's) provide companies with immunity from regulatory enforcement if the company voluntarily identifies and discloses a violation. In response to the passage of the Texas audit privilege law, the Environmental Defense Fund (EDF) filed a petition with the Environmental Protection Agency, asking it to partially withdraw its delegation of authority to enforce the federal Safe Drinking Water Act, a delegation of authority previously granted to Texas.[55] EDF claimed that "recent changes to Texas law are so dramatic" that the Underground Injection Control (UIC) program administered by the Texas Natural Resource Conservation Commission (TNRCC) no longer meets the minimum requirements of the federal UIC program. The EDF petition also complained that Texas no longer had an adequate compliance and enforcement program, and that it did not provide the opportunities for public participation in state permit or enforcement decisions required by federal law.[56] Passage of the audit privilege law was the cause of several of these deficiencies.

Although the EDF petition asked only for the withdrawal of delegation of the UIC

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[55] "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, June 17, 1996 (hereinafter "EDF Petition"). The petition is attached to this paper as Exhibit C.

[56] 42 U.S.C. §300h-1(b)(1)(A)(i), (ii).

program, the organization's cover letter to EPA Administrator Carole Browner and Regional Administrator Jane Saginaw made clear that EDF believed that the minimum requirements for the UIC program were similar--in many cases identical--to the minimum requirements of other federal programs, including specifically the Resource Conservation and Recovery Act and the Clean Air Act. To the extent that audit privilege laws compromised delegation of the UIC program, then, they might also compromise delegation of other federal environmental programs.

The EDF petition was still pending when the Texas Legislature reconvened for its 1997 biennial session. On May 12, 1997, the Legislature sent House Bill 3459 to the Governor. This bill, enacted to embody an agreement struck between the EPA and the State of Texas in response to EDF's petition, made several changes to the audit privilege legislation, which were aimed at addressing concerns outlined by the EPA during its consideration of the EDF petition:

* the bill deletes language prohibiting audit reports from being discovered, or being used in evidence in a **criminal** proceeding, but clarifies that the use of audit reports in a criminal proceeding does not waive the audit privilege for purposes of any civil or administrative proceedings.

* the bill adds language intended to protect those disclosing information to law enforcement officials from criminal liability, so long as federal or state law already provide

* the bill deletes provisions that make the disclosure of audit reports submitted to the government under a confidentiality agreement a criminal offense. Under the revised audit privilege law, such unauthorized disclosure by a state employee subjects that employee to civil penalties under Chapter 552 of the Government Code.

* the bill also authorizes a court to impose sanctions not to exceed $10,000 if it finds that a person or entity claimed knowingly or intentionally claimed that the audit privilege applied to protect information known to fall outside the protection of the audit privilege law.

* the new law no longer provides immunity from criminal prosecution to those voluntarily disclosing environmental violations

* the law no longer provides immunity from civil or administrative penalties to those voluntarily disclosing violations of environmental or health and safety laws if the violation disclosed resulted in imminent and substantial risk of serious injury to persons on-site, or to off-site persons, property or to the off-site environment.

* nor does the new law preserve immunity from civil or administrative penalties to entities voluntarily disclosing violations if the disclosed violation resulted in a "substantial economic benefit which gives the violator a clear advantage over its business competitors."[57]

While the legislative changes embodied in HB 3459 appear to address many of the EPA's concerns, private litigants obtained no real relief from the barriers constructed by the 1995 audit privilege law. However, it appears that for the time being, Texas will continue to retain delegation of federal environmental regulatory programs.

There is no doubt that audit privilege laws will insulate important and helpful documents from disclosure. All that plaintiffs' counsel can do in the face of a law like Texas's is press a defendant company to clearly establish its right to protect documents under the statute, and to look for evidence that the company has waived its right to protect the information because it has previously disclosed the information for its own purposes.

CONCLUSION

It cannot be denied that the trend toward reforming tort laws at the state and federal level has made it more difficult to prosecute personal injury claims nationwide. However, decisions

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[57] HB 3459, Section 7, attached to this paper as Exhibit D.

at the federal level--most notably that in the *Amchem* case--reveal that the courts are simply unwilling to allow trends to circumscribe claimants' rights to continue completely unchecked. This is less clear in the state legislatures, however, and members of the bar representing toxic tort claimants would be well advised to keep close watch on their respective legislatures in order to avoid undesirable legislative initiatives.

EXHIBIT A

AMCHEM PRODUCTS, INC., et al.,
Petitioners,
v.
George WINDSOR et al.

No. 96-270.

Supreme Court of the United States

Argued Feb. 18, 1997.

Decided June 25, 1997.

Asbestos products manufacturers who were members of Center for Claims Resolution (CCR), and whose stipulation of proposed global settlement of claims by persons exposed to asbestos had been court-approved, moved to enjoin actions against them by individuals who failed to timely opt out of class. The United States District Court for the Eastern District of Pennsylvania, Lowell A. Reed, Jr., J., 878 F.Supp. 716, granted injunction under All-Writs Act and Anti-Injunction Act. Parties objecting to class certification appealed, and the Court of Appeals for the Third Circuit, 83 F.3d 610, vacated and remanded with directions to decertify class. Certiorari was granted, and the Supreme Court, Justice Ginsburg, held that: (1) district court faced with request for settlement-only class certification need not inquire whether case would present intractable problems of trial management, but other requirements for certification must still be satisfied, abrogating In re Asbestos Litigation, 90 F.3d 963, White v. National Football League, 41 F.3d 402, In re A.H. Robins Co., 880 F.2d 709, and Malchman v. Davis, 761 F.2d 893, and (2) requirements for class certification of commonality of issues of fact and law and adequacy of representation were not met.

Affirmed.

Justice Breyer filed an opinion concurring in part and dissenting in part in which Justice Stevens joined.

Justice O'Connor took no part in the consideration or decision of the case.

[1] FEDERAL CIVIL PROCEDURE ⇐ 161
170Ak161
Requirements of rule governing class actions must be interpreted in keeping with both Article III constraints on federal jurisdiction and Rules Enabling Act, which instructs that rules of procedure shall not abridge, enlarge, or modify any substantive right. U.S.C.A. Const. Art. 3, § 2; 28 U.S.C.A. § 2072(b); Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[2] FEDERAL CIVIL PROCEDURE ⇐ 161.1
170Ak161.1
Rule allowing certification of class action where separate actions by or against individual class members would risk establishing incompatible standards of conduct for party opposing class takes in cases where party is obliged by law to treat members of class alike, such as a utility acting toward customers or a government imposing a tax, or where party must treat all alike as matter of practical necessity, such as riparian owner using water as against downriver owners. Fed.Rules Civ.Proc.Rule 23(b)(1)(A), 28 U.S.C.A.

[3] FEDERAL CIVIL PROCEDURE ⇐ 165
170Ak165
While text of rule allowing certification of class action where questions of law and fact common to class members predominate and class action is superior to other methods of resolution does not exclude from certification cases in which individual damages run high, drafters of rule had dominantly in mind vindication of rights of groups of people who individually would be without effective strength to bring their opponents into court at all. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[4] FEDERAL CIVIL PROCEDURE ⇐ 161.1
170Ak161.1
Policy at very core of class action mechanism is to overcome problem that small recoveries do not provide incentive for any individual to bring a solo action prosecuting his or her rights; class action solves this problem by aggregating relatively paltry potential recoveries into something worth someone's, usually an attorney's, labor. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[5] FEDERAL CIVIL PROCEDURE ⇐ 161.1
170Ak161.1
Settlement is relevant to certification of proposed class action. Fed.Rules Civ.Proc.Rule 23, 28

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U.S.C.A.

[6] COMPROMISE AND SETTLEMENT ⇐ 67
89k67
While district court which is confronted with request for settlement-only class certification need not inquire whether case, if tried, would present intractable management problems, for proposal is that there be no trial, other specifications of rule establishing requirements for certification, which are designed to protect absentees by blocking unwarranted or overbroad class definitions, demand undiluted, even heightened, attention in settlement context; such attention is of vital importance, for court asked to certify settlement class will lack opportunity, present when case is litigated, to adjust class, informed by proceedings as they unfold; abrogating In re Asbestos Litigation, 90 F.3d 963; White v. National Football League, 41 F.3d 402; In re A.H. Robins Co., 880 F.2d 709; Malchman v. Davis, 761 F.2d 893. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[6] FEDERAL CIVIL PROCEDURE ⇐ 161.1
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[7] FEDERAL CIVIL PROCEDURE ⇐ 21
170Ak21
Federal rules take effect after extensive deliberative process involving many reviewers, and text of rule thus proposed and reviewed limits judicial inventiveness, as courts are not free to amend rule outside process Congress ordered, which is properly tuned to instruction of Rules Enabling Act that rules of procedure shall not abridge any substantive right. 28 U.S.C.A. § 2072(b).

[8] COMPROMISE AND SETTLEMENT ⇐ 55
89k55
Rule providing that class action shall not be dismissed or compromised without approval of court, and that notice of proposed dismissal or compromise shall be given to all members of class in such manner as court directs, was designed to function as additional requirement, not superseding direction, for "class action" to which rule is one qualified for certification as class action. Fed.Rules Civ.Proc.Rule 23(a, b, e), 28 U.S.C.A.

[8] COMPROMISE AND SETTLEMENT ⇐ 68
89k68
Rule providing that class action shall not be dismissed or compromised without approval of court, and that notice of proposed dismissal or compromise shall be given to all members of class in such manner as court directs, was designed to function as additional requirement, not superseding direction, for "class action" to which rule is one qualified for certification as class action. Fed.Rules Civ.Proc.Rule 23(a, b, e), 28 U.S.C.A.

[8] FEDERAL CIVIL PROCEDURE ⇐ 177.1
170Ak177.1
Rule providing that class action shall not be dismissed or compromised without approval of court, and that notice of proposed dismissal or compromise shall be given to all members of class in such manner as court directs, was designed to function as additional requirement, not superseding direction, for "class action" to which rule is one qualified for certification as class action. Fed.Rules Civ.Proc.Rule 23(a, b, e), 28 U.S.C.A.

[8] FEDERAL CIVIL PROCEDURE ⇐ 1696
170Ak1696
Rule providing that class action shall not be dismissed or compromised without approval of court, and that notice of proposed dismissal or compromise shall be given to all members of class in such manner as court directs, was designed to function as additional requirement, not superseding direction, for "class action" to which rule is one qualified for certification as class action. Fed.Rules Civ.Proc.Rule 23(a, b, e), 28 U.S.C.A.

[8] FEDERAL CIVIL PROCEDURE ⇐ 1708

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170Ak1708
Rule providing that class action shall not be dismissed or compromised without approval of court, and that notice of proposed dismissal or compromise shall be given to all members of class in such manner as court directs, was designed to function as additional requirement, not superseding direction, for "class action" to which rule is one qualified for certification as class action. Fed.Rules Civ.Proc.Rule 23(a, b, e), 28 U.S.C.A.

[9] COMPROMISE AND SETTLEMENT ⇐ 67
89k67
Rules provisions which establish prerequisites to certification of class action and types of class actions which are maintainable focus court attention on whether proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives, and that dominant concern persists when settlement, rather than trial, is proposed. Fed.Rules Civ.Proc.Rule 23(a, b), 28 U.S.C.A.

[9] FEDERAL CIVIL PROCEDURE ⇐ 161.1
170Ak161.1
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[10] COMPROMISE AND SETTLEMENT ⇐ 67
89k67
Safeguards provided by criteria for qualification of action as class action are not impractical impediments, or checks shorn of utility, in context of proposed settlement class; standards set for protection of absent class members serve to inhibit appraisals of chancellor's foot kind, or class certifications dependent upon court's gestalt judgment or overarching impression of settlement's fairness, and if fairness inquiry controlled certification and permitted class designation despite impossibility of litigation, both class counsel and the court would be disarmed. Fed.Rules Civ.Proc.Rule 23(a, b, e), 28 U.S.C.A.

[10] FEDERAL CIVIL PROCEDURE ⇐ 161.1
170Ak161.1
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[11] FEDERAL CIVIL PROCEDURE ⇐ 181
170Ak181
Requirement for certification of class action that common questions of law or fact predominate over any questions affecting only individual members was not met in proposed class action which sought to achieve global settlement of current and future asbestos-related claims; benefits asbestos-exposed persons might gain from establishment of compensation scale was not pertinent to predominance inquiry, fact that all members had been exposed to asbestos products was insufficient to meet predominance standard, as different members were exposed to different products for different amounts of time in different ways, and differences in state law compounded those disparities. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[12] FEDERAL CIVIL PROCEDURE ⇐ 165
170Ak165
Inquiry into whether common questions of law or fact predominate over any questions affecting only individual members of class, as will allow certification of class action, tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[13] COMPROMISE AND SETTLEMENT ⇐ 55
89k55
Inquiry appropriate under rule which prohibits dismissal or compromise of class action without approval of court and notice to all class members protects unnamed class members from unjust or

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unfair settlements affecting their rights when representatives become fainthearted before action is adjudicated or are able to secure satisfaction of their individual claims by compromise. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[13] FEDERAL CIVIL PROCEDURE ⇐ 1696
170Ak1696
Inquiry appropriate under rule which prohibits dismissal or compromise of class action without approval of court and notice to all class members protects unnamed class members from unjust or unfair settlements affecting their rights when representatives become fainthearted before action is adjudicated or are able to secure satisfaction of their individual claims by compromise. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[14] COMPROMISE AND SETTLEMENT ⇐ 55
89k55
It is not mission of rule which prohibits dismissal or compromise of class action without approval of court and notice to class members to assure class cohesion that legitimizes representative action in the first place, and if common interest in fair compromise could satisfy predominance requirement for certification, that vital prescription would be stripped of any meaning in settlement context. Fed.Rules Civ.Proc.Rule 23(b)(3), (e), 28 U.S.C.A.

[14] FEDERAL CIVIL PROCEDURE ⇐ 1696
170Ak1696
It is not mission of rule which prohibits dismissal or compromise of class action without approval of court and notice to class members to assure class cohesion that legitimizes representative action in the first place, and if common interest in fair compromise could satisfy predominance requirement for certification, that vital prescription would be stripped of any meaning in settlement context. Fed.Rules Civ.Proc.Rule 23(b)(3), (e), 28 U.S.C.A.

[15] FEDERAL CIVIL PROCEDURE ⇐ 165
170Ak165
Requirement for certification of class action that common questions of law or fact predominate over any questions affecting only individual members is test readily met in certain cases alleging consumer or securities fraud or violations of antitrust laws, and also may, depending upon the circumstances, be satisfied in mass tort cases arising from common cause or disaster. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[16] FEDERAL CIVIL PROCEDURE ⇐ 181
170Ak181
Requirement for certification of class action that named parties will fairly and adequately protect interests of class was not met in proposed class action which sought to achieve global settlement of current and future asbestos-related claims; named parties sought to act on behalf of single giant class rather than on behalf of discrete subclasses, goal of class members who were currently injured of receiving generous immediate payments conflicted with interest of exposure-only plaintiffs in ensuring ample, inflation-protected fund for the future, and proposed settlement had no structural assurance of fair and adequate representation for diverse groups and individuals affected. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

[17] FEDERAL CIVIL PROCEDURE ⇐ 164
170Ak164
Requirement for certification of class action that named parties will fairly and adequately protect interests of class serves to uncover conflicts of interest between named parties and class they seek to represent. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

[18] FEDERAL CIVIL PROCEDURE ⇐ 164
170Ak164
In order to satisfy requirement for certification of class action that named parties will fairly and adequately protect interests of class, class representative must be part of class and possess same interest and suffer same injury as class members. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

[19] FEDERAL CIVIL PROCEDURE ⇐ 164
170Ak164
Adequacy-of-representation requirement for certification of class action tends to merge with commonality and typicality criteria of rule, which serve as guideposts for determining whether maintenance of class action is economical and whether named plaintiff's claim and class claims are so interrelated that interests of class members will be fairly and adequately protected in their absence, and adequacy heading also factors in competency and

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conflicts of class counsel. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*1 This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification sought to achieve global settlement of current and future asbestos-related claims. Never intending to litigate, the settling parties--petitioners and the representatives of the plaintiff class described below--presented to the District Court a class action complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification. The complaint identifies nine lead plaintiffs, designating them and members of their families as representatives of a class comprised of all persons who had not previously sued any of the asbestos-manufacturing companies that are petitioners in this suit, but who (1) had been exposed--occupationally or through the occupational exposure of a spouse or household member--to asbestos attributable to a petitioner, or (2) whose spouse or family member had been so exposed. Potentially hundreds of thousands, perhaps millions, of individuals may fit this description. All named plaintiffs alleged exposure; more than half of them alleged already manifested physical injuries; the others, so-called "exposure-only" claimants, alleged that they had not yet manifested any asbestos-related condition. The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the entire class.

The exhaustive agreement, inter alia, (1) proposed to settle, and to preclude nearly all class members from litigating, claims not previously filed against petitioners; (2) detailed an administrative mechanism and a schedule of payments to compensate class members who meet defined exposure and medical criteria; (3) described four categories of compensable cancers and nonmalignant conditions, and specified the range of damages to be paid qualifying claimants for each; (4) did not adjust payments for inflation; (5) capped the number of claims payable annually for each disease; and (6) denied compensation for family members' loss-of-consortium claims, for exposure-only plaintiffs' claims for emotional distress, enhanced risk of disease, and medical monitoring, and for "pleural" claims involving lung plaques but no physical impairment, even if otherwise applicable state law recognized such claims.

The District Court approved the settling parties' plan for giving notice to the class and certified the proposed class for settlement only. The court found, over numerous challenges raised by the objectors, that the settlement was fair, the court's jurisdiction properly invoked, and representation and notice adequate. Pending the issuance of a final order, the District Court enjoined class members from separately pursuing asbestos suits in any federal or state court. The Third Circuit ultimately vacated the District Court's orders. Although the objectors maintained that the case was not justiciable and that the exposure-only claimants lacked standing to sue, the Court of Appeals declined to reach these issues, reasoning that they would not exist but for the class certification. The court acknowledged that a class action may be certified for settlement only, but held that the certification requirements of Rule 23 must be met as if the case were going to be litigated, without taking the settlement into account. The court nevertheless homed in on the settlement's terms in examining aspects of the case under Rule 23 criteria. The Court of Appeals explained that certification was inappropriate because the class failed to satisfy, among other provisions, Rule 23(b)(3)'s requirement that questions common to the class "predominate over" other questions, and Rule 23(a)(4)'s adequacy of representation requirement. The court therefore ordered the class decertified.

*2 Held:

1. The class certification issues are dispositive here in that their resolution is logically antecedent to the existence of any Article III issues. This Court therefore declines to resolve objectors' assertions that no justiciable case or controversy is presented and that the exposure-only claimants lack standing to sue. Cf. Arizonans for Official English v. Arizona, 520 U.S. ----, ----, 117 S.Ct. 1055, 1068, 137 L.Ed.2d 170. The Court follows this path mindful that Rule 23's requirements must be

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interpreted in keeping with Article III constraints, and with the Rules Enabling Act's instruction that procedural rules not abridge, enlarge, or modify any substantive right. Pp. ---- - ----.

2. The sprawling class the District Court certified does not satisfy Rule 23's requirements. Pp. ---- - ----.

(a) Rule 23 gained its current shape in a 1966 revision. Its subdivisions (a) and (b) enumerate criteria that must be met for a class to be certified. Rule 23(b)(3) was the most adventuresome innovation of the 1966 Amendments, permitting judgments for money that would bind all class members save those who opt out. To gain certification under Rule 23(b)(3), a class must satisfy the requirements of Rule 23(a), among them, that named class representatives will fairly and adequately protect class interests; the class must also meet the Rule 23(b)(3) criteria that common questions "predominate over any questions affecting only individual members" and that class resolution be "superior to other available methods for the fair and efficient adjudication of the controversy." To alert Rule 23(b)(3) class members to their right to "opt out," Rule 23 requires "the best notice practicable under the circumstances." Rule 23(c)(2). Finally, Rule 23(e) specifies that a class action cannot be settled without the court's approval, and that notice of the proposed compromise must be given to all class members in such manner as the court directs. Pp. ---- - ----.

(b) Because settlement is relevant to the propriety of class certification, the Third Circuit's statement that Rule 23(a) and (b)(3) "must be satisfied without taking into account the settlement" bears modification. But the Third Circuit did not, in fact, ignore the settlement. The court homed in on settlement terms in explaining why it found absentees' interests inadequately represented. The Third Circuit's inspection of the settlement agreement in that regard was altogether proper. Whether trial would present intractable management problems, see Rule 23(b)(3)(D), is not a consideration when settlement-only certification is requested, for the proposal is that there be no trial. But other specifications of the rule designed to protect absentee class members by blocking unwarranted or overbroad class definitions are of vital importance in the settlement context, for the court in such a case will lack the opportunity to adjust the class as litigation unfolds. See Rule 23(c) and (d). And, of overriding importance, courts must be mindful that they are bound to enforce the rule as now composed, for Federal Rules may be amended only through the extensive deliberative process Congress prescribed. Rule 23(e)'s settlement prescription was designed to function as an additional requirement, not a superseding direction, to the class-qualifying criteria of Rule 23(a) and (b). Cf. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176-177, 94 S.Ct. 2140, 2151-2152, 40 L.Ed.2d 732. The dominant concern of Rule 23(a) and (b)--that a proposed class have sufficient unity so that absentees can fairly be bound by class representatives' decisions--persists when settlement, rather than trial, is proposed. Those subdivisions' safeguards provide practical checks in the settlement context. First, their standards serve to inhibit class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness. Second, if a Rule 23(e) fairness inquiry controlled certification, eclipsing Rule 23(a) and (b), and permitting certification despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court would face a bargain proffered for its approval without benefit of adversarial investigation. Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted by the rulemakers--that if a settlement is "fair," then certification is proper. Pp. ---- - ----.

*3 (c) Rule 23(b)(3)'s predominance requirement is not met by the factors relied on by the District Court and the settling parties: class members' shared experience of asbestos exposure; their common interest in receiving prompt and fair compensation, while minimizing the risks and transaction costs inherent in the tort system's asbestos litigation process; and the settlement's fairness. The benefits asbestos-exposed persons might gain from a grand-scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement, and tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.

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In contrast, the Rule 23(e) inquiry protects unnamed class members from unjust or unfair settlements agreed to by fainthearted or self-interested class representatives; the Rule 23(e) prescription was not designed to assure the class cohesion that legitimizes representative action in the first place. If a common interest in a fair compromise could satisfy Rule 23(b)(3)'s predominance requirement, that vital prescription would be stripped of any meaning in the settlement context. The predominance criterion is not satisfied by class members' shared experience of asbestos exposure, given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions. No settlement class called to the Court's attention is as sprawling as the one certified here. Although mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement, the Advisory Committee for the 1966 Rule 23 revision advised that such cases are ordinarily not appropriate for class treatment, and warned district courts to exercise caution when individual stakes are high and disparities among class members great. The certification in this case does not follow the counsel of caution. That certification cannot be upheld, for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the rule's design. Pp. ---- - ----.

(d) Nor can the class approved by the District Court satisfy Rule 23(a)(4)' s adequate representation inquiry. That inquiry serves to uncover conflicts of interest between named parties and the class they seek to represent. See General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157-158, n. 13, 102 S.Ct. 2364, 2370-2371, n. 13, 72 L.Ed.2d 740. Representatives must be part of the class and possess the same interest and suffer the same injury as the class members. E.g., East Tex. Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S.Ct. 1891, 1896-1897, 52 L.Ed.2d 453. In this case, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future. Cf. General Telephone Co. of Northwest v. EEOC, 446 U.S. 318, 331, 100 S.Ct. 1698, 1706-1707, 64 L.Ed.2d 319. The disparity between the currently injured and exposure-only categories of plaintiffs, and the diversity within each category, are not made insignificant by the District Court's finding that petitioners' assets suffice to pay settled claims. Although this is not a Rule 23(b)(1)(B) "limited fund" case, the settlement's terms--e.g., no inflation adjustments, only a few claimants per year permitted to opt out at the back end, and loss-of-consortium claims extinguished--reflect essential allocation decisions designed to confine compensation and to limit defendants' liability. Thus, the settling parties achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. The Third Circuit found no assurance here that the named parties operated under a proper understanding of their representational responsibilities. That assessment is on the mark. Pp. ---- - ----.

*4 (e) In light of the conclusions that the class does not satisfy the requirements of common issue predominance and adequacy of representation, this Court need not rule, definitively, on the adequacy of the notice given here. The Court recognizes, however, the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous as the class certified by the District Court. Pp. ---- - ----.

(f) The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load the settling parties and the District Court heaped upon it. P. ----.

83 F.3d 610, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J.,

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joined. O'CONNOR, J., took no part in the consideration or decision of the case.

Stephen M. Shapiro, for petitioners.

Laurence H. Tribe, Cambridge, MA, for respondents.

For U.S. Supreme Court Briefs See:

1996 WL 721635 (Resp.Brief)

1996 WL 721641 (Pet.Brief)

1997 WL 13204 (Resp.Brief)

1997 WL 13206 (Resp.Brief)

1997 WL 13207 (Resp.Brief)

1997 WL 13208 (Resp.Brief)

1996 WL 722038 (Amicus.Brief)

1996 WL 722039 (Amicus.Brief)

1996 WL 722040 (Amicus.Brief)

1996 WL 744852 (Amicus.Brief)

1997 WL 13567 (Amicus.Brief)

1997 WL 13585 (Amicus.Brief)

1997 WL 13596 (Amicus.Brief)

1997 WL 13605 (Amicus.Brief)

1997 WL 14807 (Amicus.Brief)

1997 WL 16348 (Amicus.Brief)

For Transcript of Oral Argument See:

1997 WL 83675 (U.S.Oral.Arg.)

Justice GINSBURG delivered the opinion of the Court.

This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification sought to achieve global settlement of current and future asbestos-related claims. The class proposed for certification potentially encompasses hundreds of thousands, perhaps millions, of individuals tied together by this commonality: each was, or some day may be, adversely affected by past exposure to asbestos products manufactured by one or more of 20 companies. Those companies, defendants in the lower courts, are petitioners here.

The United States District Court for the Eastern District of Pennsylvania certified the class for settlement only, finding that the proposed settlement was fair and that representation and notice had been adequate. That court enjoined class members from separately pursuing asbestos-related personal-injury suits in any court, federal or state, pending the issuance of a final order. The Court of Appeals for the Third Circuit vacated the District Court's orders, holding that the class certification failed to satisfy Rule 23's requirements in several critical respects. We affirm the Court of Appeals' judgment.

I

A

The settlement-class certification we confront evolved in response to an asbestos-litigation crisis. See Georgine v. Amchem Products, Inc., 83 F.3d 610, 618, and n. 2 (C.A.3 1996) (citing commentary). A United States Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by THE CHIEF JUSTICE in September 1990, described facets of the problem in a 1991 report:

*5 "[This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.

"The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over;

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transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether." Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 (Mar.1991).

Real reform, the report concluded, required federal legislation creating a national asbestos dispute-resolution scheme. See id., at 3, 27-35; see also id., at 42 (dissenting statement of Hogan, J.) (agreeing that "a national solution is the only answer" and suggesting "passage by Congress of an administrative claims procedure similar to the Black Lung legislation"). As recommended by the Ad Hoc Committee, the Judicial Conference of the United States urged Congress to act. See Report of the Proceedings of the Judicial Conference of the United States 33 (Mar. 12, 1991). To this date, no congressional response has emerged.

In the face of legislative inaction, the federal courts--lacking authority to replace state tort systems with a national toxic tort compensation regime--endeavored to work with the procedural tools available to improve management of federal asbestos litigation. Eight federal judges, experienced in the superintendence of asbestos cases, urged the Judicial Panel on Multidistrict Litigation (MDL Panel), to consolidate in a single district all asbestos complaints then pending in federal courts. Accepting the recommendation, the MDL Panel transferred all asbestos cases then filed, but not yet on trial in federal courts to a single district, the United States District Court for the Eastern District of Pennsylvania; pursuant to the transfer order, the collected cases were consolidated for pretrial proceedings before Judge Weiner. See In re Asbestos Products Liability Litigation (No. VI), 771 F.Supp. 415, 422-424 (Jud.Pan.Mult.Lit. 1991). [FN1] The order aggregated pending cases only; no authority resides in the MDL Panel to license for consolidated proceedings claims not yet filed.

FN1. In a series of orders, the MDL Panel had previously denied other asbestos-case transfer requests. See In re Asbestos and Asbestos Insulation Material Products Liability Litigation, 431 F.Supp. 906, 910 (JPML 1977); In re Asbestos Products Liability Litigation (No. II), MDL-416 (JPML Mar. 13, 1980) (unpublished order); In re Asbestos School Products Liability Litigation, 606 F.Supp. 713, 714 (JPML 1985); In re Ship Asbestos Products Liability Litigation, MDL-676 (JPML Feb. 4, 1986) (unpublished order); In re Leon Blair Asbestos Products Liability Litigation, MDL-702 (JPML Feb. 6, 1987) (unpublished order).

B

After the consolidation, attorneys for plaintiffs and defendants formed separate steering committees and began settlement negotiations. Ronald L. Motley and Gene Locks--later appointed, along with Motley's law partner Joseph F. Rice, to represent the plaintiff class in this action--co-chaired the Plaintiffs' Steering Committee. Counsel for the Center for Claims Resolution (CCR), the consortium of 20 former asbestos manufacturers now before us as petitioners, participated in the Defendants' Steering Committee. [FN2] Although the MDL order collected, transferred, and consolidated only cases already commenced in federal courts, settlement negotiations included efforts to find a "means of resolving ... future cases." Record, Doc. 3, p. 2 (Memorandum in Support of Joint Motion for Conditional Class Certification); see also Georgine v. Amchem Products, Inc., 157 F.R.D. 246, 266 (E.D.Pa.1994) ("primary purpose of the settlement talks in the consolidated MDL litigation was to craft a national settlement that would provide an alternative resolution mechanism for asbestos claims," including claims that might be filed in the future).

FN2. The CCR Companies are Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Asbestos Claims Management Corp.; Certainteed Corp.; C.E. Thurston & Sons, Inc.; Dana Corp.; Ferodo America, Inc.; Flexitallic, Inc.; GAF Building Materials, Inc.; I.U. North America, Inc.; Maremont Corp.; National Services Industries, Inc.; Nosroc Corp.; Pfizer Inc.; Quigley Co.; Shook & Fletcher Insulation Co.; T & N, PLC; Union Carbide Corp.; and United States Gypsum Co. All of the CCR petitioners stopped manufacturing asbestos products around 1975.

*6 In November 1991, the Defendants' Steering Committee made an offer designed to settle all pending and future asbestos cases by providing a fund for distribution by plaintiffs' counsel among asbestos-exposed individuals. The Plaintiffs'

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Steering Committee rejected this offer, and negotiations fell apart. CCR, however, continued to pursue "a workable administrative system for the handling of future claims." Id., at 270.

To that end, CCR counsel approached the lawyers who had headed the Plaintiffs' Steering Committee in the unsuccessful negotiations, and a new round of negotiations began; that round yielded the mass settlement agreement now in controversy. At the time, the former heads of the Plaintiffs' Steering Committee represented thousands of plaintiffs with then-pending asbestos-related claims--claimants the parties to this suit call "inventory" plaintiffs. CCR indicated in these discussions that it would resist settlement of inventory cases absent "some kind of protection for the future." Id., at 294; see also id., at 295 (CCR communicated to the inventory plaintiffs' attorneys that once the CCR defendants saw a rational way to deal with claims expected to be filed in the future, those defendants would be prepared to address the settlement of pending cases).

Settlement talks thus concentrated on devising an administrative scheme for disposition of asbestos claims not yet in litigation. In these negotiations, counsel for masses of inventory plaintiffs endeavored to represent the interests of the anticipated future claimants, although those lawyers then had no attorney-client relationship with such claimants.

Once negotiations seemed likely to produce an agreement purporting to bind potential plaintiffs, CCR agreed to settle, through separate agreements, the claims of plaintiffs who had already filed asbestos-related lawsuits. In one such agreement, CCR defendants promised to pay more than $200 million to gain release of the claims of numerous inventory plaintiffs. After settling the inventory claims, CCR, together with the plaintiffs' lawyers CCR had approached, launched this case, exclusively involving persons outside the MDL Panel's province--plaintiffs without already pending lawsuits. [FN3]

FN3. It is basic to comprehension of this proceeding to notice that no transferred case is included in the settlement at issue, and no case covered by the settlement existed as a civil action at the time of the MDL Panel transfer.

C

The class action thus instituted was not intended to be litigated. Rather, within the space of a single day, January 15, 1993, the settling parties--CCR defendants and the representatives of the plaintiff class described below--presented to the District Court a complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification. [FN4]

FN4. Also on the same day, the CCR defendants filed a third-party action against their insurers, seeking a declaratory judgment holding the insurers liable for the costs of the settlement. The insurance litigation, upon which implementation of the settlement is conditioned, is still pending in the District Court. See, e.g., Georgine v. Amchem Prods., Inc., No. 93-0215, 1994 WL 502475 (E.D.Pa., Sept.2, 1994) (denying motion of insurers to compel discovery).

The complaint identified nine lead plaintiffs, designating them and members of their families as representatives of a class comprising all persons who had not filed an asbestos-related lawsuit against a CCR defendant as of the date the class action commenced, but who (1) had been exposed--occupationally or through the occupational exposure of a spouse or household member--to asbestos or products containing asbestos attributable to a CCR defendant, or (2) whose spouse or family member had been so exposed. [FN5] Untold numbers of individuals may fall within this description. All named plaintiffs alleged that they or a member of their family had been exposed to asbestos-containing products of CCR defendants. More than half of the named plaintiffs alleged that they or their family members had already suffered various physical injuries as a result of the exposure. The others alleged that they had not yet manifested any asbestos-related condition. The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the class as a whole.

FN5. The complaint defines the class as follows: "(a) All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U.S. military, merchant, or passenger ships), either occupationally or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-

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> containing products for which one or more of the Defendants may bear legal liability and who, as of January 15, 1993, reside in the United States or its territories, and who have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury, or damage, or death in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability). "(b) All spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraph (a) above who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) above in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability)." 1 App. 13-14.

*7 The complaint invoked the District Court's diversity jurisdiction and asserted various state-law claims for relief, including (1) negligent failure to warn, (2) strict liability, (3) breach of express and implied warranty, (4) negligent infliction of emotional distress, (5) enhanced risk of disease, (6) medical monitoring, and (7) civil conspiracy. Each plaintiff requested unspecified damages in excess of $100,000. CCR defendants' answer denied the principal allegations of the complaint and asserted 11 affirmative defenses.

A stipulation of settlement accompanied the pleadings; it proposed to settle, and to preclude nearly all class members from litigating against CCR companies, all claims not filed before January 15, 1993, involving compensation for present and future asbestos-related personal injury or death. An exhaustive document exceeding 100 pages, the stipulation presents in detail an administrative mechanism and a schedule of payments to compensate class members who meet defined asbestos-exposure and medical requirements. The stipulation describes four categories of compensable disease: mesothelioma; lung cancer; certain "other cancers" (colon-rectal, laryngeal, esophageal, and stomach cancer); and "non-malignant conditions" (asbestosis and bilateral pleural thickening). Persons with "exceptional" medical claims--claims that do not fall within the four described diagnostic categories--may in some instances qualify for compensation, but the settlement caps the number of "exceptional" claims CCR must cover.

For each qualifying disease category, the stipulation specifies the range of damages CCR will pay to qualifying claimants. Payments under the settlement are not adjustable for inflation. Mesothelioma claimants--the most highly compensated category--are scheduled to receive between $20,000 and $200,000. The stipulation provides that CCR is to propose the level of compensation within the prescribed ranges; it also establishes procedures to resolve disputes over medical diagnoses and levels of compensation.

Compensation above the fixed ranges may be obtained for "extraordinary" claims. But the settlement places both numerical caps and dollar limits on such claims. [FN6] The settlement also imposes "case flow maximums," which cap the number of claims payable for each disease in a given year.

> FN6. Only three percent of the qualified mesothelioma, lung cancer, and "other cancer" claims, and only one percent of the total number of qualified "non-malignant condition" claims can be designated "extraordinary." Average expenditures are specified for claims found "extraordinary"; mesothelioma victims with compensable extraordinary claims, for example, receive, on average, $300,000.

Class members are to receive no compensation for certain kinds of claims, even if otherwise applicable state law recognizes such claims. Claims that garner no compensation under the settlement include claims by family members of asbestos-exposed individuals for loss of consortium, and claims by so-called "exposure-only" plaintiffs for increased risk of cancer, fear of future asbestos-related injury, and medical monitoring. "Pleural" claims, which might be asserted by persons with asbestos-related plaques on their lungs but no accompanying physical impairment, are also excluded. Although not entitled to present compensation, exposure-only claimants and pleural claimants may qualify for benefits when and if they develop a compensable disease and meet the relevant exposure and medical criteria. Defendants forgo defenses to liability, including statute of limitations pleas.

*8 Class members, in the main, are bound by the settlement in perpetuity, while CCR defendants may choose to withdraw from the settlement after ten

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years. A small number of class members--only a few per year--may reject the settlement and pursue their claims in court. Those permitted to exercise this option, however, may not assert any punitive damages claim or any claim for increased risk of cancer. Aspects of the administration of the settlement are to be monitored by the AFL-CIO and class counsel. Class counsel are to receive attorneys' fees in an amount to be approved by the District Court.

D

On January 29, 1993, as requested by the settling parties, the District Court conditionally certified, under Federal Rule of Civil Procedure 23(b)(3), an encompassing opt-out class. The certified class included persons occupationally exposed to defendants' asbestos products, and members of their families, who had not filed suit as of January 15. Judge Weiner appointed Locks, Motley, and Rice as class counsel, noting that "[t]he Court may in the future appoint additional counsel if it is deemed necessary and advisable." Record, Doc. 11, p. 3 (Class Certification Order). At no stage of the proceedings, however, were additional counsel in fact appointed. Nor was the class ever divided into subclasses. In a separate order, Judge Weiner assigned to Judge Reed, also of the Eastern District of Pennsylvania, "the task of conducting fairness proceedings and of determining whether the proposed settlement is fair to the class." See 157 F.R.D., at 258. Various class members raised objections to the settlement stipulation, and Judge Weiner granted the objectors full rights to participate in the subsequent proceedings. Ibid. [FN7]

FN7. These objectors, now respondents before this Court, include three groups of individuals with overlapping interests, designated as the "Windsor Group," the New Jersey "White Lung Group," and the "Cargile Group." Margaret Balonis, an individual objector, is also a respondent before this Court. Balonis states that her husband, Casimir, was exposed to asbestos in the late 1940s and was diagnosed with mesothelioma in May 1994, after expiration of the opt-out period, see infra, at ----, ----. The Balonises sued CCR members in Maryland state court, but were charged with civil contempt for violating the federal District Court's anti-suit injunction. Casimir Balonis died in October 1996. See Brief for Balonis Respondents 9-11.

In preliminary rulings, Judge Reed held that the District Court had subject-matter jurisdiction, see Carlough v. Amchem Products, Inc., 834 F.Supp. 1437, 1467-1468 (E.D.Pa.1993), and he approved the settling parties' elaborate plan for giving notice to the class, see Carlough v. Amchem Products, Inc., 158 F.R.D. 314, 336 (E.D.Pa.1993). The court-approved notice informed recipients that they could exclude themselves from the class, if they so chose, within a three-month opt-out period.

Objectors raised numerous challenges to the settlement. They urged that the settlement unfairly disadvantaged those without currently compensable conditions in that it failed to adjust for inflation or to account for changes, over time, in medical understanding. They maintained that compensation levels were intolerably low in comparison to awards available in tort litigation or payments received by the inventory plaintiffs. And they objected to the absence of any compensation for certain claims, for example, medical monitoring, compensable under the tort law of several States. Rejecting these and all other objections, Judge Reed concluded that the settlement terms were fair and had been negotiated without collusion. See 157 F.R.D., at 325, 331-332. He also found that adequate notice had been given to class members, see id., at 332-334, and that final class certification under Rule 23(b)(3) was appropriate, see id., at 315.

***9** As to the specific prerequisites to certification, the District Court observed that the class satisfied Rule 23(a)(1)'s numerosity requirement, [FN8] see ibid., a matter no one debates. The Rule 23(a)(2) and (b)(3) requirements of commonality [FN9] and preponderance [FN10] were also satisfied, the District Court held, in that

FN8. Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable."

FN9. Rule 23(a)(2) requires that there be "questions of law or fact common to the class."

FN10. Rule 23(b)(3) requires that "the [common] questions of law or fact ... predominate over any questions affecting only individual members."

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"[t]he members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system. Whether the proposed settlement satisfies this interest and is otherwise a fair, reasonable and adequate compromise of the claims of the class is a predominant issue for purposes of Rule 23(b)(3)." Id., at 316.

The District Court held next that the claims of the class representatives were "typical" of the class as a whole, a requirement of Rule 23(a)(3), [FN11] and that, as Rule 23(b)(3) demands, [FN12] the class settlement was "superior" to other methods of adjudication. See ibid.

FN11. Rule 23(a)(3) states that "the claims ... of the representative parties [must be] typical of the claims ... of the class."

FN12. Rule 23(b)(3) requires that "a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy."

Strenuous objections had been asserted regarding the adequacy of representation, a Rule 23(a)(4) requirement. [FN13] Objectors maintained that class counsel and class representatives had disqualifying conflicts of interests. In particular, objectors urged, claimants whose injuries had become manifest and claimants without manifest injuries should not have common counsel and should not be aggregated in a single class. Furthermore, objectors argued, lawyers representing inventory plaintiffs should not represent the newly-formed class.

FN13. Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class."

Satisfied that class counsel had ably negotiated the settlement in the best interests of all concerned, and that the named parties served as adequate representatives, the District Court rejected these objections. See id., at 317-319, 326-332. Subclasses were unnecessary, the District Court held, bearing in mind the added cost and confusion they would entail and the ability of class members to exclude themselves from the class during the three-month opt-out period. See id., at 318-319. Reasoning that the representative plaintiffs "have a strong interest that recovery for all of the medical categories be maximized because they may have claims in any, or several categories," the District Court found "no antagonism of interest between class members with various medical conditions, or between persons with and without currently manifest asbestos impairment." Id., at 318. Declaring class certification appropriate and the settlement fair, the District Court preliminarily enjoined all class members from commencing any asbestos-related suit against the CCR defendants in any state or federal court. See Georgine v. Amchem Products, Inc., 878 F.Supp. 716, 726-727 (E.D.Pa.1994).

*10 The objectors appealed. The United States Court of Appeals for the Third Circuit vacated the certification, holding that the requirements of Rule 23 had not been satisfied. See Georgine v. Amchem Products, Inc., 83 F.3d 610 (1996).

E

The Court of Appeals, in a long, heavily detailed opinion by Judge Becker, first noted several challenges by objectors to justiciability, subject-matter jurisdiction, and adequacy of notice. These challenges, the court said, raised "serious concerns." Id., at 623. However, the court observed, "the jurisdictional issues in this case would not exist but for the [class action] certification." Ibid. Turning to the class-certification issues and finding them dispositive, the Third Circuit declined to decide other questions.

On class-action prerequisites, the Court of Appeals referred to an earlier Third Circuit decision, In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768 (C.A.3), cert. denied, 516 U.S. ----, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995) (hereinafter GM Trucks), which held that although a class action may be certified for settlement purposes only, Rule 23(a)'s requirements must be satisfied as if the case were going to be litigated. 55 F.3d, at 799-800. The same rule should apply, the Third Circuit said, to class certification under Rule 23(b)(3). See 83 F.3d, at 625. But cf. In re Asbestos Litigation, 90 F.3d 963, 975-976, and n. 8 (C.A.5 1996), cert. pending, Nos. 96-1379, 96-1394. While stating that

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the requirements of Rule 23(a) and (b)(3) must be met "without taking into account the settlement," 83 F.3d, at 626, the Court of Appeals in fact closely considered the terms of the settlement as it examined aspects of the case under Rule 23 criteria. See id., at 630-634.

The Third Circuit recognized that Rule 23(a)(2)'s "commonality" requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class "predominate over" other questions. The court therefore trained its attention on the "predominance" inquiry. See id., at 627. The harmfulness of asbestos exposure was indeed a prime factor common to the class, the Third Circuit observed. See id., at 626, 630. But uncommon questions abounded.

In contrast to mass torts involving a single accident, class members in this case were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases. See id., at 626, 628. "These factual differences," the Third Circuit explained, "translate [d] into significant legal differences." Id., at 627. State law governed and varied widely on such critical issues as "viability of [exposure-only] claims [and] availability of causes of action for medical monitoring, increased risk of cancer, and fear of future injury." Ibid. [FN14] "[T]he number of uncommon issues in this humongous class action," the Third Circuit concluded, ibid., barred a determination, under existing tort law, that common questions predominated, see id., at 630.

> FN14. Recoveries under the laws of different States spanned a wide range. Objectors assert, for example, that 15% of current mesothelioma claims arise in California, where the statewide average recovery is $419,674--or more than 209% above the $200,000 maximum specified in the settlement for mesothelioma claims not typed "extraordinary." See Brief for Respondents George Windsor et al. 5-6, n. 5 (citing 2 App. 461).

*11 The Court of Appeals next found that "serious intra-class conflicts preclude[d] th[e] class from meeting the adequacy of representation requirement" of Rule 23(a)(4). Ibid. Adverting to, but not resolving charges of attorney conflict of interests, the Third Circuit addressed the question whether the named plaintiffs could adequately advance the interests of all class members. The Court of Appeals acknowledged that the District Court was certainly correct to this extent: " '[T]he members of the class are united in seeking the maximum possible recovery for their asbestos-related claims.' " Ibid. (quoting 157 F.R.D., at 317). "But the settlement does more than simply provide a general recovery fund," the Court of Appeals immediately added; "[r]ather, it makes important judgments on how recovery is to be allocated among different kinds of plaintiffs, decisions that necessarily favor some claimants over others." 83 F.3d, at 630.

In the Third Circuit's view, the "most salient" divergence of interests separated plaintiffs already afflicted with an asbestos-related disease from plaintiffs without manifest injury (exposure-only plaintiffs). The latter would rationally want protection against inflation for distant recoveries. See ibid. They would also seek sturdy back-end opt-out rights and "causation provisions that can keep pace with changing science and medicine, rather than freezing in place the science of 1993." Id., at 630-631. Already injured parties, in contrast, would care little about such provisions and would rationally trade them for higher current payouts. See id., at 631. These and other adverse interests, the Court of Appeals carefully explained, strongly suggested that an undivided set of representatives could not adequately protect the discrete interests of both currently afflicted and exposure-only claimants.

The Third Circuit next rejected the District Court's determination that the named plaintiffs were "typical" of the class, noting that this Rule 23(a)(3) inquiry overlaps the adequacy of representation question: "both look to the potential for conflicts in the class." Id., at 632. Evident conflict problems, the court said, led it to hold that "no set of representatives can be 'typical' of this class." Ibid.

The Court of Appeals similarly rejected the District Court's assessment of the superiority of the class action. The Third Circuit initially noted that a class action so large and complex "could not be tried." Ibid. The court elaborated most particularly, however, on the unfairness of binding exposure-only plaintiffs who might be unaware of the class action

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or lack sufficient information about their exposure to make a reasoned decision whether to stay in or opt out. See id., at 633. "A series of statewide or more narrowly defined adjudications, either through consolidation under Rule 42(a) or as class actions under Rule 23, would seem preferable," the Court of Appeals said. Id., at 634.

***12** The Third Circuit, after intensive review, ultimately ordered decertification of the class and vacation of the District Court's anti-suit injunction. Id., at 635. Judge Wellford concurred, "fully subscrib[ing] to the decision of Judge Becker that the plaintiffs in this case ha[d] not met the requirements of Rule 23." Ibid. He added that in his view, named exposure-only plaintiffs had no standing to pursue the suit in federal court, for their depositions showed that "[t]hey claimed no damages and no present injury." Id., at 638.

We granted certiorari, 519 U.S. ----, 117 S.Ct. 379, 136 L.Ed.2d 297 (1996), and now affirm.

II

Objectors assert in this Court, as they did in the District Court and Court of Appeals, an array of jurisdictional barriers. Most fundamentally, they maintain that the settlement proceeding instituted by class counsel and CCR is not a justiciable case or controversy within the confines of Article III of the Federal Constitution. In the main, they say, the proceeding is a nonadversarial endeavor to impose on countless individuals without currently ripe claims an administrative compensation regime binding on those individuals if and when they manifest injuries.

Furthermore, objectors urge that exposure-only claimants lack standing to sue: Either they have not yet sustained any cognizable injury or, to the extent the complaint states claims and demands relief for emotional distress, enhanced risk of disease, and medical monitoring, the settlement provides no redress. Objectors also argue that exposure-only claimants did not meet the then-current amount-in-controversy requirement (in excess of $50,000) specified for federal-court jurisdiction based upon diversity of citizenship. See 28 U.S.C. § 1332(a).

[1] As earlier recounted, see supra, at ----, the Third Circuit declined to reach these issues because they "would not exist but for the [class action] certification." 83 F.3d, at 623. We agree that "[t]he class certification issues are dispositive," ibid.; because their resolution here is logically antecedent to the existence of any Article III issues, it is appropriate to reach them first, cf. Arizonans for Official English v. Arizona, 520 U.S. ----, ----, 117 S.Ct. 1055, 1068, 137 L.Ed.2d 170 (1997) (declining to resolve definitively question whether petitioners had standing because mootness issue was dispositive of the case). We therefore follow the path taken by the Court of Appeals, mindful that Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b). See also Fed. Rule Civ. Proc. 82 ("rules shall not be construed to extend ... the [subject matter] jurisdiction of the United States district courts"). [FN15]

FN15. The opinion dissenting in part does not find the class certification issues dispositive--at least not yet, and would return the case to the Third Circuit for a second look. See post, at ----, ----. If certification issues were genuinely in doubt, however, the jurisdictional issues would loom larger. Concerning objectors' assertions that exposure-only claimants do not satisfy the $50,000 amount-in-controversy and may have no currently ripe claim, see Metro-North Commuter R. Co. v. Buckley, --- U.S. ----, ----, --- S.Ct. ----, ----, --- L.Ed.2d ----(Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C. § 51 et seq., interpreted in light of common-law principles, does not permit "exposure-only" railworker to recover for negligent infliction of emotional distress or lump-sum damages for costs of medical monitoring).

III

***13** To place this controversy in context, we briefly describe the characteristics of class actions for which the Federal Rules provide. Rule 23, governing federal-court class actions, stems from equity practice and gained its current shape in an innovative 1966 revision. See generally Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L.Rev. 356, 375-400

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(1967) (hereinafter Kaplan, Continuing Work). Rule 23(a) states four threshold requirements applicable to all class actions: (1) numerosity (a "class [so large] that joinder of all members is impracticable"); (2) commonality ("questions of law or fact common to the class"); (3) typicality (named parties' claims or defenses "are typical ... of the class"); and (4) adequacy of representation (representatives "will fairly and adequately protect the interests of the class").

[2] In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3). Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing "incompatible standards of conduct for the party opposing the class," Fed. Rule Civ. Proc. 23(b)(1)(A), or would "as a practical matter be dispositive of the interests" of nonparty class members "or substantially impair or impede their ability to protect their interests," Fed. Rule Civ. Proc. 23(b)(1)(B). Rule 23(b)(1)(A) "takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners)." Kaplan, Continuing Work 388 (footnotes omitted). Rule 23(b)(1)(B) includes, for example, "limited fund" cases, instances in which numerous persons make claims against a fund insufficient to satisfy all claims. See Advisory Committee's Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C.App., pp. 696-697 (hereinafter Adv. Comm. Notes).

Rule 23(b)(2) permits class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds generally applicable to the class." Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples. Adv. Comm. Notes, 28 U.S.C.App., p. 697; see Kaplan, Continuing Work 389 (subdivision (b)(2) "build[s] on experience mainly, but not exclusively, in the civil rights field").

In the 1966 class-action amendments, Rule 23(b)(3), the category at issue here, was "the most adventuresome" innovation. See Kaplan, A Prefatory Note, 10 B.C. Ind. & Com. L.Rev. 497, 497 (1969) (hereinafter Kaplan, Prefatory Note). Rule 23(b)(3) added to the complex-litigation arsenal class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded. See 7A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1777, p. 517 (2d ed.1986) (hereinafter Wright, Miller, & Kane); see generally Kaplan, Continuing Work 379-400. Rule 23(b)(3) "opt out" class actions superseded the former "spurious" class action, so characterized because it generally functioned as a permissive joinder ("opt in") device. See 7A Wright, Miller, & Kane § 1753, at 28-31, 42-44; see also Adv. Comm. Notes, 28 U.S.C.App., p. 695.

***14** Framed for situations in which "class-action treatment is not as clearly called for" as it is in Rule 23(b)(1) and (b)(2) situations, Rule 23(b)(3) permits certification where class suit "may nevertheless be convenient and desirable." Adv. Comm. Notes, 28 U.S.C.App., p. 697. To qualify for certification under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a) prerequisites: Common questions must "predominate over any questions affecting only individual members"; and class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." In adding "predominance" and "superiority" to the qualification-for-certification list, the Advisory Committee sought to cover cases "in which a class action would achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Ibid. Sensitive to the competing tugs of individual autonomy for those who might prefer to go it alone or in a smaller unit, on the one hand, and systemic efficiency on the other, the Reporter for the 1966 amendments cautioned: "The new provision invites a close look at the case before it is accepted as a class action...." Kaplan, Continuing Work 390.

Rule 23(b)(3) includes a nonexhaustive list of factors pertinent to a court's "close look" at the predominance and superiority criteria:

"(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already

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commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

In setting out these factors, the Advisory Committee for the 1966 reform anticipated that in each case, courts would "consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit." Adv. Comm. Notes, 28 U.S.C.App., p. 698. They elaborated:

"The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable." Ibid.

See also Kaplan, Continuing Work 391 ("Th[e] interest [in individual control] can be high where the stake of each member bulks large and his will and ability to take care of himself are strong; the interest may be no more than theoretic where the individual stake is so small as to make a separate action impracticable.") (footnote omitted). As the Third Circuit observed in the instant case: "Each plaintiff [in an action involving claims for personal injury and death] has a significant interest in individually controlling the prosecution of [his case]"; each "ha[s] a substantial stake in making individual decisions on whether and when to settle." 83 F.3d, at 633.

*15 [3][4] While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Kaplan, Prefatory Note 497. As concisely recalled in a recent Seventh Circuit opinion:

"The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997).

To alert class members to their right to "opt out" of a (b)(3) class, Rule 23 instructs the court to "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. Rule Civ. Proc. 23(c)(2); see Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173-177, 94 S.Ct. 2140, 2150-2152, 40 L.Ed.2d 732 (1974) (individual notice to class members identifiable through reasonable effort is mandatory in (b)(3) actions; requirement may not be relaxed based on high cost).

No class action may be "dismissed or compromised without [court] approval," preceded by notice to class members. Fed. Rule Civ. Proc. 23(e). The Advisory Committee's sole comment on this terse final provision of Rule 23 restates the rule's instruction without elaboration: "Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action." Adv. Comm. Notes, 28 U.S.C.App., p. 699.

In the decades since the 1966 revision of Rule 23, class action practice has become ever more "adventuresome" as a means of coping with claims too numerous to secure their "just, speedy, and inexpensive determination" one by one. See Fed. Rule Civ. Proc. 1. The development reflects concerns about the efficient use of court resources and the conservation of funds to compensate claimants who do not line up early in a litigation queue. See generally J. Weinstein, Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices (1995); Schwarzer, Settlement of Mass Tort Class Actions: Order out of Chaos, 80 Cornell L.Rev. 837 (1995).

Among current applications of Rule 23(b)(3), the "settlement only" class has become a stock device. See, e.g., T. Willging, L. Hooper, & R. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 61-62 (1996) (noting large number of such cases in districts studied). Although all Federal Circuits recognize the utility of Rule 23(b)(3) settlement classes, courts have divided on the extent to which a proffered settlement affects

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court surveillance under Rule 23's certification criteria.

*16 In GM Trucks, 55 F.3d, at 799-800, and in the instant case, 83 F.3d, at 624-626, the Third Circuit held that a class cannot be certified for settlement when certification for trial would be unwarranted. Other courts have held that settlement obviates or reduces the need to measure a proposed class against the enumerated Rule 23 requirements. See, e.g., In re Asbestos Litigation, 90 F.3d, at 975(C.A.5) ("in settlement class context, common issues arise from the settlement itself") (citing H. Newberg & A. Conte, 2 Newberg on Class Actions § 11.28, at 11-58 (3d ed.1992)); White v. National Football League, 41 F.3d 402, 408 (C.A.8 1994) ("adequacy of class representation ... is ultimately determined by the settlement itself"), cert. denied, 515 U.S. 1137, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995); In re A.H. Robins Co., 880 F.2d 709, 740(C.A.4) ("[i]f not a ground for certification per se, certainly settlement should be a factor, and an important factor, to be considered when determining certification"), cert. denied sub nom. Anderson v. Aetna Casualty & Surety Co., 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989); Malchman v. Davis, 761 F.2d 893, 900 (C.A.2 1985) (certification appropriate, in part, because "the interests of the members of the broadened class in the settlement agreement were commonly held"), cert. denied, 475 U.S. 1143, 106 S.Ct. 1798, 90 L.Ed.2d 343 (1986).

A proposed amendment to Rule 23 would expressly authorize settlement class certification, in conjunction with a motion by the settling parties for Rule 23(b)(3) certification, "even though the requirements of subdivision (b)(3) might not be met for purposes of trial." Proposed Amendment to Fed. Rule Civ. Proc. 23(b), 117 S.Ct. No. 1 CXIX, CLIV to CLV (Aug.1996) (Request for Comment). In response to the publication of this proposal, voluminous public comments--many of them opposed to, or skeptical of, the amendment--were received by the Judicial Conference Standing Committee on Rules of Practice and Procedure. See, e.g., Letter from Steering Committee to Oppose Proposed Rule 23, signed by 129 law professors (May 28, 1996); Letter from Paul D. Carrington (May 21, 1996). The Committee has not yet acted on the matter. We consider the certification at issue under the rule as it is currently framed.

IV

We granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification. The Third Circuit's opinion stated that each of the requirements of Rule 23(a) and (b)(3) "must be satisfied without taking into account the settlement." 83 F.3d, at 626 (quoting GM Trucks, 55 F.3d, at 799). That statement, petitioners urge, is incorrect.

*17 [5] We agree with petitioners to this limited extent: settlement is relevant to a class certification. The Third Circuit's opinion bears modification in that respect. But, as we earlier observed, see supra, at ----, the Court of Appeals in fact did not ignore the settlement; instead, that court homed in on settlement terms in explaining why it found the absentees' interests inadequately represented. See 83 F.3d, at 630-631. The Third Circuit's close inspection of the settlement in that regard was altogether proper.

[6] Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the rule--those designed to protect absentees by blocking unwarranted or overbroad class definitions--demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold. See Fed. Rule Civ. Proc. 23(c), (d). [FN16]

FN16. Portions of the opinion dissenting in part appear to assume that settlement counts only one way--in favor of certification. See post, at ---- - ---- , ----. But see post, at ----. To the extent that is the dissent's meaning, we disagree. Settlement, though a relevant factor, does not inevitably signal that class action certification should be granted more readily than it would be were the case to be litigated. For reasons the Third Circuit aired, see 83 F.3d 610, 626-635 (1996), proposed settlement classes sometimes warrant more, not less caution on

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the question of certification.

[7] And, of overriding importance, courts must be mindful that the rule as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. See 28 U.S.C. §§ 2073, 2074. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure "shall not abridge ... any substantive right." § 2072(b).

[8][9] Rule 23(e), on settlement of class actions, reads in its entirety: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." This prescription was designed to function as an additional requirement, not a superseding direction, for the "class action" to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b). Cf. Eisen, 417 U.S., at 176-177, 94 S.Ct., at 2151-2152 (adequate representation does not eliminate additional requirement to provide notice). Subdivisions (a) and (b) focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.

[10] The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments--checks shorn of utility--in the settlement class context. First, the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind--class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness.

*18 Second, if a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, see Coffee, Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L.Rev. 1343, 1379-1380 (1995), and the court would face a bargain proffered for its approval without benefit of adversarial investigation, see, e.g., Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1352 (C.A.7 1996) (Easterbrook, J., dissenting from denial of rehearing en banc) (parties "may even put one over on the court, in a staged performance"), cert. denied, 520 U.S. ----, 117 S.Ct. 1569, 137 L.Ed.2d 714 (1997).

Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted--that if a settlement is "fair," then certification is proper. Applying to this case criteria the rulemakers set, we conclude that the Third Circuit's appraisal is essentially correct. Although that court should have acknowledged that settlement is a factor in the calculus, a remand is not warranted on that account. The Court of Appeals' opinion amply demonstrates why--with or without a settlement on the table--the sprawling class the District Court certified does not satisfy Rule 23's requirements. [FN17]

FN17. We do not inspect and set aside for insufficient evidence district court findings of fact. Cf. post, at ----, ---- - ----. Rather, we focus on the requirements of Rule 23, and endeavor to explain why those requirements cannot be met for a class so enormously diverse and problematic as the one the District Court certified.

A

[11] We address first the requirement of Rule 23(b)(3) that "[common] questions of law or fact ... predominate over any questions affecting only individual members." The District Court concluded that predominance was satisfied based on two factors: class members' shared experience of asbestos exposure and their common "interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." 157 F.R.D., at 316. The settling parties also contend that the settlement's fairness is a common question, predominating over disparate legal issues that might be pivotal in litigation but become irrelevant under the settlement.

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The predominance requirement stated in Rule 23(b)(3), we hold, is not met by the factors on which the District Court relied. The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, see supra, at ---- - ----, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement. [FN18]

FN18. In this respect, the predominance requirement of Rule 23(b)(3) is similar to the requirement of Rule 23(a)(3) that "claims or defenses" of the named representatives must be "typical of the claims or defenses of the class." The words "claims or defenses" in this context--just as in the context of Rule 24(b)(2) governing permissive intervention--"manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." Diamond v. Charles, 476 U.S. 54, 76-77, 106 S.Ct. 1697, 1711, 90 L.Ed.2d 48 (1986) (O'CONNOR, J., concurring in part and concurring in judgment).

[12][13][14] The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. See 7A Wright, Miller, & Kane 518-519. [FN19] The inquiry appropriate under Rule 23(e), on the other hand, protects unnamed class members "from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise." See 7B Wright, Miller, & Kane § 1797, at 340-341. But it is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place. If a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that vital prescription would be stripped of any meaning in the settlement context.

FN19. This case, we note, involves no "limited fund" capable of supporting class treatment under Rule 23(b)(1)(B), which does not have a predominance requirement. See Georgine v. Amchem Products, Inc., 157 F.R.D. 246, 318 (E.D.Pa.1994); see also id., at 291, and n. 40. The settling parties sought to proceed exclusively under Rule 23(b)(3).

*19 The District Court also relied upon this commonality: "The members of the class have all been exposed to asbestos products supplied by the defendants...." 157 F.R.D., at 316. Even if Rule 23(a)'s commonality requirement may be satisfied by that shared experience, the predominance criterion is far more demanding. See 83 F.3d, at 626-627. Given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard.

The Third Circuit highlighted the disparate questions undermining class cohesion in this case:

"Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma.... Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.

"The [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories." Id., at 626.

Differences in state law, the Court of Appeals observed, compound these disparities. See id., at 627 (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823, 105 S.Ct. 2965, 2980, 86 L.Ed.2d 628 (1985)).

[15] No settlement class called to our attention is as sprawling as this one. Cf. In re Asbestos Litigation, 90 F.3d, at 976, n. 8 ("We would likely agree with the Third Circuit that a class action requesting individual damages for members of a global class of asbestos claimants would not satisfy [Rule 23] requirements due to the huge number of individuals and their varying medical expenses,

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smoking histories, and family situations."). Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws. See Adv. Comm. Notes, 28 U.S.C.App., p. 697; see also supra, at ---- - ----. Even mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement. The Advisory Committee for the 1966 revision of Rule 23, it is true, noted that "mass accident" cases are likely to present "significant questions, not only of damages but of liability and defenses of liability, ... affecting the individuals in different ways." Ibid. And the Committee advised that such cases are "ordinarily not appropriate" for class treatment. Ibid. But the text of the rule does not categorically exclude mass tort cases from class certification, and district courts, since the late 1970s, have been certifying such cases in increasing number. See Resnik, From "Cases" to "Litigation," 54 Law & Contemp.Prob. 5, 17-19 (Summer 1991) (describing trend). The Committee's warning, however, continues to call for caution when individual stakes are high and disparities among class members great. As the Third Circuit's opinion makes plain, the certification in this case does not follow the counsel of caution. That certification cannot be upheld, for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the rule's design.

B

***20** [16][17][18][19] Nor can the class approved by the District Court satisfy Rule 23(a)(4)'s requirement that the named parties "will fairly and adequately protect the interests of the class." The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. See General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157-158, n. 13, 102 S.Ct. 2364, 2370-2371, n. 13, 72 L.Ed.2d 740 (1982). "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." East Tex. Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S.Ct. 1891, 1896, 52 L.Ed.2d 453 (1977) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216, 94 S.Ct. 2925, 2930, 41 L.Ed.2d 706 (1974)). [FN20]

FN20. The adequacy-of-representation requirement "tend[s] to merge" with the commonality and typicality criteria of Rule 23(a), which "serve as guideposts for determining whether ... maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157, n. 13, 102 S.Ct. 2364, 2370, n. 13, 72 L.Ed.2d 740 (1982). The adequacy heading also factors in competency and conflicts of class counsel. See id., at 157-158, n. 13, 102 S.Ct., at 2370-2371, n. 13. Like the Third Circuit, we decline to address adequacy-of-counsel issues discretely in light of our conclusions that common questions of law or fact do not predominate and that the named plaintiffs cannot adequately represent the interests of this enormous class.

As the Third Circuit pointed out, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future. Cf. General Telephone Co. of Northwest v. EEOC, 446 U.S. 318, 331, 100 S.Ct. 1698, 1707, 64 L.Ed.2d 319 (1980) ("In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes.").

The disparity between the currently injured and expossure-only categories of plaintiffs, and the diversity within each category are not made insignificant by the District Court's finding that petitioners' assets suffice to pay claims under the settlement. See 157 F.R.D., at 291. Although this is not a "limited fund" case certified under Rule 23(b)(1)(B), the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability. For example, as earlier described, see supra, at ---- - ---- , the settlement includes no adjustment for inflation;

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only a few claimants per year can opt out at the back end; and loss-of-consortium claims are extinguished with no compensation.

The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency. In another asbestos class action, the Second Circuit spoke precisely to this point:

*21 "[W]here differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups. The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." In re Joint Eastern and Southern Dist. Asbestos Litigation, 982 F.2d 721, 742-743 (C.A.2 1992), modified on reh'g sub nom. In re Findley, 993 F.2d 7 (C.A.2 1993).

The Third Circuit found no assurance here--either in the terms of the settlement or in the structure of the negotiations--that the named plaintiffs operated under a proper understanding of their representational responsibilities. See 83 F.3d, at 630-631. That assessment, we conclude, is on the mark.

C

Impediments to the provision of adequate notice, the Third Circuit emphasized, rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement. Id., at 633; cf. In re Asbestos Litigation, 90 F.3d, at 999-1000 (Smith, J., dissenting). Many persons in the exposure-only category, the Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.

Family members of asbestos-exposed individuals may themselves fall prey to disease or may ultimately have ripe claims for loss of consortium. Yet large numbers of people in this category--future spouses and children of asbestos victims--could not be alerted to their class membership. And current spouses and children of the occupationally exposed may know nothing of that exposure.

Because we have concluded that the class in this case cannot satisfy the requirements of common issue predominance and adequacy of representation, we need not rule, definitively, on the notice given here. In accord with the Third Circuit, however, see 83 F.3d, at 633-634, we recognize the gravity of the question whether class action notice sufficient under the Constitu tion and Rule 23 could ever be given to legions so unselfconscious and amorphous.

V

The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. [FN21] Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load CCR, class counsel, and the District Court heaped upon it. As this case exemplifies, the rulemakers' prescriptions for class actions may be endangered by "those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the rule] with distaste." C. Wright, Law of Federal Courts 508 (5th ed.1994); cf. 83 F.3d, at 634 (suggesting resort to less bold aggregation techniques, including more narrowly defined class certifications).

FN21. The opinion dissenting in part is a forceful statement of that argument.

* * *

*22 For the reasons stated, the judgment of the Court of Appeals for the Third Circuit is

Affirmed.

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Justice O'CONNOR took no part in the consideration or decision of this case.

Justice BREYER, with whom Justice STEVENS joins, concurring in part and dissenting in part.

Although I agree with the Court's basic holding that "settlement is relevant to a class certification," ante, at ----, I find several problems in its approach that lead me to a different conclusion. First, I believe that the need for settlement in this mass tort case, with hundreds of thousands of lawsuits, is greater than the Court's opinion suggests. Second, I would give more weight than would the majority to settlement-related issues for purposes of determining whether common issues predominate. Third, I am uncertain about the Court's determination of adequacy of representation, and do not believe it appropriate for this Court to second-guess the District Court on the matter without first having the Court of Appeals consider it. Fourth, I am uncertain about the tenor of an opinion that seems to suggest the settlement is unfair. And fifth, in the absence of further review by the Court of Appeals, I cannot accept the majority's suggestions that "notice" is inadequate.

These difficulties flow from the majority's review of what are highly fact-based, complex, and difficult matters, matters that are inappropriate for initial review before this Court. The law gives broad leeway to district courts in making class certification decisions, and their judgments are to be reviewed by the Court of Appeals only for abuse of discretion. See Califano v. Yamasaki, 442 U.S. 682, 703, 99 S.Ct. 2545, 2558-2559, 61 L.Ed.2d 176 (1979). Indeed, the District Court's certification decision rests upon more than 300 findings of fact reached after five weeks of comprehensive hearings. Accordingly, I do not believe that we should in effect set aside the findings of the District Court. That court is far more familiar with the issues and litigants than is a court of appeals or are we, and therefore has "broad power and discretion ... with respect to matters involving the certification" of class actions. Reiter v. Sonotone Corp., 442 U.S. 330, 345, 99 S.Ct. 2326, 2334, 60 L.Ed.2d 931 (1979); cf. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402, 110 S.Ct. 2447, 2459, 110 L.Ed.2d 359 (1990) (district court better situated to make fact-dependent legal determinations in Rule 11 context).

I do not believe that we can rely upon the Court of Appeals' review of the District Court record, for that review, and its ultimate conclusions, are infected by a legal error. E.g., Georgine v. Amchem Products, Inc., 83 F.3d 610, 626 (C.A.3 1996) (holding that "considered as a litigation class," the class cannot meet Rule 23's requirements) (emphasis added). There is no evidence that the Court of Appeals at any point considered the settlement as something that would help the class meet Rule 23. I find, moreover, the fact-related issues presented here sufficiently close to warrant further detailed appellate court review under the correct legal standard. Cf. Reno v. Bossier Parish School Bd., 520 U.S. ----, 117 S.Ct. 1491, 1501, 137 L.Ed.2d 730 (1997). And I shall briefly explain why this is so.

I

*23 First, I believe the majority understates the importance of settlement in this case. Between 13 and 21 million workers have been exposed to asbestos in the workplace--over the past 40 or 50 years--but the most severe instances of such exposure probably occurred three or four decades ago. See Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation, pp. 6-7 (Mar.1991) (Judicial Conference Report); App. 781-782, 801; B. Castleman, Asbestos: Medical and Legal Aspects 787-788 (4th ed.1996). This exposure has led to several hundred thousand lawsuits, about 15% of which involved claims for cancer and about 30% for asbestosis. See In re Joint Eastern and Southern Dist. Asbestos Litigation, 129 B.R. 710, 936-937 (E. and S.D.N.Y.1991) (Joint Litigation). About half of the suits have involved claims for pleural thickening and plaques--the harmfulness of which is apparently controversial. (One expert below testified that they "don't transform into cancer" and are not "predictor[s] of future disease," App. 781.) Some of those who suffer from the most serious injuries, however, have received little or no compensation. In re School Asbestos Litigation, 789 F.2d 996, 1000 (C.A.3 1986); see also Edley & Weiler, Asbestos: A Multi-Billion-Dollar Crisis, 30 Harv. J. Legis. 383, 384, 393 (1993) ("[U]p to one-half of asbestos claims are now being filed by people who have little or no physical impairment. Many of these claims produce substantial payments (and substantial costs) even though the individual litigants will never

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become impaired"). These lawsuits have taken up more than 6% of all federal civil filings in one recent year, and are subject to a delay that is twice that of other civil suits. Judicial Conference Report 7, 10-11.

Delays, high costs, and a random pattern of noncompensation led the Judicial Conference Ad Hoc Committee on Asbestos Litigation to transfer all federal asbestos personal-injury cases to the Eastern District of Pennsylvania in an effort to bring about a fair and comprehensive settlement. It is worth considering a few of the Committee's comments. See Judicial Conference Report 2 (" 'Decisions concerning thousands of deaths, millions of injuries, and billions of dollars are entangled in a litigation system whose strengths have increasingly been overshadowed by its weaknesses.' The ensuing five years have seen the picture worsen: increased filings, larger backlogs, higher costs, more bankruptcies and poorer prospects that judgments--if ever obtained--can be collected' ") (quoting Rand Corporation Institute for Civil Justice); id., at 13 ("The transaction costs associated with asbestos litigation are an unconscionable burden on the victims of asbestos disease," and citing Rand finding that "of each asbestos litigation dollar, 61 cents is consumed in transaction costs.... Only 39 cents were paid to the asbestos victims"); id., at 12 ("Delays also can increase transaction costs, especially the attorneys' fees paid by defendants at hourly rates. These costs reduce either the insurance fund or the company's assets, thereby reducing the funds available to pay pending and future claimants. By the end of the trial phase in [one case], at least seven defendants had declared bankruptcy (as a result of asbestos claims generally)"); see also J. Weinstein, Individual Justice in Mass Tort Litigation 155 (1995); Edley & Weiler, supra, at 389-395.

***24** Although the transfer of the federal asbestos cases did not produce a general settlement, it was intertwined with and led to a lengthy year-long negotiation between the co-chairs of the Plaintiff's Multi-District Litigation Steering Committee (elected by the Plaintiff's Committee Members and approved by the District Court) and the 20 asbestos defendants who are before us here. Georgine v. Amchem Products, Inc., 157 F.R.D. 246, 266-267, (E.D.Pa.1994); App. 660-662. These "protracted and vigorous" negotiations led to the present partial settlement, which will pay an estimated $1.3 billion and compensate perhaps 100,000 class members in the first 10 years. 157 F.R.D., at 268, 287. "The negotiations included a substantial exchange of information" between class counsel and the 20 defendant companies, including "confidential data" showing the defendants' historical settlement averages, numbers of claims filed and settled, and insurance resources. Id., at 267. "Virtually no provision" of the settlement "was not the subject of significant negotiation," and the settlement terms "changed substantially" during the negotiations. Ibid. In the end, the negotiations produced a settlement that, the District Court determined based on its detailed review of the process, was "the result of arms-length adversarial negotiations by extraordinarily competent and experienced attorneys." Id., at 335.

The District Court, when approving the settlement, concluded that it improved the plaintiffs' chances of compensation and reduced total legal fees and other transaction costs by a significant amount. Under the previous system, according to the court, "[t]he sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease." Ibid. The court believed the settlement would create a compensation system that would make more money available for plaintiffs who later develop serious illnesses.

I mention this matter because it suggests that the settlement before us is unusual in terms of its importance, both to many potential plaintiffs and to defendants, and with respect to the time, effort, and expenditure that it reflects. All of which leads me to be reluctant to set aside the District Court's findings without more assurance than I have that they are wrong. I cannot obtain that assurance through comprehensive review of the record because that is properly the job of the Court of Appeals and that court, understandably, but as we now hold, mistakenly, believed that settlement was not a relevant (and, as I would say, important) consideration.

Second, the majority, in reviewing the District Court's determination that common "issues of fact and law predominate," says that the predominance "inquiry trains on the legal or factual questions that qualify each class member's case as a genuine

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controversy, questions that preexist any settlement." Ante, at ---- (footnote omitted). I find it difficult to interpret this sentence in a way that could lead me to the majority's conclusion. If the majority means that these pre-settlement questions are what matters, then how does it reconcile its statement with its basic conclusion that "settlement is relevant" to class certification, or with the numerous lower court authority that says that settlement is not only relevant, but important? See, e. g., In re A.H. Robins Co., 880 F.2d 709, 740(C.A.4), cert. denied sub nom. Anderson v. Aetna Casualty & Surety Co., 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989); In re Beef Industry Antitrust Litigation, 607 F.2d 167, 177-178 (C.A.5 1979), cert. denied sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Assn., 452 U.S. 905, 101 S.Ct. 3029, 69 L.Ed.2d 405 (1981); 2 H. Newberg & A. Conte, Newberg on Class Actions § 11.27, pp. 11-54 to 11-55 (3d ed.1992).

***25** Nor do I understand how one could decide whether common questions "predominate" in the abstract--without looking at what is likely to be at issue in the proceedings that will ensue, namely, the settlement. Every group of human beings, after all, has some features in common, and some that differ. How can a court make a contextual judgment of the sort that Rule 23 requires without looking to what proceedings will follow? Such guideposts help it decide whether, in light of common concerns and differences, certification will achieve Rule 23's basic objective--"economies of time, effort, and expense." Advisory Committee's Notes on Fed. Rule Civ. Proc. 23(b)(3), 28 U.S.C.App., p. 697. As this Court has previously observed, "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 160, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982); see also C. Wright, A. Miller, & M. Kane, 7B Federal Practice and Procedure § 1785, p. 107, and n. 34 (1986). I am not saying that the "settlement counts only one way." Ante, at ---- n. 16. Rather, the settlement may simply "add a great deal of information to the court's inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint" and courts "can and should" look to it to enhance the "ability ... to make informed certification decisions." In re Asbestos, 90 F.3d 963, 975 (C.A.5 1996).

The majority may mean that the District Court gave too much weight to the settlement. But I am not certain how it can reach that conclusion. It cannot rely upon the Court of Appeals, for that court gave no positive weight at all to the settlement. Nor can it say that the District Court relied solely on "a common interest in a fair compromise," ante, at ----, for the District Court did not do so. Rather, it found the settlement relevant because it explained the importance of the class plaintiffs' common features and common interests. The court found predominance in part because:

> "The members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." 157 F.R.D., at 316. The settlement is relevant because it means that these common features and interests are likely to be important in the proceeding that would ensue--a proceeding that would focus primarily upon whether or not the proposed settlement fairly and properly satisfied the interests class members had in common. That is to say, the settlement underscored the importance of (a) the common fact of exposure, (b) the common interest in receiving some compensation for certain rather than running a strong risk of no compensation, and (c) the common interest in avoiding large legal fees, other transaction costs, and delays. Ibid.

***26** Of course, as the majority points out, there are also important differences among class members. Different plaintiffs were exposed to different products for different times; each has a distinct medical history and a different history of smoking; and many cases arise under the laws of different States. The relevant question, however, is how much these differences matter in respect to the legal proceedings that lie ahead. Many, if not all, toxic tort class actions involve plaintiffs with such differences. And the differences in state law are of diminished importance in respect to a proposed settlement in which the defendants have waived all defenses and agreed to compensate all those who were injured. Id., at 292.

These differences might warrant subclasses, though subclasses can have problems of their own.

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"There can be a cost in creating more distinct subgroups, each with its own representation.... [T]he more subclasses created, the more severe conflicts bubble to the surface and inhibit settlement.... The resources of defendants and, ultimately, the community must not be exhausted by protracted litigation." Weinstein, Individual Justice in Mass Tort Litigation, at 66. Or these differences may be too serious to permit an effort at group settlement. This kind of determination, as I have said, is one that the law commits to the discretion of the district court--reviewable for abuse of discretion by a court of appeals. I believe that we are far too distant from the litigation itself to reweigh the fact-specific Rule 23 determinations and to find them erroneous without the benefit of the Court of Appeals first having restudied the matter with today's legal standard in mind.

Third, the majority concludes that the "representative parties" will not "fairly and adequately protect the interests of the class." Rule 23(a)(4). It finds a serious conflict between plaintiffs who are now injured and those who may be injured in the future because "for the currently injured, the critical goal is generous immediate payments," a goal that "tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." Ante, at ----.

I agree that there is a serious problem, but it is a problem that often exists in toxic tort cases. See Weinstein, supra, at 64 (noting that conflict "between present and future claimants" "is almost always present in some form in mass tort cases because long latency periods are needed to discover injuries"); see also Judicial Conference Report 34-35 ("Because many of the defendants in these cases have limited assets that may be called upon to satisfy the judgments obtained under current common tort rules and remedies, there is a 'real and present danger that the available assets will be exhausted before those later victims can seek compensation to which they are entitled' ") (citation omitted). And it is a problem that potentially exists whenever a single defendant injures several plaintiffs, for a settling plaintiff leaves fewer assets available for the others. With class actions, at least, plaintiffs have the consolation that a district court, thoroughly familiar with the facts, is charged with the responsibility of ensuring that the interests of no class members are sacrificed.

*27 But this Court cannot easily safeguard such interests through review of a cold record. "What constitutes adequate representation is a question of fact that depends on the circumstances of each case." Wright, Miller, & Kane, 7A Federal Practice and Procedure, § 1765, at 271. That is particularly so when, as here, there is an unusual baseline, namely, the " 'real and present danger' " described by the Judicial Conference Report above. The majority's use of the lack of an inflation adjustment as evidence of inadequacy of representation for future plaintiffs, ante, at ---- - ----, is one example of this difficulty. An inflation adjustment might not be as valuable as the majority assumes if most plaintiffs are old and not worried about receiving compensation decades from now. There are, of course, strong arguments as to its value. But that disagreement is one that this Court is poorly situated to resolve.

Further, certain details of the settlement that are not discussed in the majority opinion suggest that the settlement may be of greater benefit to future plaintiffs than the majority suggests. The District Court concluded that future plaintiffs receive a "significant value" from the settlement due to variety of its items that benefit future plaintiffs, such as: (1) tolling the statute of limitations so that class members "will no longer be forced to file premature lawsuits or risk their claims being time-barred"; (2) waiver of defenses to liability; (3) payment of claims, if and when members become sick, pursuant to the settlement's compensation standards, which avoids "the uncertainties, long delays and high transaction costs [including attorney's fees] of the tort system"; (4) "some assurance that there will be funds available if and when they get sick," based on the finding that each defendant "has shown an ability to fund the payment of all qualifying claims" under the settlement; and (5) the right to additional compensation if cancer develops (many settlements for plaintiffs with noncancerous conditions bar such additional claims). 157 F.R.D., at 292. For these reasons, and others, the District Court found that the distinction between present and future plaintiffs was "illusory." 157 F.R.D., at 317-318.

I do not know whether or not the benefits are more or less valuable than an inflation adjustment. But I can certainly recognize an argument that they are. (To choose one more brief illustration, the

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majority chastises the settlement for extinguishing loss-of-consortium claims, ante, at ----, ----, but does not note that, as the District Court found, the "defendants' historical [settlement] averages, upon which the compensation values are based, include payments for loss of consortium claims, and, accordingly, the Compensation Schedule is not unfair for this ascribed reason," 157 F.R.D., at 278.) The difficulties inherent in both knowing and understanding the vast number of relevant individual fact-based determinations here counsel heavily in favor of deference to district court decisionmaking in Rule 23 decisions. Or, at the least, making certain that appellate court review has taken place with the correct standard in mind.

*28 Fourth, I am more agnostic than is the majority about the basic fairness of the settlement. Ante, at ---- - ----. The District Court's conclusions rested upon complicated factual findings that are not easily cast aside. It is helpful to consider some of them, such as its determination that the settlement provided "fair compensation ... while reducing the delays and transaction costs endemic to the asbestos litigation process" and that "the proposed class action settlement is superior to other available methods for the fair and efficient resolution of the asbestos-related personal injury claims of class members." 157 F.R.D., at 316 (citation omitted); see also id., at 335 ("The inadequate tort system has demonstrated that the lawyers are well paid for their services but the victims are not receiving speedy and reasonably inexpensive resolution of their claims. Rather, the victims' recoveries are delayed, excessively reduced by transaction costs and relegated to the impersonal group trials and mass consolidations. The sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease. Indeed, [these] unimpaired victims have, in many states, been forced to assert their claims prematurely or risk giving up all rights to future compensation for any future lung cancer or mesothelioma. The plan which this Court approves today will correct that unfair result for the class members and the ... defendants"); id., at 279, 280 (settlement "will result in less delay for asbestos claimants than that experienced in the present tort system" and will "result in the CCR defendants paying more claims, at a faster rate, than they have ever paid before"); id., at 292; Edley & Weiler, 30 Harv. J. Legis., at 405, 407 (finding that "[t]here are several reasons to believe that this settlement secures important gains for both sides" and that they "firmly endorse the fairness and adequacy of this settlement"). Indeed, the settlement has been endorsed as fair and reasonable by the AFL-CIO (and its Building and Construction Trades Department), which represents a " 'substantial percentage' " of class members, 157 F.R.D., at 325, and which has a role in monitoring implementation of the settlement, id., at 285. I do not intend to pass judgment upon the settlement's fairness, but I do believe that these matters would have to be explored in far greater depth before I could reach a conclusion about fairness. And that task, as I have said, is one for the Court of Appeals.

Finally, I believe it is up to the District Court, rather than this Court, to review the legal sufficiency of notice to members of the class. The District Court found that the plan to provide notice was implemented at a cost of millions of dollars and included hundreds of thousands of individual notices, a wide-ranging television and print campaign, and significant additional efforts by 35 international and national unions to notify their members. 157 F.R.D., at 312-313, 336. Every notice emphasized that an individual did not currently have to be sick to be a class member. And in the end, the District Court was "confident" that Rule 23 and due process requirements were satisfied because, as a result of this "extensive and expensive notice procedure," "over six million" individuals "received actual notice materials," and "millions more" were reached by the media campaign. Id., at 312, 333, 336. Although the majority, in principle, is reviewing a Court of Appeals' conclusion, it seems to me that its opinion might call into question the fact-related determinations of the District Court. Ante, at ----. To the extent that it does so, I disagree, for such findings cannot be so quickly disregarded. And I do not think that our precedents permit this Court to do so. See Reiter, 442 U.S., at 345, 99 S.Ct., at 2334; Yamasaki, 442 U.S., at 703, 99 S.Ct., at 2558-2559.

II

*29 The issues in this case are complicated and difficult. The District Court might have been correct. Or not. Subclasses might be appropriate. Or not. I cannot tell. And I do not believe that this Court should be in the business of trying to make

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these fact-based determinations. That is a job suited to the district courts in the first instance, and the courts of appeal on review. But there is no reason in this case to believe that the Court of Appeals conducted its prior review with an understanding that the settlement could have constituted a reasonably strong factor in favor of class certification. For this reason, I would provide the courts below with an opportunity to analyze the factual questions involved in certification by vacating the judgment, and remanding the case for further proceedings.

END OF DOCUMENT

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EXHIBIT B

NO. 23,697

COPY

THOMAS GERALDEAN HENSON, ET AL.,	§	IN THE DISTRICT COURT OF
	§	FILED
	§	AUG 31 1996
Plaintiffs,	§	AT 2:40 O'CLOCK P M
	§	LEOLA KOMAS
VS.	§	MILAM COUNTY, TEXAS
	§	DISTRICT CLERK
	§	MILAM COUNTY, TEXAS
MINERVA REFINING COMPANY, ET AL.,	§	BY DEPUTY
	§	
Defendants.	§	20TH JUDICIAL DISTRICT

MOTION FOR DISCOVERY SCHEDULING ORDER AND OPPOSITION TO DEFENDANTS' MOTION FOR DOCKET CONTROL ORDER

TO THE HONORABLE JUDGE OF THIS COURT

COME NOW Plaintiffs, Thomas Geraldean Henson et al., and file this Motion for Discovery Scheduling Order and this their Response in opposition to Defendants' Motion for Docket Control Order, and in support thereof would respectfully show the following:

I

INTRODUCTION

This is a toxic tort case brought in September, 1993, by 137 Plaintiffs. Plaintiffs seek redress for injuries suffered as a result of their exposure to toxic substances located at or emanating from Defendant Minerva Refining Company's abandoned oil refinery located in Milam County, Texas. Plaintiffs specifically claim that they were exposed to unsafe amounts of toxic chemicals, including lead, because the Defendants allowed these pollutants to accumulate on the site of the abandoned refinery, where the contamination could be transported via air and water pathways beyond the confines of the property and into the surrounding community where Plaintiffs resided. In addition, because Defendants negligently failed to either control access to the property or post warning signs around the property until 1987, the site posed an attractive nuisance for area residents, especially children. The site has been subject to the regulatory oversight of the Texas Natural Resource Conservation Commission (TNRCC)[1] since 1987, the TNRCC has been supervising remedial investigation and feasibility study activities under authority granted by the State Superfund program.[2] Among TNRCC's first demands on these Defendants were that Defendants restrict access to the site and post signs in English & Spanish at one hundred foot intervals, warning the public of the presence of hazardous substances. Administrative Order on Consent (Jan. 18, 1988) at 3 [attached as Exhibit B].

[1]Or its immediate predecessor, the Texas Water Commission.

[2]Tex. Health & Safety Code Ann. Ch. 361, subch. F (Vernon 1992). Defendants make much of the fact that the Minerva refinery has not been officially "listed" as a state Superfund site. However, the site is not listed simply because the "potentially responsible parties" (Defendants here) agreed to cooperate in the remediation of the site, and entered into an administrative order with the state agency reflecting that agreement. Pollution Cleanup Division, TNRCC, State Superfund Quarterly Status Report for the Quarter Ending March 31, 1996, PD-017/96-1 (June 1996) at 1 [excerpts of which are attached as Exhibit A]; Tex. Health & Safety Code Ann. § 361.183 (Vernon 1992). One can draw no conclusions about the potential threat posed by the condition of the site from the fact that it is not officially listed; in fact, the Minerva refinery received the *second highest* Hazard Ranking Score *of all current or proposed Superfund sites in the state of Texas*. Exhibit A at 17. The Hazard Ranking System is the "principal screening tool used by the EPA to evaluate risks to public health and the environment associated with abandoned or uncontrolled hazardous waste sites." Exhibit A at 6.

II

PROCEDURAL HISTORY

In their motion, Defendants essentially argue that because this case has been on file for more than two years, Plaintiffs should, as a matter of law, be prepared to present specific causation evidence, even though discovery on the merits has by no means been concluded. While Plaintiffs discuss the scientific flaws in this approach more fully in ¶ III, *infra*, a more complete understanding of the unusual procedural history of this case is necessary to fairly evaluate Defendants' claim that Plaintiffs should surely be in a position to present specific causation evidence at this stage of the litigation. While Defendants would have this Court believe that Plaintiffs have been dragging their feet, delaying final resolution of this case because they cannot prove their case, Plaintiffs contend that the fact that this case has not yet been resolved is due primarily to the *refusal of the Defendants* to permit crucial factual discovery of the Minerva refinery site. In addition, certain procedural anomalies have slowed the Plaintiffs' ability to complete their preparation of this case.

This case was filed in September, 1993, and Defendants answered in October, 1993. Shortly after the filing, the action was stayed for six months by the Texas Insurance Commissioner due to the impaired condition of one of the Defendants' insurers. The six-month stay, entered pursuant to the authority vested in the Commissioner by the Insurance Code, was extended for an additional six months in July, 1994. *See* Order Authorizing Extension of Stay [attached as Exhibit C]; Tex. Ins. Code Art. 21.28-C, § 17. Discovery was limited during this period of time, primarily to some written discovery of Plaintiffs and some discovery of defense documents.

In February, 1995, shortly after the Insurance Commissioner's stay expired, the Milam County District Court contacted Plaintiffs and instructed them to obtain a 1995 trial setting or their case would be dismissed for want of prosecution. This ultimatum was issued despite the fact that the case had been officially stayed for an entire year. The Plaintiffs complied with the Court's directive by obtaining a December trial setting. However, informal talks concerning the viability of a 1995 trial date were held among counsel at the time the Plaintiffs obtained the trial setting. Counsel agreed to discuss the possible need for a continuance at a time closer to the December, 1995, trial setting.

Plaintiffs soon initiated efforts to obtain access to Defendants' property in order to obtain sampling crucial to the preparation of their exposure case. *See* May 15, 1995 letter from Fred Baron to Ron Secrest [attached as Exhibit D]. Such access is ordinarily granted by agreement in toxic tort cases; however, the Defendants refused to permit it. After considering Plaintiffs' formal motion to obtain an order permitting such routine discovery, the Honorable Charles Lance granted Plaintiffs' motion to gain entry, but conditioned entry upon a deposit by Plaintiffs of $35,000 in the registry of the Court to pay Defendants' "response" costs. Judge Lance denied Plaintiffs' motion for reconsideration of that decision.

Consequently, as the trial date approached, Plaintiffs had yet to be granted crucial discovery that would permit them to fully explore the extent and nature of the contamination present at the Minerva refinery. Defendants, on the other hand, desired additional time to complete their discovery of Plaintiffs. After conferring in October, 1995, the parties filed an agreed motion for a continuance on November 2, 1995, their first such motion. This agreed motion was inexplicably denied by Judge Lance on November 8, 1995, with fewer than 30 days remaining before trial. *See* Order Denying Agreed Motion for Continuance [attached as Exhibit E]. Plaintiffs subsequently filed a motion to disqualify and/or recuse Judge Lance on November 17, 1995. Judge Lance was ordered disqualified on December 1, 1995. *See* Transcript of Hearing on Motion to Recuse before the Honorable Robert T. Pfueffer at 84 (Dec. 1, 1995) [excerpts of which are attached as Exhibit F]. Although Presiding Judge B.B. Schraub promptly

appointed Judge Derwood Johnson to hear this case, and notified the Milam County District Court of the appointment. no notice was provided to the parties, who did not learn of the appointment until April, 1996, some five months later

Upon learning of the appointment of Judge Johnson, Plaintiffs immediately filed a new motion to gain entry on land, together with a request for a hearing [3] Plaintiffs had by that time been seeking to enter the Minerva refinery property for a full year. Still bent on resisting Plaintiffs' attempts to sample their property, Defendants exercised their right to strike Judge Johnson on June 4, 1996, thus delaying any hearing on Plaintiffs' motion Tex Gov't Code § 74 053 Once again, the parties were without a judge or a way to proceed with the case. That fact notwithstanding, the Defendants filed the instant motion for a Docket Control Order, arguing that they are entitled to extraordinary relief due to implied foot-dragging on the part of Plaintiffs They also filed their third motion in opposition to Plaintiffs' attempt to gain entry onto the Minerva refinery property for sampling purposes A judge was finally appointed to preside over this case on or about August 20, 1996

As the above description clearly indicates, to the extent that this Court concludes that insufficient progress has been made toward the ultimate resolution of this case, the fault for that lack of progress cannot be placed at the feet of the Plaintiffs Plaintiffs' efforts to obtain crucial discovery necessary to the preparation of their liability and exposure cases have been hampered by the unrelenting resistance of Defendants and by administrative stay orders, the disqualification of Judge Lance, and the delays experienced in the search for a judge. For this reason and for

[3]Judge Lance's disqualification rendered his prior decisions--including the one denying Plaintiffs the right to gain entry on Defendants' land absent the payment of $35,000--null and void *Buckholts I.S.D. v. Glaser* 632 S.W.2d 146, 148 (Tex 1982); *Blanchard v. Krueger* 916 S.W.2d 15, 19 (Tex. App – Houston [1st Dist] 1995, no writ)

the reasons set forth below, Plaintiffs oppose Defendants' Motion for Docket Control Order, and have filed their own Motion for Discovery Scheduling Order as an alternative to Defendants' motion

III

ARGUMENT

Although innocuously styled a motion seeking a "docket control order," nothing in Defendants' motion has anything whatsoever to do with "controlling the docket"[4] in this case Under the guise of seeking court intervention to control the docket, Defendants actually seek an order imposing significant unfair burdens upon Plaintiffs, burdens *not* imposed under Texas law or the Texas procedural rules Plaintiffs are ready and willing to negotiate and abide by any discovery scheduling order entered by this Court, and Plaintiffs have filed their own Motion for Discovery Scheduling Order in pursuit of this goal However, it is clear that Defendants do not seek to organize discovery with their motion, rather, they seek to avoid what they consider to be the "wasteful" expense "full discovery" (obtaining medical records and taking depositions)[5] poses for them by having the court transfer that expense to the Plaintiffs Defendants also clearly hope to use such an order as the basis for the pretrial dismissal of Plaintiffs' claims, in what is a transparent "end run" around the standards set for summary judgment in Rule 166a of the Texas Rules of Civil Procedure *See, e.g.*, Tex. R. Civ. P. 166a(c) & (g). Because the

[4]A docket control order typically sets deadlines for discovery, the amendment of pleadings, and the filing of dispositive motions, imposes a trial date, or addresses other issues set forth in Rule 166a(a)-(p) *Loffland Bros. Co. v. Downer*, 822 S.W.2d 249, 251 (Tex App –Houston [1st Dist.] 1991, orig proceeding)

[5]Defendants' Motion for Docket Control Order, ¶ II at 2

"docket control" scheme Defendants would have this Court impose is fundamentally flawed from a scientific perspective and would place significant and unfair burdens on Plaintiffs, and because the Texas procedural rules governing discovery and pre-trial procedure do not provide the alternative route to dismissal sought by Defendants here, Plaintiffs ask this Court to deny Defendants' motion, and to adopt the Discovery Scheduling Order proposed by Plaintiffs

A. **Granting Defendants' Motion Would Place Untenable Burdens upon Plaintiffs Because It Is Inconsistent with the Nature of the Scientific Inquiry Employed in Toxic Tort Cases.**

Defendants' proposed "docket control order" would require Plaintiffs to submit specific medical causation evidence for each plaintiff far in advance of trial and prior to completion of their investigation into facts relating to liability and exposure.[6] In this toxic tort case, Plaintiffs are required to prove that their exposure to lead and other chemicals located at or emanating from the abandoned refinery occurred at such significant levels that they received a dose of particular toxins (or a mixture thereof) large enough to cause them to develop disease Data relevant to the amount and character of the toxic substances in the water and soil at the refinery over the years is crucial to Plaintiffs' calculations of dose because individual causation is a

[6]Defendants have asked this Court to enter an order requiring Plaintiffs to submit an affidavit from a *physician* attesting to:

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 of the subject plaintiff.

c) The manner by which the subject plaintiff was exposed to each chemical (i.e., ingestion, inhalation, and/or skin absorption);

d) The duration of time over which the subject plaintiff was exposed to each chemical or chemicals, 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.

Defendants' Motion for Docket Control Order, ¶ VII at 8.

function of chemical toxicity, exposure and dose."

Due to no fault or delay of their own, Plaintiffs are still investigating the method of exposure to toxins at the refinery and the nature and dose of toxins received by Plaintiffs Plaintiffs take issue with Defendants' representation to this Court that it is "uncontested" that "[t]he constituents are known." *See* Defendants' Motion for Docket Control Order, ¶ 3, at 3 As explained in the procedural history set out above, Plaintiffs have been seeking entry onto the Defendants' land for the purpose of inspecting the refinery site and taking their own samples of soil and water at the site *for well over a year* Plaintiffs do not believe that the constituents--more appropriately described as toxins--are known, and it is for this reason that they have been actively seeking an opportunity to discover the nature and amount of toxic constituents at the site. Furthermore, Plaintiffs are still investigating the extent and nature of Defendants' activities at the Minerva Refining Facility site, especially for those years subsequent to the cessation of refining activities (1947-present) While Defendants have revealed that oil storage activities took place during that time, little is known about the specific activities involved in the oil storage operations or the substances used during that time, and Defendants have not explained how some of the chemicals detected on the site came to be there. Such facts are significant to the preparation of Plaintiffs' exposure case. The issue of causation cannot be analyzed without a complete picture of exposure and dose.

Defendants' insistence that "the last shall go first," and that a *prima facie* case of medical causation be presented *before* a complete investigation into the exposure issues places Plaintiffs

[7]Boston, G., *A Mass-Exposure Model of Toxic Causation: The Content of Scientific Proof and the Regulatory Experience*, 18 Colum. J. Envtl. L. 181, 213-18 (1993) (noting that the circumstances of exposure and dose must be considered specifically in order to determine whether it is reasonable for an identified illness or symptom to occur in a particular person)

in the "no-win" position of either presenting a medical case based upon incomplete exposure evidence or failing to comply with the "docket control order," leaving them vulnerable to the dismissal of their claims. *See Lore v. Lone Pine Corp.*, N.J. Super. Ct. Monmouth County No. L33606-85, *appeal dism'd*, Tex. R. Civ. P. 215(2)(b)(5). Furthermore, asking Plaintiffs' experts to render opinions based upon incomplete exposure evidence may lead to exclusion of their causation testimony. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558-60 (Tex. 1995). As more explicitly set forth below, Texas Rule of Civil Procedure 166 does not permit trial courts to present parties with such a Hobson's choice.

B. Because Defendants' Proposed "Docket Control Order" Conflicts with Texas Rule of Civil Procedure 166b, Texas Rule of Civil Evidence 702, and Texas Case Law Governing the Designation of Testifying Experts, the Protection of the Identity and Opinions of Consulting Experts, and the Protection of Attorney Work Product, Granting Defendants' Motion Would Constitute an Abuse of Discretion.

Defendants would have this Court believe that the entry of "Lone Pine" orders in Texas and elsewhere[8] is "routine." Defendants' Motion for Docket Control Order, ¶ II at 2.

[8]The cases from other state and federal courts cited by Defendants in the body of their motion are either distinguishable or are unreported opinions. In the only two published opinions cited by Defendants, one upheld a trial court's decision *declining* to enter a "Lone Pine" order: *Kinnick v. Scherr, Inc.*, 541 N.W.2d 803 (Wis. Ct. App. 1995), and the other concerned a five-day evidentiary summary judgment proceeding in a federal court--not a "Lone Pine" order: *Renaud v. Martin Marietta Corp.*, 749 F. Supp. 1545 (D.Co. 1990), *aff'd*, 972 F.2d 304 (10th Cir. 1992). Defendants cite unreported opinions from New Jersey, Louisiana, Colorado and Pennsylvania. *See* Defendants' Motion, ¶¶ II & IX. Each of these states prohibits the citation of unreported cases. 210 Pa. Code § 67.55 (Commonwealth Court Internal Operating Procedures, § 414) (1994); N.J. Rules of Gen. Applic., Rule 1:36 (1995); Co. Rev. Stat. Ann., Ch. 32, Rule 35(f) (1995); La. Rev. Stat. Ann., Uniform Rules, Courts of Appeal, Rule 2-16.3 (1995). Without copies of these unreported cases or orders, this Court has no way to evaluate whether or not the cases are on point, or whether they were decided on the basis of drastically different facts or markedly different state law or rules of procedure. States enact procedural rules barring the citation of unreported opinions because such opinions are not intended to add to the jurisprudence of the forum state. Since such cases do not make up the common law in the states in which they were decided, it makes little sense to accept them as guidance or precedent in *this* state.

The only other authorities cited by Defendants in support of their assertion that Lone Pine orders are "routinely" entered are two articles written by authors whose qualifications and affiliations are unknown. *See*

However, the only Texas authority to which they point is an unreported trial court order," and, in the *ten years* since the original *Lone Pine* slip opinion was issued, *Lone Pine* has *not been followed, cited, or even discussed in a single published opinion by a Texas court*.[10] Defendants attempt to explain this paucity of authority by stating: "Obviously, few reported cases exist on this subject because the concept is so logical and fair that it does not get attacked." Defendants' Motion for Docket Control Order at 10 n.8. The more plausible "obvious" reason is that few such orders *have* been entered because such orders are not provided for by--and actually conflict with--the Texas Rules of Civil Procedure and Civil Evidence.

Defendants attempt to invoke the Court's authority under Rule 166 in support of their "Lone Pine" demand that Plaintiffs immediately produce proof of medical causation sufficient to withstand a motion for summary judgment. Rule 166 grants the trial court discretion to issue orders necessary to aid in the disposition of cases. Tex. R. Civ. P. 166. However, the authority granted by Rule 166 is not boundless. *See, e.g., Provident Life & Accident Ins. Co. v. Haslip*, 216 S.W.2d 805, 807 (Tex. 1949); *General Electric Co. v. Salinas*, 861 S.W.2d 20.

Defendants' Motion, ¶ IX at 9 & 10 n.9. These authors cite unreported opinions from the same states cited by Defendants, except that they also cited an unreported opinion from Montana, which also does not allow the citation of unreported opinions. Internal Operating Rules of the Montana Supreme Court, § 1(c) (1994). The *only other* citation that the articles add is to an order entered in the *Love Canal* litigation. On appeal, the trial court that entered this order was found to have abused its discretion and the order was modified. Significantly, the modified order did *not* require plaintiffs to provide specific proof of exposure, injury, or causation. In re Love Canal Actions, 547 N.Y.S.2d 174, 179 (N.Y. Sup. Ct. 1989), modified, 161 A.D.2d 1169, 555 N.Y.S.2d 519 (N.Y. App. Div. 1990). As one of the authors of the articles cited by Defendants aptly stated: "Few of the courts entering CMOs [case management orders] have supported their entry of these orders by citation to authority." D. Alan Rubin, *Strategies in Litigating Multiple Plaintiff Toxic Tort Suits, in Environmental Litigation* 122, 137 (Kole, et al. eds. 1991).

[9]*See Baptiste v. Exxon Corp.*, Exhibit B to Defendants' motion.

[10]Significantly, the same is true of New Jersey, the state of origin of the *Lone Pine* slip opinion: in the *ten years* since the original *Lone Pine* slip opinion was issued by a New Jersey trial court, *Lone Pine* has *not been followed, cited, or even discussed in a single published opinion by a New Jersey state court*.

23 (Tex. App.--Corpus Christi 1993, orig. proceeding) ("Although the trial court may properly limit and control discovery by a Rule 166 docket control order, . . . the power of the trial court to control or prohibit discovery is not absolute but must be exercised *in accordance with the rules* and with due regard for the rights and expectations of the parties regarding continued discovery."). Orders issued pursuant to the pretrial conference must "assist in the disposition of the case *without undue expense or burden to the parties*." Tex. R. Civ. P. 166 (emphasis added). In other words, orders entered to expedite the disposition of the case must be fair and reasonable. The order sought by Defendants is neither.

Defendants' requested order is unfair, unreasonable, and an undue burden to Plaintiffs because it conflicts with the expert discovery provisions of Rule 166b. Rule 166 does *not* grant the trial court the authority to issue orders concerning expert discovery that are inconsistent with those specific provisions of Rule 166b governing such discovery. *See General Electric Co. v. Salinas*, 861 S.W.2d 21, 23 (Tex. App.--Corpus Christi 1993, orig. proceeding). Rule 166b sets out specific rules which provide the *exclusive* method by which expert discovery may be had. *See* Tex. R. Civ. P. 166b(2)(e) (stating that expert discovery "may be obtained *only* as" set out at Rule 166(b)(2)(e)). The Rule protects from discovery the identity, mental impressions, and opinions of experts retained only for consulting purposes. Tex. R. Civ. P. 166b(3)(b) (consulting expert privilege); Tex. R. Civ. P. 166b(3)(a) (work product privilege); *Werner v. Miller*, 579 S.W.2d 455, 456 (Tex. 1979). A trial judge may compel parties to make the determination as to the status (testifying or consulting) of experts "within a reasonable and specific time before the date of the trial." Tex. R. Civ. P. 166b(3)(b) & 166b(2)(e)(3). Once the determination of an expert's status has been made, disclosure of that expert's identity,

together with the subject matter of the expert's testimony, must be made "as soon as is practical" but no later than 30 days prior to the beginning of trial. Tex. R. Civ. P. 166b(6)(b).

Defendants ask this Court to *order* Plaintiffs to designate expert witnesses far in advance of trial and prior to the existence of a trial setting[11] and/or to waive the consulting expert privilege afforded by the Texas Rules of Civil Procedure. Because discovery has not been completed and Plaintiffs are still developing their cases, Plaintiffs have not yet designated their testifying experts.[12] Although Rule 166b grants trial courts broad discretion to require the designation of experts, that discretion is not boundless. *Loffland Brothers Co. v. Downey*, 822 S.W.2d 249, 252 (Tex. App.--Houston [1st Dist.] 1991, orig. proceeding) (holding that trial court abused its discretion by not allowing designation of experts more than eight months in advance of trial). Without a trial setting, a trial court cannot compel the designation of experts. *Pedraza v. Peters*, 826 S.W.2d 741, 745 (Tex. App.--Houston [14th Dist.] 1992, no writ).

[11]There is no trial setting in this case. In their Motion for Discovery Scheduling Order, Plaintiffs propose a trial date of July 28, 1997. Defendants have not proposed, or sought, a trial date.

[12]When faced with the unexpected denial of the agreed motion for a continuance and the impending December 1995 trial date, Plaintiffs attempted to designate and identify their testifying experts. Plaintiffs submit that this designation was *not* made after Plaintiffs had had sufficient time to develop their case so that an "intelligent decision" could be made regarding designation. *See Werner v. Miller*, 579 S.W.2d 455, 456 (Tex. 1979). Transcript of Hearing on Motion for Continuance, Motion to Exclude Expert Testimony, etc. at 6 (Nov. 16, 1995) (attached as Exhibit G) (with Plaintiffs' counsel Mr. Baron stating: "[W]ithout the opportunity to enter the land and do testing, it is going to be extremely difficult, if not impossible, for our expert witnesses to give their opinions."). However, Judge Lance granted Defendants' motion to strike these experts. *See* Transcript of Hearing on Motion for Continuance, Motion to Exclude Expert Testimony, etc. at 16 (Nov. 16, 1995) (attached as Exhibit G). Plaintiffs are not bound by Judge Lance's decision. *Buckholts I.S.D. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982) (holding that disqualification renders prior decisions null and void); *Blanchard v. Krueger*, 916 S.W.2d 15, 19 (Tex. App. -- Houston [1st Dist.] 1995, no writ) (same). Nor are Plaintiffs limited by or to their prior attempted designation. Tex. R. Civ. P. 166b(6)(b) (allowing supplementation of responses to add expert witnesses); *H.B. Zachry Co. v. Gonzalez*, 847 S.W.2d 246 (Tex. 1993) (holding that, where a party fails to identify experts more than 30 days before first trial setting, and trial setting is removed to a date more than 30 days from date of first trial setting, party "must be permitted an opportunity to timely supplement answers"). While Plaintiffs have designated some of their testifying experts in answers to interrogatories, Plaintiffs have not designated all of their experts, including all of the experts required to respond to Defendants' motion.

("Because the record does not reflect a trial setting, the trial court was not authorized to compel designation of experts more than thirty days before trial."). Even with a trial setting, a party is entitled to "sufficient time to develop [its] case so that an intelligent decision can be made regarding the use of [its] expert[s]." *Werner v. Miller*, 579 S.W.2d 455, 456 (Tex. 1979); *Green v. Lerner*, 786 S.W.2d 486, 490-91 (Tex. App.--Houston [1st Dist.] 1990, orig. proceeding) (holding that trial court did not abuse its discretion when it refused to order a party to designate its testifying experts while discovery was on-going). Furthermore, "nothing in the rules requires a party to seek out its experts at a particular time during pretrial." *Tinsley v. Downey*, 822 S.W.2d 784, 786-87 (Tex. App.--Houston [14th Dist.] 1992, orig. proceeding); *see also Mentis v. Barnard*, 870 S.W.2d 14, 16 (Tex. 1994) (holding that Rule 166b does not establish a time by which a party must retain its testifying experts). As one appellate court explained:

> [g]enerally, a plaintiff may contact an expert for investigative purposes months or years prior to trial and may not make the determination to use that witness as a testifying expert *unless and until all other discovery is completed and the expert has had an opportunity to review all of the evidence, deposition testimony, and any other facts pertinent to formulating the expert's opinion.*

Tinsley v. Downey, 822 S.W.2d 784, 786-87 (Tex. App.--Houston [14th Dist.] 1992, orig. proceeding).

Defendants' proposed "docket control" order flies in the face of Rule 166b. Plaintiffs cannot comply with Defendants' proposed order without being forced to reveal the identity, mental impressions, and opinions of experts whom Plaintiffs have not yet designated as testifying experts. The order would therefore require Plaintiffs to waive their consulting expert privilege, in violation of Rule 166b(3)(b). Furthermore, this compelled designation of experts prior to the

setting of a trial date, and prior to the completion of discovery that is crucial to the development of Plaintiffs' cases,[13] is in violation of Rule 166(b)(2)(e), Rule 166(b)(6)(b), and established case law. *E.g.*, *Pedraza*, 826 S.W.2d at 745; *Tinsley*, 822 S.W.2d at 786-87. Rule 166b sets the *exclusive* method by which expert discovery may be had in Texas. *See* Tex. R. Civ. P. 166b(2)(e). Defendants' "Lone Pine" order is not provided for--nor allowed by--the Texas Rules of Civil Procedure.

In addition to violating numerous provisions of Texas Rule of Civil Procedure 166b, Defendants' proposed order is in conflict with Rule 702 of the Texas Rules of Civil Evidence and the case law interpreting that rule. Defendants' order would require Plaintiffs to retain a *physician* to answer Defendants' questions. However, Texas law does not require that medical causation be attested to by someone with a medical degree. Texas Rule of Civil Evidence 702 permits anyone qualified by knowledge, skill, experience, training or education to provide such expert testimony. *Lesser v. St. Elizabeth Hospital*, 807 S.W.2d 657, 659 (Tex. App.--Beaumont 1991, writ denied) (declining to adopt a "bright line" rule requiring that medical causation evidence be provided only by a medical doctor); *Ponder v. Texarkana Memorial Hospital, Inc.*, 840 S.W.2d 476, 478-79 (Tex. App.--Houston [14th Dist.] 1991, writ denied) (permitting neuroscience Ph.D. to testify as to medical causation). Defendants do not stop there, however. Defendants would also require such a physician to attest to facts relating to exposure history and to the presence and movement of toxic chemicals, none of which are within a physician's personal knowledge or expertise. Defendants would have Plaintiffs' physician state *under oath* that exposure to specific chemicals caused specific injuries prior to Plaintiffs being provided

[13] *See* ¶ III(A) *supra*.

access to the site so that they can determine for themselves which chemicals are or were at the site, in what amounts such chemicals are or were at the site, and how the chemicals are dispersed throughout the site. An order that requires one party to hire a particular type of expert (here, a physician) to develop and express opinions about a list of multiple causation and exposure issues (some of which are outside his/her area of personal knowledge and expertise) developed by opposing counsel, and to submit affidavits as to those opinions many months in advance of trial and prior to the conclusion of the investigation of exposure facts, exceeds the discretion granted by Texas Rule of Civil Procedure 166 and conflicts with Texas Rule of Civil Evidence 702 and Texas Rule of Civil Procedure 166b.

Plaintiffs concede that they will eventually have to identify their testifying experts and disclose the mental impressions and opinions held by those experts pursuant to Texas Rule of Civil Procedure 166b(2)(e). Plaintiffs have proposed a reasonable and specific date for this designation in their proposed Discovery Scheduling Order. Defendants' proposed order, however, was not drafted pursuant to the Texas Rules of Civil Procedure. The Rules provide specific mechanisms which address Defendants' concerns: If Defendants desire additional information regarding the basis of Plaintiffs' claims, established discovery tools like plaintiff and expert depositions and interrogatories are available to them; if Defendants desire elaboration of the discovery propounded to date, they may tender additional interrogatories, depose the Plaintiffs, or file a motion to compel discovery pursuant to Rule 215; if Defendants believe that Plaintiffs filed this suit in bad faith or that the suit is groundless, they may file motions for sanctions pursuant to Rule 13; and, if Defendants believe that there is no genuine issue of material fact as to causation, they may file motions for summary judgment pursuant to Rule

166a. Given Defendants' failure to avail themselves of tools clearly appropriate to their concerns, Defendants should not be granted the extraordinary, unprecedented relief sought here.

C. Defendants' Assertions Concerning the Content of Discovery Propounded to Date are Misleading and Lend No Support to their Contention that Plaintiffs Should Come Forward with Specific Medical Causation Evidence.

Defendants' primary complaint seems to be that Plaintiffs have not yet proffered their medical causation evidence. *E.g.*, Defendants' Motion for Docket Control Order, ¶¶ IV & V. This should not be a surprise to Defendants, as Plaintiffs have been seeking entry onto Defendants' land for the purpose of sampling for over a year, and Plaintiffs have consistently argued that the data that they will gather from such a visit will be crucial to their exposure and dose calculations, which in turn will provide the foundation for expert opinions on medical causation. *See, e.g.*, Plaintiffs' Motion to Gain Entry to Property ¶ 2 (filed July 6, 1995) [attached as Exhibit H]. Rather than grant Plaintiffs access to their land so that discovery on causation could move forward, Defendants have filed this and other motions,[14] evidencing their propensities to both put the cart before the horse and look for causation in all the wrong places.

Defendants complain that Plaintiffs' answers to interrogatories and depositions do not contain evidence of exposure and causation. *E.g.*, Defendants' Motion for Docket Control Order, ¶¶ IV, V & VI. In depositions and responses to interrogatories, Plaintiffs have provided their history of exposure to the site and have listed the illnesses and injuries that they have suffered.[15] Each plaintiff has also signed a medical release. And, as explained above, medical

[14] *E.g.*, Defendants' Motion for Protective Order and Opposition to Plaintiffs' Motion to Gain Entry to Property (filed June 20, 1996).

[15] *See, e.g.*, Representative Examples of Plaintiffs' answers to Defendant Minerva Refining Company's First Set of Interrogatories, especially answers to interrogatories 9, 13 & 14 [attached as Exhibit I].

causation evidence will be provided subsequent to Plaintiffs' gaining entry upon Defendants' land."[16] It is ludicrous to suggest, however, that Plaintiffs should have, or even could have, provided medical causation evidence in their depositions. Medical causation evidence must be provided by qualified expert witnesses, particularly in complex toxic tort cases such as this one. *See generally E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

Additionally, and contrary to Defendants' implication at footnote 6 of their motion, Plaintiffs *have* clarified in writing that those Plaintiffs who have indicated that they have never lived in the vicinity of the Minerva refinery, or who claim no damages for personal injury themselves, are proceeding in either a representative or derivative capacity. *See* Defendants' Motion for Docket Control Order, ¶ VI at 7 n.6, Letter from Frederick M. Baron to Ron Secrest, August 1, 1994 (attached as Exhibit K). Examples of Plaintiffs' Responses to Defendant C. Elliott Middleton's First Set of Interrogatories (stating that claims of certain Plaintiffs are for loss of consortium) (attached as Exhibit L).

[16]Defendants also complain that individual Plaintiffs have not identified past physicians or health care providers who have linked their illnesses and diseases to the Minerva Refinery site. Defendants conveniently overlook the obvious explanations for this. First, most treating physicians are concerned with treating patients not investigating the cause of their illnesses. Second, until recently, Plaintiffs were not aware that they had been exposed to toxic substances at the Minerva Refinery site (if they had been). Defendants would surely have filed motions for summary judgment on statute of limitations grounds), so they had no reason to inform any treating physician of this fact or to inquire about potential problems resulting from their exposure. Third, and most important, the great majority of Plaintiffs cannot, and could not, afford to go to the doctor in the first place. *See, e.g.*, Excerpts from Depositions of Representative Plaintiffs (attached as Exhibit J).

Defendants claim that there is doubt as to medical causation in this case because every Plaintiff who has had a blood lead test shows results within normal limits. Defendants' Motion for Docket Control Order, ¶ VI, at 7 n.5. This statement is misleading. Only 5 of 137 Plaintiffs have had their blood tested for lead. *See* Defendants' Exhibit K. More importantly, a blood lead test only measures exposures that have occurred in the short term, "reflecting short shifts in lead exposure or transitory events." Paul Mushak, *The Monitoring of Human Lead Exposure in Human Lead Exposure* 45, 53 (Herbert L. Needleman ed. 1992). Each of the Plaintiffs' tests contained in Defendants' Exhibit K was performed after 1990. Since Defendants fenced the Minerva site in 1987, a blood test performed in the 1990s would not be indicative of whether Plaintiffs were exposed to lead at the Minerva Refinery site. *Id.*

D. **Plaintiffs' Proposed Discovery Scheduling Order Contains a Reasonable Discovery Schedule that Will Provide for the Efficient Disposition of this Case.**

Plaintiffs have filed a proposed Discovery Scheduling Order that sets deadlines for the completion of discovery, the designation of expert witnesses, and the filing of certain motions. Plaintiffs' proposed order also sets a trial date of July 28, 1997. This Court has the authority to set deadlines for discovery and the filing of motions. Tex. R. Civ. P. 166(c); *see also Loffland Bros. Co. v. Downey*, 822 S.W.2d 249, 250 (Tex. App.--Houston [1st Dist.] 1991, orig. proceeding). This Court also has the authority to set a "reasonable and specific" deadline for the disclosure of testifying experts. Tex. R. Civ. P. 166b(2)(e)(3). Plaintiffs' proposed Discovery Scheduling Order would allow discovery in this case to be completed in an organized fashion and as rapidly as is reasonably possible. It is a reasonable alternative to the inequitable and unprecedented "docket control order" sought by Defendants.

IV.

CONCLUSION

Plaintiffs stand ready to work with Defendants and the Court to develop an appropriate scheduling order. However, because the docket control order sought by Defendants would work a significant hardship on Plaintiffs, and because it is contrary to governing law and operable scientific principles, Plaintiffs ask this Court to deny Defendants' motion for a docket control order.

WHEREFORE, Plaintiffs respectfully request that Defendants' Motion for Docket Control Order be DENIED in all respects, and that Plaintiffs' Motion for Discovery Scheduling Order be GRANTED. Plaintiffs further request that this matter be set for a hearing before the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiffs' Motion for Discovery Scheduling Order and Opposition to Defendants' Motion for Docket Control Order has been sent via certified mail to the following on the 29 day of August, 1996.

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_____
LAURA J. VAN PELT

NO. 23,697

THOMAS GERALDEAN HENSON, ET AL.,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
VS.	§	MILAM COUNTY, TEXAS
MINERVA REFINING COMPANY, ET AL.,	§	
Defendants.	§	20TH JUDICIAL DISTRICT

DISCOVERY SCHEDULING ORDER

On this day the Court conducted a hearing on Plaintiffs' Motion for Discovery Scheduling Order and Defendants' Motion for Docket Control Order. The Court denies Defendants' motion and instead enters this its Discovery Scheduling Order.

I. It is ORDERED that discovery shall be conducted according to the following schedule:

(A) The parties are to be prepared for trial on all issues on July 28, 1997.

(B) All motions in limine shall be filed by July 15, 1997.

(C) All motions for summary judgment shall be filed by July 15, 1997.

(D) The parties shall designate which of their experts may be called to testify at trial by May 1, 1997. All discovery related to expert witnesses shall be concluded by July 7, 1997.

(E) All discovery other than discovery related to expert witnesses shall be concluded by June 2, 1997.

II. It is further ordered that the parties by agreement may change the deadlines set out above as long as the trial setting is not changed.

SIGNED this ____ day of _____, 1996.

_____
DISTRICT JUDGE PRESIDING

NO. 23,697

THOMAS GERALDEAN HENSON, ET AL.,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
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SIGNED this ____ day of _____, 1996.

_____
DISTRICT JUDGE PRESIDING

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DONALD F. HALL and MARY ANN HALL, et al.,

Plaintiffs,

VS.

BABCOCK & WILCOX COMPANY, et al.,

Defendants.

CIVIL ACTION NO. 94-0951

Judge Donetta W. Ambrose
Magistrate Judge Ila Jeanne Sensenich

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MARK ALLEN CLOWES, Individually as spouse and personal representative of MARCIA JOSEPHINE CLOWES, deceased and as parent and natural guardian on behalf of CHRISTINE MARIE CLOWES and STEPHANIE LYNN CLOWES,

Plaintiffs,

VS.

BABCOCK & WILCOX, B&W NUCLEAR ENVIRONMENTAL SERVICES, INC. and ATLANTIC RICHFIELD COMPANY,

Defendants.

CIVIL ACTION NO. 94-2088

Judge Donetta W. Ambrose
Magistrate Judge Ila Jeanne Sensenich

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

COME NOW, Plaintiffs, and file this their response in opposition to Defendants' Motion for a Protective Order, and in support thereof would respectfully show the following:

have not yet completed even one round of discovery on the merits in this case. They also seek this relief without raising in their motion any specific objection to specific interrogatories or requests for production, apparently in the expectation that this Court should be left to imagine for itself what further requests will be forthcoming from Plaintiffs, as well as the grounds upon which they will be objectionable. The Court should deny Defendants' motion because granting such draconian relief would be tantamount to ruling that compliance with Rule 8 and Rule 11 and the proper commencement of an action in federal court is no longer sufficient to entitle parties to utilize the federal discovery rules. Granting Defendants' motion effectively amends Rules 8 and 11 to permit federal courts to require that plaintiffs possess evidence sufficient to withstand a motion for summary judgment before they will be permitted to make use of the federal discovery rules. This is simply not the law.

Rule 8 describes the general rules of pleading in federal court; it requires that complaints include a "short and plain" statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). It further requires that pleadings contain only "simple, concise and direct" averments, but requires that all pleadings be construed so as to do substantial justice. Fed. R. Civ. P. 8(e), (f). The purpose of Rule 8 is to determine how much information must be contained in the pleading. Franz v. U.S. Powerlifting Federation, 836 F.2d 1063, 1067-8 (7th Cir. 1987); Cook v. Rockwell International Corp., 147 F.R.D. 237, 247 (D. Colo. 1993). Rule 11, by contrast, provides that any pleadings submitted to the Court must be signed, which signature constitutes a certification that the pleading is not being presented for an improper purpose, and is warranted by existing law or by a nonfrivolous argument for its extension, and that the factual allegations in the pleading have evidentiary support, or are likely to have such support after a reasonable opportunity for further discovery. Fed. R. Civ. P. 11(b)(1), (2), (3).

Court here has not been presented with a motion for summary judgment nor is there any allegation that Plaintiffs' claims in this case are ripe for dismissal as a matter of law so Hancock does not provide useful guidance. Finally, E.E.O.C. v. Carter Carburetor involves the E.E.O.C.'s failure to identify "other persons" referred to in its complaint, persons against whom defendant had allegedly discriminated. The court held that the E.E.O.C. "obviously" had no facts concerning those unnamed "other" persons, so it would be prohibited from introducing evidence about any other persons at trial. E.E.O.C. v. Carter Carburetor, Div. of ACF Ind., Inc., 76 F.R.D. 143, 144-145 (E.D. Mo. 1977). The court did not, in that case, hold that any limits should be imposed on discovery. Id. None of these cases is similar in any respect to the case at bar, and they provide no support for Defendants' conclusion that justice requires entry of a protective order.

Because Defendants have failed to demonstrate that the Court's refusal to enter the protective order sought would subject them to specific and particular harm, and because the knowledge possessed by individual Plaintiffs has no relevance to this inquiry, Defendants' Motion for a Protective Order should be denied.

III.

B. Even If The Court Were To Conclude That Defendants Are Entitled To Some Protection From Broad Discovery, Granting The Protective Order Sought Here Is Draconian, And Tantamount To Imposing Additional Pre-filing Duties Upon Plaintiffs.

The order sought by Defendants here would prohibit Plaintiffs from conducting further discovery until they produce evidence "of each plaintiff's exposure to alleged hazardous emissions," and "reports of medical or other experts supporting each plaintiff's claim of injury." Defendants' Memorandum at 2-3. Defendants seek this relief even though the Plaintiffs

Taken together, these rules describe the requirements to initiate a federal court action, and to take advantage of federal court process.

> Rule 8 determines how much information has to be in the complaint...Rule 11 requires not that counsel *plead* facts, but that counsel *know* facts after conducting a reasonable investigation, and then only enough to make it reasonable to press litigation to the point of seeking discovery. Rule 11 neither modifies the 'notice pleading' approach of the federal rules nor requires counsel to prove the case in advance of discovery.

Franz v. U.S. Powerlifting Federation, 836 F.2d at 1067-1068, emp. original; Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 95 (3rd Cir. 1988)(A requirement that counsel, before filing a complaint, secure the type of proof necessary to withstand a motion for summary judgment would set a pre-filing standard beyond that contemplated by Rule 11); Cook v. Rockwell International Corp., 147 F.R.D. at 248.[3] Once a good faith investigation into the facts and law has been conducted, and a notice pleading stating the viable claims has been filed, Rule 26 provides no further limitations on the parties' ability to avail themselves of the discovery process created in the federal rules.[4]

Defendants raise no complaint that Plaintiffs have failed to comply with Rule 8 or Rule 11. Yet, citing no relevant authority, they ask this Court to rule that Plaintiffs must produce additional evidence of specific causation above and beyond the requirements of the federal pleading rules before Plaintiffs are permitted to utilize the broad discovery rights guaranteed by

[3] Although this action has been on file with the Court for approximately fifteen months, the parties have only been free to conduct merits discovery since February, 1995. Plaintiffs have not yet received documents responsive to their first round of merits discovery. Therefore, insofar as discovery of documents not available in the public domain is concerned (and access to such documents is what the federal discovery rules provide), Plaintiffs stand in exactly the same shoes they stood in on the day this case was filed.

[4] The 1993 Amendments to Rule 26(d) do prohibit the initiation of discovery before the initial conference required by new Rule 26(f) has occurred. However, the Western District of Pennsylvania has by Memorandum Order dated December 10, 1993, declined to adopt this amendment. Once the action is properly commenced and the Defendants served, no additional limits on a parties' ability to propound discovery exist.

Rule 26. Defendants essentially seek a "back door" amendment to those rules, which would require Plaintiffs to produce at the threshold of litigation that quantum of proof which would be sufficient to withstand a motion for summary judgment. This is error because the relief that Defendants seek would undermine the entire discovery-based system created by the federal rules for the adjudication of disputes. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. at 251, 57 L.Ed.2d at 264, Banco de Credito Indus., S.A. v. Tesorena General, 990 F.2d 827, 838 (5th Cir. 1993).

While Plaintiffs acknowledge that orders staying discovery have been granted in the federal court in a manner that is consistent with the rules, those orders protecting parties from discovery are typically entered *only after* parties have been provided with substantial opportunities to conduct discovery. Gray v. Town of Darien, 927 F.2d 69, 74 (2d. Cir. 1991)(Trial court committed no error when it denied plaintiff's motion to re-open discovery where plaintiffs had failed to seek discovery in the period provided by the trial court, and where plaintiffs failed to show good cause for reopening discovery); Avirgan v. Hull, 932 F.2d 1572, 1581 (11th Cir. 1991)(If significant discovery has been obtained and it appears that further discovery would not be helpful in resolving the issues, a request for further discovery is appropriately denied); Washington v. Brown & Williamson Tobacco Corp., 959 F.2d 1566, 1571 (11th Cir. 1992)(Court may limit class-wide discovery seeking information on virtually every employer practice where plaintiffs were unable to identify their Title VII class after an action had been pending three years); Reed v. AMAX Coal Co., 971 F.2d 1295, 1301 (7th Cir. 1992)(Trial court could enter protective order after plaintiff in a Title VII case was given ample opportunity to conduct discovery but failed to do so properly); SIL-FLO, Inc. v. SFHC, Inc., 917 F.2d 1507, 1514 (10th Cir. 1990)(Where plaintiffs failed to make diligent use of the discovery period provided by the court, it was not an abuse of discovery to refuse to re-open discovery). The Third Circuit has demonstrated reluctance to deny discovery, even where the face of a plaintiff's pleading reveals a defect. Nehemiah v. Athletics Congress of U.S.A., F.2d 42, 48 (3rd Cir. 1985)(Plaintiff would be permitted discovery into jurisdictional even where plaintiff's complaint did not properly allege personal jurisdiction facts); Aviation Specialties, Inc. v. United Technologies Corp., 568 F.2d 1186, 1189 (5th Cir. 1978).

In support of their motion, Defendants cite to a number of cases in which the court is called upon to decide whether plaintiffs, faced with a motion for summary judgment, are entitled to further discovery under Rule 56(f), or whether the affidavits then before the court were adequate to support judgment against the Plaintiff as a matter of law. See cases cited by Defendant at Defendants' Memorandum, pp. 38-39 (with the exception of Marsden v. Boston Edison Company, No. 92-11718 (D. Mass. March 10, 1993, slip op.). This Court has not been presented with such a motion, and therefore these cases are simply not on point. Analogizing to the summary judgment context, however, does illustrate the enormity and significance of the relief sought by Defendants here. In the event that Defendants *had* filed motion for summary judgment under Rule 56(b) and (c), Plaintiffs could demonstrate their entitlement to merits discovery upon articulating a "plausible" basis for their belief that discoverable materials exist which would raise a trial-worthy issue. Mattoon v. City of Pittsfield, 980 F.2d 1, 7 (1st Cir. 1992); Radich v. Goode, 886 F.2d 1391, 1393 (3rd. 1989) (Generally, courts should not grant motions for summary judgment until the party opposing the motion has had an adequate opportunity to conduct discovery.); Doe v. Mercy Health Corp. of Southeastern Pa., 150 F.R.D. 83, 84 (same). What Defendants ask Plaintiffs to produce here in order to establish an entitlement to discovery is enough evidence for Plaintiffs to *defeat* a motion for summary

judgment on the merits of their claims, not simply demonstrate an entitlement to additional discovery under Rule 56(f). Obviously, Defendants here have *not* filed such a motion or made the demonstrations that no genuine issue of material fact exists such that the question of Plaintiffs' entitlement to discovery should even be called into question. Yet, they seek relief greatly in excess of what such a motion would bring them. Defendants' motion is quite simply overreaching at its worst.

Defendant does cite three cases in which orders similar to those sought here have been granted. While Plaintiffs contend that each of these cases was wrongly decided, Plaintiffs believes each is also distinguishable. In Lore v. Lone Pine, a New Jersey state court judge ordered that plaintiffs provided specific causation evidence of the sort sought here after determining that no prima facie claim for personal injuries or property damage appeared on the face of the complaint. Lore v. Lone Pine Corp., No. L 33606-85 (Superior Court New Jersey Nov. 18, 1986), slip op. at 1.[3] No such finding has been made in this case. In addition, that case involved claims for injury and property damage based upon the pollution of plaintiffs' groundwater, claims brought in spite of the fact that EPA had apparently conducted studies of the groundwater, which studies the trial court had concluded demonstrated that there was "no problem" with groundwater contamination. Lore v. Lone Pine, slip op. at 2. In our case, by contrast, Defendants concede that both the Center for Hazardous Materials Research (CHMR) and the Environmental Compliance Organization (ECO) have determined that enriched radioactive materials attributable to Defendants' Apollo facility have escaped into the surrounding community. Defendants' Memorandum at 13, 20; Plaintiffs' Exhibit A at 16-17, 26-27; Plaintiffs' Exhibit B at 7, 15. In addition, the CHMR report contains recommendations that additional work be conducted in the vicinity of the Apollo plant, and lists as a priority item "historical dose reconstruction," which is the type of study Plaintiffs in this case seek to conduct. See Exhibit A at 27. Plaintiffs would finally note that the Lone Pine case was not designated for publication by the New Jersey state judge authoring the opinion. New Jersey prohibits the citation of unreported cases as precedent. N.J. Rules of Gen. Applic., Rule 1:36 (1995). States enact procedural rules barring the citation of unreported opinions because such opinions are not intended to add to the jurisprudence of the forum state. Since such cases do not make up the decisional law in the states in which they were decided, it makes little sense to adopt them as guidance or precedent in this federal court case. Because Lone Pine is distinguishable, this Court ought not follow its guidance in this case.

In re Love Canal Actions is distinguishable because the order adopted by the trial court in that case, which is similar to that sought here, was imposed upon plaintiffs after counsel for plaintiffs had been litigating Love Canal exposure cases on behalf of a group of similarly situated plaintiffs for 10 years. In re Love Canal Actions, 547 N.Y.S. 2d 174, 177 (Supreme Court of New York 1989), aff'd as modified, 555 N.Y.S. 2d 519 (A.D. 4th Dept. 1990). In contrast to Love Canal, the instant case has been on file for approximately 15 months. Plaintiffs have not yet received all documents responsive to even their first round of merits discovery. It is also important to note that, on appeal, the Love Canal trial court's order requiring the submission of reports of "experts, supporting each individual plaintiff's claim of injury and causation thereof...." was modified significantly because the appellate court concluded that the trial court lacked authority to issue that order. In re Love Canal Actions, 161 A.D. 2d 1169, 116 555 N.Y.S. 2d 519 (A.D. 1990). Plaintiffs were ultimately required to submit only a rep... from each expert and treating physician chosen to testify at trial, which report contained a

[3] This case is attached to Defendants' Memorandum as Exhibit Z.

description of the subjects about which the expert would testify. This Court has already imposed deadlines for the filing of such expert reports. Love Canal is simply not on point.

Defendants rely most heavily upon Marsden v. Boston Edison Co., No. 92-11718 (D. Mass. March 10, 1993), slip op.,* the only federal court case cited in which an order like the one sought by Defendants was granted. The procedural posture of the Marsden case is distinguishable from the instant case because in Marsden, the court was confronted with defendant's motion for summary judgment, and was therefore asked to decide whether plaintiffs were entitled to additional discovery under Rule 56(f). Slip op. at 1. As already noted, that is decidedly not the case here. Marsden is factually dissimilar to this case because plaintiffs' answers to interrogatories and their affidavits in opposition to summary judgment provided the trial court with no evidence that any discharges of radioactive material occurred, a crucial fact for the trial court—"I would be more inclined to grant plaintiffs' plea for the discovery of whatever records are in the exclusive possession of Boston Edison if the plaintiffs...had been able to identify even a single release of radioactive material during the relevant time period." Slip Op. at 5-6. As discussed above, in this case, two independent consulting firms have released reports to the public documenting the existence of radioactive materials attributable to the Apollo facility in the surrounding neighborhood. See Exhibit A at 16-17, 26-27; Exhibit B at 7, 15. Additionally, Plaintiffs' responses to the contention interrogatories propounded by Defendants revealed that other public records reviewed by Plaintiffs or their counsel demonstrated that the Apollo and Parks Township facilities frequently operated in violation of their permits, and of then-existing regulations, that radioactive material attributable to the facilities was present in the communities, that historically, facility stack sampling techniques

* This case is attached to Defendants' Memorandum as Exhibit Z.

failed to provide technical assurance that off-site concentrations were within acceptable limits, and that measured stack concentration levels frequently exceeded permissible levels. See, e.g., Answers to Interrogatories #1(a), 1(h) of Rita Stanley, attached herein as Exhibit C. Plaintiffs further identified some of the documents reviewed by them which provide substantiation for their claims that off-site releases had occurred, and that the conduct of Defendants or their predecessors was culpable. Three representative documents have been attached to this response as Exhibits. See Exhibit D, Report to Joint Committee on Atomic Energy, June, 1967, Appendix II at 1 (Bates #P0010393); Exhibit E, Report to Joint Committee on Atomic Energy, June, 1967, Appendix III at 1-2 (Bates #P0010400-P0010401); Exhibit F, Letter from E.V. Berry, NUMEC, to Eber Price, Atomic Energy Commission, at 1 (Bates #P0017678). Because the case at bar is distinguishable from Marsden, that case does not provide this Court with helpful guidance.

A case that *is* on point is Cook v. Rockwell International Corp., 147 F.R.D. 237 (D. Colo. 1993). Plaintiffs in that case were persons living in the vicinity of the Rocky Flats nuclear weapons production facility. Those plaintiffs, like Plaintiffs here, alleged that during the operation of Rocky Flats, defendants Dow Chemical Corporation and Rockwell International released radioactive and non-radioactive substances into the area surrounding the facility. As in this case, Defendants moved for a stay of discovery early in the litigation, claiming like Defendants here, that discovery should not be permitted "because the case had no factual basis." Cook v. Rockwell International, 147 F.R.D. at 240. Like Defendants here, they also argued that documents in the public domain, together with the limited set of "core" documents ordered produced in the case management order, were a "complete collection of the relevant information available..." Id. at 243. In response to a defense motion, Chief Magistrate Judge Abram

entered a case management order requiring that defendants produce a few discrete documents, and ordering plaintiffs to provide a specific statement of facts supporting each individual's claims, including the identification of each substance to which that person was exposed, the amount of exposure, and an identification of any expert relied upon to establish exposure and causation. Id. at 240-241. Judge Abram later denied plaintiffs' motion for additional document discovery, accepting the argument that plaintiffs could and should rely on data already in the public record. Id. at 242. Plaintiffs appealed from Judge Abram's orders requiring that they provide these specific factual statements without additional discovery.

In reviewing the magistrate's orders, District Judge Kane concluded that those orders had put plaintiffs "between a rock and a hard place" because, as in this case, publicly available data supported plaintiffs' claims that there had been releases, but that data, standing alone, provided an inadequate scientific basis to support plaintiff's dose reconstruction studies. Id. at 243. The court also found that an "independent" consulting firm's study of the area was by definition incomplete since it included recommendations for future study. Id. Plaintiffs would note that the CHMR report referenced by Defendants in their memorandum also contains recommendations that further study be conducted. See Exhibit A at 27. Finally, Judge Kane rejected the magistrate's conclusion that any dose reconstruction analysis could be based "simply on measurements of existing levels of contaminants in the air, soil and bodies of individual plaintiffs," finding that the magistrate's scientific surmise was "rarely true" in actual practice. Id. at 244. Judge Kane recognized that current measurements of contamination were only one factor to be considered, and that experts must be able to review data on the consumption and emissions of hazardous materials over time. "Soil, air and body testing is not enough." Id. at 244. Judge Kane modified the orders issued by the magistrate, holding that "Plaintiffs will not

be required to submit their expert reports until they have had a fair opportunity to identify, procure and digest any relevant documents produced through ...further discovery." Id. at 245. Both orders were modified by the trial court.

Granting Defendants' motion for a protective order in this case would likewise put Plaintiffs here "between a rock and a hard place" on the barest of showings that Defendants will be harmed by further discovery. Like Plaintiffs in Cook v. Rockwell, Plaintiffs here would be severely hamstrung in their ability to obtain the scientific data on historical plant operations necessary to conduct their historic dose reconstruction, the bulk of which data is in the exclusive possession of Defendants. As Defendants well know, in order for a medical professional to offer an opinion concerning the causation of a plaintiff's medical injuries, that expert will need information establishing the level of exposure to which the individual was exposed over time because individual causation is a function of chemical toxicity, exposure and dose. A complete picture of exposure and dose cannot be developed without a comprehensive understanding of the sources of emissions from a facility over time.* Because the facilities in this case were so close to residential neighborhoods, emissions coming both from stacks and discharge points, and fugitive emissions (which are typically not monitored or measured) are of crucial significance here. The information sought by Plaintiffs in the discovery propounded thus far (and not yet received) has been specifically directed to discovering facts that will provide a complete picture of fugitive emissions and "point source" emissions. Defendants' are well aware that their insistence that the "last shall go first," and that Plaintiffs submit evidence of specific causation at the outset of this litigation, before the investigation into exposure issues is complete, places

* G. Bouton, "A Mass-Exposure Model of Toxic Causation: The Content of Scientific Proof and the Regulatory Experience," 18 Col. J. Envtl. L. 181, 213-218 (1993)(Noting that the circumstances of exposure and dose must be considered specifically in order to determine whether it is reasonable for an identified illness or symptom to occur in a particular person.)

Plaintiffs in the "no-win" position of either presenting a medical case based upon incomplete exposure evidence or failing to comply with the Court's protective order. Both horns of this dilemma leave Plaintiffs vulnerable to premature dismissal of their claims, which is undeniably the goal of Defendants' motion. Renaud v. Martin Marietta Corp., 749 F.Supp 1545, 1548-1553 (D. Colo. 1990), aff'd 972 F.2d 304 (10th Cir. 1992). Because Defendants have not demonstrated the particular harm to justify entry of any protective order, and because the breadth of the order sought would significantly prejudice Plaintiffs, the Court should deny Defendants' motion in its entirety.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs move this Court for an order DENYING Defendants' Motion for Protective Order in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiffs' Response in Opposition to Defendants' Motion for Protective Order has been FEDERAL EXPRESSED to the following on the 6th day of September, 1995:

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_____
KAY GUNDERSON REEVES

STATE OF NEW YORK
SUPREME COURT COUNTY OF ERIE

FRAZER, et al.,
Plaintiffs,

- vs -

WESTINGHOUSE ELECTRIC CORPORATION, et al.
Defendants

Index No.
I 1995 195

STATE OF NEW YORK
SUPREME COURT COUNTY OF ERIE

JEAN EWERT, et al.,
Plaintiffs,

- vs -

WESTINGHOUSE ELECTRIC CORPORATION, et al.,
Defendants.

Index No.
I 1995/2302

STATE OF NEW YORK
SUPREME COURT COUNTY OF ERIE

NINA CLINE, et al.,
Plaintiffs,

- vs -

WESTINGHOUSE ELECTRIC CORPORATION, et al.,
Defendants

Index No.
I 1995/4024

Assigned Justice - All Cases
Hon. Peter J. Notaro

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR A CASE MANAGEMENT ORDER

FACTUAL BACKGROUND

This is a toxic tort suit filed on behalf of individual plaintiffs who lived, participated in recreational activities, and/or worked in the immediate vicinity of the Pfohl Brothers Landfill in Cheektowaga, New York, which operated from 1932 until 1971. During its years of operation, the landfill accepted hazardous and solid wastes from municipalities, manufacturers and utilities. Among the hazardous wastes disposed of at the site are known carcinogens, including benzene, dioxin and polychlorinated biphenyls (PCBs).[1] The site has been placed on the National Priorities List, and is currently being administered under the federal "Superfund" program.

Plaintiffs filed three separate actions in this Court for personal injuries and/or wrongful death between January and May of 1995. Defendants include the owners and operators of the landfill, together with individual waste haulers who transported waste to the landfill over its years of operation and individual waste generators who disposed of waste products at the landfill over its years of operation.[2] Plaintiffs, asserting claims sounding in negligence, gross negligence and strict liability, contend that they were exposed to hazardous chemicals emanating or released from the Pfohl Brothers Landfill, and that those exposures caused them to develop disease,

[1] See Federal Agency for Toxic Substances and Disease Registry (ATSDR) report, "Pfohl Brothers Landfill, Cheektowaga, Erie County, New York," November 2, 1995, at 3 (attached to Defendants' Motion as Exhibit B).

[2] The waste generators and haulers sued as Defendants in this action were each identified by the New York State Department of Environmental Conservation as probable generators and haulers of hazardous, as opposed to non-hazardous, waste disposed of at the Landfill. Technical Environmental Consultants, Inc., "Pfohl Brothers Landfill Site Phase I Document Review," Aug. 1988; Interagency Task Force on Hazardous Waste, "Draft Report on Hazardous Waste Disposal in Erie and Niagara Counties, New York," March 1979 (excerpts of which are attached herein as Exhibit B).

primarily various forms of cancer.

Plaintiffs have obtained no discovery on the merits of the issues in dispute to date. Plaintiffs served their first set of interrogatories on the defendants who transported and or disposed of hazardous waste to or at the Pfohl Brothers Landfill in May, 1996. Upon Defendants' request, Plaintiffs granted Defendants an additional thirty days to respond to these interrogatories. See Letter of Defense Liaison Counsel Laurie Stryka Bloom dated June 21, 1996 (attached as Exhibit C). Instead of responding to Plaintiffs' interrogatories, on July 19, 1996, Defendants filed a motion for a protective order, which is currently pending before this Court. Plaintiffs, however, have tendered releases to Defendants providing them with access to Plaintiffs' medical records, which comprise a significant portion of the merits-related documents in Plaintiffs' possession.

On July 11, 1996, Defendants filed their Motion for a Case Management Order, seeking an order from this Court that would deny Plaintiffs any discovery on the merits of their claims unless and until Plaintiffs come forward with a specified quantum of expert proof dictated by Defendants. Plaintiffs oppose Defendants' motion, and have filed their own Motion for a Case Management Order as an alternative to Defendants' proposal.

II.

ARGUMENT

Although innocuously styled a motion seeking a "case management order," nothing in Defendants' motion has anything whatsoever to do with managing the progress of this case or narrowing the issues in dispute. Under the guise of seeking Court intervention to "manage" this case, Defendants actually seek an order completely denying Plaintiffs any discovery on the

merits of this case until each of them produces an expert report or an expert disclosure sufficient to establish:

> 1. Each individual plaintiff's alleged exposure to particular substances at the Pfohl landfill as to time, place, nature (air, water, soil, etc.), degree and duration.
>
> 2. Each plaintiff's alleged injury(s), and
>
> 3. Causation--specifically, a showing, in evidentiary form, by a medical scientific expert on behalf of each plaintiff which establishes (i) that plaintiff was exposed to an identified substance(s) at the Landfill in an amount or at levels capable of causing illness or disease (with appropriate factual and scientific support), and; (ii) to a reasonable degree of medical/scientific certainty (with appropriate scientific support), that the referenced exposure was the competent producing cause of the injury complained of by each plaintiff.

Defendants' Notice of Motion, ¶A. Put more succinctly, Defendants ask this Court to rewrite the statutory provisions governing disclosure to require that, prior to being entitled to avail themselves of discovery in a civil action, personal injury plaintiffs must come forward with comprehensive, detailed expert reports establishing exposure, injury, and causation. Because the "case management" scheme Defendants would have this Court impose is fundamentally flawed from a scientific perspective and would place significant and unfair burdens on Plaintiffs, and because CPLR 3101(d) contains specific limitations on expert disclosure which may not be rewritten on the whim of Defendants, Plaintiffs ask this Court to deny Defendants' motion, and to adopt the Case Management Order proposed by Plaintiffs.

A. Because CPLR 3101(d) Does Not Permit this Court to Require Plaintiffs to File "Prima Facie" Expert Reports or Expert Disclosure as Sought by Defendants, Granting Defendants' Motion Would Constitute an Abuse of Discretion.

The Legislature has carefully circumscribed the type and scope of expert disclosure

permitted under New York law. Upon request, a party must identify each person whom the party expects to call as an expert witness at trial and disclose in reasonable detail

- the subject matter on which each expert is expected to testify,
- the substance of the facts and opinions on which each expert is expected to testify,
- the qualifications of each expert witness, and
- a summary of the grounds for each expert's opinion.

N.Y. Civ. Prac. L. & R. 3101(d)(1)(i) (McKinney 1995). Any additional disclosure "concerning the expected testimony of any expert may be obtained only by court order upon a showing of *special circumstances* and *subject to restrictions* as to scope."[3] N.Y. Civ. Prac. L. & R. 3101(d)(1)(iii) (McKinney 1995) (emphasis added).

Defendants' motion should be denied because this Court is without power to grant the draconian relief sought by Defendants. To do so would require the Court both to step far outside the boundaries of expert disclosure that have been established by the Legislature and to impose new, overwhelming barriers before claimants seeking discovery in civil litigation. This Court lacks the power to eliminate limitations on discovery established by the Legislature and to create obstacles to discovery where the Legislature has declined to do so.

Defendants' proposed case management order is incompatible with CPLR 3101(d) for numerous and varied reasons. The first, and most important, reason is that CPLR 3101(d) *does not provide for the disclosure of expert reports*,[4] regardless of their form or contents. The

[3] CPLR 3101(d)(1)(i) allows for disclosure of testifying experts. Discovery of non-testifying experts who were consulted in anticipation of litigation or for trial is privileged. N.Y. Civ. Prac. L. & R. 3101(d)(2) (McKinney 1995); Erie County Indus. Dev. Agency v. Musrynski, 629 N.Y.S.2d 646 (N.Y. Sup. Ct. 1995). Thus, absent a showing of "special circumstances" or "undue hardship," expert discovery is limited to the specific provisions of CPLR 3101(d)(1)(i). Id. at 3101(d)(1)(ii); 3101(d)(1)(iii); & 3101(d)(2).

[4] In extenuating circumstances and subject to certain restrictions, expert reports may be obtained upon a showing of "special circumstances." CPLR 3101(d)(1)(iii); see supra at 9-10.

Appellate Division, Fourth Department so held in In re Love Canal Actions, 161 A.D.2d 1169, 555 N.Y.S.2d 519 (N.Y. App. Div. 1990). After ten years of litigation involving hundreds of plaintiffs in which four orders coordinating discovery were granted, the trial court in that case entered an order very similar to that sought by Defendants here. Specifically, the court o that:

> prior to any further prosecution of a personal injury claim in these Love Canal actions, within six months from service of an order herein, each plaintiff shall provide the following documentation to defendants
>
> > (b) reports of treating physicians and medical or other experts, supporting each individual plaintiff's claim of injury and causation thereof by exposure to chemicals from the old Love Canal landfill.

In re Love Canal Actions, 547 N.Y.S.2d 174, 179 (N.Y. Sup. Ct. 1989), modified, 161 A.D.2d 1169, 555 N.Y.S.2d 519 (N.Y. App. Div. 1990). On appeal, the Fourth Department held that the trial court had abused its discretion: "CPLR 3101(d)(1)(i) does not provide for the disclosure of expert reports as ordered by the [trial court]." In re Love Canal Actions, 161 A.D.2d at 1170, 555 N.Y.S.2d at 520. The Court modified the trial court's order so that plaintiffs were required to provide medical records from their treating physicians and the specifically enumerated items set forth in CPLR 3101(d)(1)(i), but were relieved from the burden of providing reports of "medical or other experts, supporting each individual plaintiff's claim of injury and causation thereof by exposure to chemicals from the old Love Canal landfill." Id. Significantly, the modified order did *not* require plaintiffs to provide specific proof of exposure, injury, or causation. Id.

Defendants' proposed case management order, which would require each plaintiff to file a "*prima facie* expert report" or "an expert disclosure pursuant to CPLR 3101(d)(1)(i)"

establishing exposure, injury, and causation in the specific form dictated by Defendants, is absolutely inconsistent with the Appellate Division's decision in In re Love Canal Actions. This Court would abuse its discretion by ordering Plaintiffs to file expert reports, *prima facie* or otherwise. Id. Defendants' alternative request for "expert disclosure pursuant to CPLR 3101(d)(1)(i)" does not solve the problem, because Defendants ask for such disclosure in name only. CPLR 3101(d)(1)(i) only allows for identification of experts and reasonable disclosure of the "*subject matter* on which each expert is expected to testify, the *substance* of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness, and a *summary* of the grounds for each expert's opinion." N.Y. Civ. Prac. L. & R. 3101(d)(1)(i) (McKinney 1995); Renucci v. Mercy Hospital, 508 N.Y.S.2d 518, 519 (N.Y. App. Div. 1986) ("request for the 'facts and opinions' upon which the plaintiff's expert was expected to testify was improper, as the [defendant] was entitled to only the 'substance' thereof."). Defendants, by way of their case management order, may not dictate the subject matter of Plaintiffs' experts' testimony, nor the specific opinions these experts must reach. Saar v. Brown & Odabashian, P.C., 527 N.Y.S.2d 685, 690 (N.Y. Sup. Ct. 1988) ("the court cannot delineate the exact contents of a satisfactory disclosure").

The time frame sought by Defendants in their proposed case management order provides an additional, independent reason why the order is in conflict with CPLR 3101(d)(1)(i). Defendants seek an order compelling plaintiffs to produce expert reports establishing specific causation *within three months* of entry of the order. However, CPLR 3101(d)(1)(i) "does not set forth a time frame for expert disclosure," nor does it "require a party to retain an expert at any specific time." Krajewski v. Rosinski, 212 A.D.2d 886, 887, 622 N.Y.S.2d 367, 368

(N.Y. App. Div. 1995); Lillis v. D'Souza, 174 A.D.2d 976, 572 N.Y.S.2d 136 (N.Y. App. Div. 1991). In fact, the rule specifically provides for the last-minute disclosure of experts. N.Y. Civ. Prac. L. & R. 3101(d)(1)(i) (McKinney 1995).

The lack of a statutory time frame highlights Defendants' attempt to reshape the statute for their own purposes. "CPLR 3101(d) was intended to provide timely provision of expert witness information between parties so that parties could adequately and thoroughly *prepare for trial*." Bauernfeind v. Albany Medical Center Hosp., 195 A.D.2d 819, 600 N.Y.S.2d 516 (N.Y. App. Div. 1993). It was *not* intended to be invoked at the outset of litigation--prior to the conduct of discovery--to force a party to retain experts for the purpose of providing reports on issues defined by the opposing party. In fact, at least two New York courts have held that the statute may not be used for this purpose. Dunn v. Medina Memorial Hosp., 502 N.Y.S.2d 633 (N.Y. Sup. Ct. 1986); Saar v. Brown & Odabashian, P.C., 527 N.Y.S.2d 685, 689-90 (N.Y. Sup. Ct. 1988).

In Dunn, the court held that it lacked the power to order a party to retain an expert at any particular stage of discovery, particularly where, as here, discovery was ongoing. The defendants in Dunn moved for an order pursuant to CPLR 3101(d) compelling plaintiff to retain an expert immediately and to comply with defendants' demands for expert disclosure. The Dunn defendants, like Defendants here, argued that it would be difficult to prepare to defend against the plaintiff's "overbroad allegations" without disclosure of plaintiff's expert's position(s). The court explained its denial of defendants' motion in telling language:

> In the action before the Court, there is no evidence that there is an insufficier time before commencement of trial for the prescribed disclosure, and therefor *lacking any other direction by the legislature to force any party to retain the expert by a given time or event in the development of an action* proceeding to

trial, and *clearly no direction that the expert disclosure required be made before depositions*, the Court will not sanction action which the Legislature did not address in its efforts to encourage disclosure in all actions (not merely medical malpractice)

Dunn, 502 N.Y.S.2d at 635. With respect to defendants' complaint regarding "overbroad allegations" and the supposed need to "limit the issues," the court referred defendants "to the multitude of civil procedures available ... for enlightenment and further particularization." Id.

Defendants in this case seek the exercise of even broader unspecified powers than those sought by defendants in Dunn, because Defendants here would have this Court compel Plaintiffs to retain experts at a particular time for a particular purpose, *and* would deny Plaintiffs access to *any* merits-based discovery until their experts accomplished this purpose. There is no directive from the Legislature authorizing such a stay of merits discovery,[1] and Defendants have *failed to cite a single case in which a New York court conditioned any and all disclosure upon compliance with an order even remotely resembling that sought by Defendants here.*[2] To the

[1]Defendants' attempt to invoke Federal Rule of Civil Procedure 26(a)(2)(B) by analogy. Aside from the fact that the federal rules do not apply in state court, Rule 26(a)(2)(B) provides no authority for Defendants' request. Defendants argue that their proposed order is no more than an extension of the Rule 26(a)(2)(B) requirement regarding submission of expert reports. Defendants read the rule far too broadly. Rule 26(a)(2)(B) does require that *both* parties submit expert reports, and that such reports contain all opinions the expert will offer at trial, together with facts and information about the experts' qualifications. However, the rule does not provide that one of the parties be required to submit such reports *prior to obtaining discovery*, which is the particular relief sought by Defendants here. Rule 26(a)(2)(B) is simply a procedural tool intended to make pre-trial discovery of experts more meaningful by imposing a duty to provide a more comprehensive written report about the expert's testimony before trial. Advisory Committee Notes to 1993 Amendments to Rule 26(a)(2). Consistent with that goal, the default submission date contemplated by the rule is 90 days before trial, not at the outset of litigation, prior to any merits discovery. Fed. R. Civ. P. 26(a)(2)(C). Federal Rule 26(a)(2)(B) is clearly a procedural device designed to provide more meaningful discovery, not a tool to eliminate discovery. It provides no support for Defendants' contention that Plaintiffs should be required to provide evidence of a prima facie case prior to obtaining any discovery of Defendants on the merits of their claims.

[2]In re Love Canal Actions, 161 A.D.2d 1169, 555 N.Y.S.2d 519 (N.Y. App. Div. 1990), is not such a case. Plaintiffs in that action were permitted to engage in protracted discovery over a period of ten years, pursuant to four orders coordinating discovery, prior to the Appellate Division's approval of a *modified* order in compliance with CPLR 3101(d)(1)(i). See In re Love Canal Actions, 547 N.Y.S.2d 174, 179 (N.Y. Sup. Ct. 1989). In contrast, Plaintiffs in this case have not received *any* merits-based discovery from *any* Defendant, and

contrary, CPLR 3101 must be liberally construed to provide for "very broad disclosure" of any evidence that is "material and necessary" to the prosecution of an action. N.Y. Civ. Prac. L. & R. 3101(a) (McKinney 1995). Ocean to Ocean Seafood Sales, Inc. v. Trans-O-Fish & Seafood Co., 138 A.D.2d 265, 525 N.Y.S.2d 611 (N.Y. App. Div. 1988). Clayton Funding Corp. v. State Bank of Long Island, 632 N.Y.S.2d 29 (N.Y. App. Div. 1995). South & Center Chautauqua Lake Sewer Distrct. v. Secord Bros., Inc., 149 A.D.2d 978, 540 N.Y.S.2d 115 (N.Y. App. Div. 1989).

Defendants suggest that CPLR 3101(d)(1)(iii) authorizes this Court to provide the draconian relief requested in its case management order. Under CPLR 3101(d)(1)(iii), "further disclosure" of an expert is conditioned upon a showing of "special circumstances." However, "the 'special circumstances' requirement of CPLR 3101(d)(1)(iii) ... is more than a 'nominal' barrier to discovery". "a conclusory allegation that such discovery is necessary to fully prepare for litigation is insufficient to establish that requirement." 232 Broadway Corp. v. New York Property Ins. Underwriting Ass'n, 567 N.Y.S.2d 790 (N.Y. App. Div. 1991). Courts have generally limited the "special circumstances" to situations where evidence inspected by one party's experts has been lost, destroyed, or otherwise rendered unavailable to the opposing party. E.g., id.; Generali Ins. Co. v. Honeywell, Inc., 194 A.D.2d 442, 599 N.Y.S.2d 254 (N.Y. App. Div. 1993). And, even in these situations, courts limit the "further disclosure" of the experts to disclosure related to the factual observations--as opposed to the opinions--of the experts. E.g., Rosario v. General Motors Corp., 148 A.D.2d 108, 113, 543 N.Y.S.2d 974, 977 (N.Y. App. Div. 1989).

Defendants' proposed case management order fails to comply with CPLR 3101(d)(1)(i).

The *only* "special circumstance" alleged by Defendants is the need to coordinate discovery between the state and federal courts. Defendants do not and cannot explain why such coordination is dependent upon implementation of Defendants' case management order.[3] Nor could Defendants explain why such coordination would justify blatant disregard of state statutes governing disclosure. Moreover, Defendants cite no authority for the proposition that discovery coordination is a "special circumstance" under the statute. Finally, even if discovery coordination is a "special circumstance," CPLR 3101(d)(1)(iii) would only allow "further disclosure" of Plaintiffs' experts' factual observations. Rosario v. General Motors Corp., 148 A.D.2d 108, 113, 543 N.Y.S.2d 974, 977 (N.Y. App. Div. 1989). Disclosure of the experts' opinions would continue to be limited to the specific provisions of CPLR 3101(d)(1)(i).

In sum, the specific statute that governs expert disclosure--CPLR 3101(d)--not only does not authorize the imposition of Defendants' proposed case management order, but actually prohibits it.[4] In an apparently desperate attempt to find authority for the Court to issue its proposed order, Defendants cite a laundry list of "broad" and "inherent" powers. See Defendants' Memorandum at 5-6. Plaintiffs do not dispute that this Court has "broad discretion in supervising disclosures." In re Love Canal Actions, 161 A.D.2d 1169, 555 N.Y.S.2d 519 (N.Y. App. Div. 1990). In fact, the Appellate Division in In re Love Canal Actions so held *in the same opinion in which it significantly modified an order granting substantially the same relief*

[3]Presumably, this Court could devise numerous ways to coordinate discovery with the federal court, including entering Plaintiffs' Proposed Case Management Order.

[4] Plaintiffs do not dispute that, at the appropriate time and upon request by Defendants, Plaintiffs will be required to provide the specific expert disclosure set forth at CPLR 3101(d)(1)(i). Defendants' proposed case management order is not such a request. In fact, Defendants' failure to comply with the specific provisions of CPLR 3101(d)(1)(i) warrants vacatur of the entire demand. Reuben v. Mercy Hospital, 508 N.Y.S.2d 518, 519 (N.Y. App. Div. 1986).

sought by Defendants here. Id. "Broad discretion" is not unlimited, unfettered discretion, which is what Defendants would have this Court exercise.

B. Defendants' Claim that Plaintiffs Have Improperly Joined Parties in this Litigation Is Meritless and Provides No Support for their Request that Discovery Be Stayed.

As further support for their proposed case management order, Defendants maintain that "there are serious threshold issues of misjoinder that must be resolved before discovery proceeds." Defendants' Memorandum of Law at 10. The issue of joinder, however, has little or nothing to do with the remedy Defendants seek in their Motion for Case Management Order, which is that Plaintiffs come forward with specific causation evidence without obtaining discovery from any parties to this litigation.

Defendants submit the affidavit of Laurie Styka Bloom in support of their claim of misjoinder, which allegedly justifies entry of an order requiring Plaintiffs to come forward with specific causation evidence prior to being permitted any formal discovery. However, Ms. Bloom's "affidavit" is fatally defective and cannot be considered evidence. The alleged affidavit, which contains "facts" supporting the motion for a case management order (¶¶23-31), statements regarding the content of certain studies conducted by various public agencies (¶¶33-34), statements regarding the alleged state of medical and scientific knowledge as it relates to "signature" cancers (¶35), and "facts" gleaned from Plaintiffs' medical records (¶36), *fails to contain a single allegation that any of the assertions contained therein are facts within Ms. Bloom's personal knowledge.* See Bloom Affidavit. Indeed, certain of the "facts" contained in Ms. Bloom's affidavit are clearly outside her area of expertise, particularly those statements

purporting to represent that specific substances cause certain particular types of cancer (see, e.g., ¶35), a matter clearly within the purview of a medical doctor or other scientific expert, not the lawyer for the Defendants.

Based on the defective Bloom affidavit, Defendants argue that joinder is not proper because the plaintiffs do not have the same injury, the same circumstances of exposure, and are not grouped along family lines or by allegedly responsible defendants. Bloom Affidavit at ¶¶9, 25, 28-30. But if Defendants believe parties have been improperly joined, they should file a motion to sever under CPLR 1003, which they have failed to do. Had they done so, however, their remedy would be the addition or subtraction of parties, and *not* a requirement that Plaintiffs produce a prima facie case on the merits of their claim before being provided discovery on the merits of that claim. See N.Y. Civ. Prac. L. & R. 1003 (McKinney 1995) ("Misjoinder of parties is not a ground for dismissal of an action. Parties may be added or dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon such terms as may be just.").

Not only is Defendants' misjoinder argument misplaced, it is also without merit. CPLR 1002(a) specifically permits parties to be joined as plaintiffs in one action if they assert "any right to relief jointly, severally, or in the alternative arising out of the same transaction, occurrence, or series of transactions or occurrences" and "if any common question of law or fact would arise." N.Y. Civ. Prac. L. & R. 1002(a) (McKinney 1995). Joinder as a defendant is proper if "there is asserted any right to relief jointly, severally, or in the alternative, arising out of the same transaction, occurrence, or series of transactions or occurrences" and "if any common question of law or fact would arise." N.Y. Civ. Prac. L. & R. 1002(b) (McKinney

1995).

Plaintiffs in this action have all lived, worked or participated in recreational activities in the immediate vicinity of the now-abandoned Pfohl Brothers Landfill located in Cheektowaga, New York. Plaintiffs claim that they were exposed to hazardous and toxic chemicals rele or emanating from the landfill, and that Defendants were negligent in, at a minimum, disposi of hazardous wastes in a landfill not appropriately constructed for such disposal activities, and that they continued to generate wastes for disposal in this facility after they knew or should have known that the landfill failed to contain the wastes. The transaction or series of transactions of interest to Plaintiffs is the periodic disposal and ongoing management of hazardous wastes at the Pfohl Brothers Landfill between 1932 and 1971. Issues common to the plaintiffs include the extent of the generators' state of knowledge about the suitability of the landfill, the nature and quantity of the releases of hazardous toxins, separately or in combination, from the landfill over the relevant years, together with scientific questions concerning possible interactions among chemicals disposed of at the Landfill[2] and the causal relationship between the calculated doses of hazardous materials received by Plaintiffs and their resultant diseases. Questions common among the defendants include whether or not disposal of hazardous waste at the Pfohl Brothers Landfill was an abnormally dangerous activity, the extent to which the generators are jointly and severally liable for indivisible injuries under state common or statutory law, the negligence of

[2] See Upton, A., Kneip, T., Toniolo, T., "Public Health Aspects of Toxic Chemical Disposal Sites," 10 Annual Rev. Public Health 1, 4 (1989) (noting that a major source of uncertainty [in developing appropriate dose-response analyses] stems from the fact that chemicals at disposal sites are encountered in mixtures rather than in pure form; consequently, "the possibility of synergistic or other more complex interactions between them must also be considered.") (copy attached herein as Exhibit D); Sullivan, J. & Krieger, G., Hazardous Materials Toxicology (1992) at 17 (same).

the owner/operator of the Pfohl Brothers Landfill, and the vicarious liability of the generators for any negligence on the part of the owner/operator.

Far from helping their cause, Defendants' misjoinder "examples" clearly illustrate the need for additional discovery as a prerequisite to the "narrowing" of substantive issues in this case. See Bloom Affidavit at ¶29. The first scenario, for example, purports to demonstrate the "manifest injustice and inefficiency" of allowing discovery to proceed where one defendant has sent only one toxic substance to the site and where this toxic substance is linked to only one disease, a disease not suffered by all Plaintiffs entitled to discovery. All that is "manifest" in this scenario, however, is that the "injustice" complained of can only be evaluated if the Plaintiffs know--which they clearly do not--which Defendants disposed of what chemicals during particular time periods. Defendants are currently the only parties in a position to know which toxic substances each of them sent during various time periods. This Court should not deny discovery based on phantom scenarios only the Defendants are in the position to verify. Discovery is clearly needed, and Defendants' arguments merely serve to emphasize that need.

Finally, Defendants' joinder arguments are disingenuous in light of their assertions regarding the need for coordination between state and federal courts, which they claim is "particularly appropriate here given the overwhelming similarities between the cases." Bloom Affidavit at ¶18.

C. Defendants' Assertions Concerning the Content of Public Studies Are Misleading and Lend No Support to their Contention that Plaintiffs Should Come Forward with Specific Causation Evidence Prior to Discovery on the Merits.

Defendants attempt to buttress their legal arguments with "facts" set forth in the Bloom

Affidavit at ¶¶32-34, contending that these "facts" demonstrate that the case management order they seek is appropriate. As stated above, however, the Bloom Affidavit is fatally defective and constitutes nothing more than the argument of counsel. Additionally, Bloom's statements about the factual record are misleading; read in a more objective light, the facts clearly demonstrate the need for additional discovery. Defendants cannot make misleading statements about the state of knowledge regarding a hazardous landfill site, and, on the basis of those statements, obtain radical relief that would rewrite the discovery rules.

The misleading nature of Bloom's statements is exemplified by her claim that a 1993 New York State Department of Environmental Conservation report "concluded that there was no evidence of ... off-site migration" of materials at the Pfohl Brothers Landfill. See Affidavit, ¶33(A). Statements contained in that 1993 report conflict with Bloom's conclusion. For example, at page 3 of the report the Department states that the clean-up remedy selected for the site "will control the off-site migration of contaminants and eliminate the potential routes of exposure to the public and the environment" and states that a slurry wall will be installed "to contain the wastes and eliminate migration of contaminants." See Exhibit E, "1993 Off-site Remedial Investigation," New York State Dep't of Envtl. Conservation, at 3. Such remedial activities would hardly be necessary if there had been no migration of chemicals from the landfill.

Similarly, Bloom states at ¶33(b)&(c) that the Agency for Toxic Substances and Disease Registry (ATSDR) found that a June 1990 study by the New York Department of Health found "no unusual pattern" regarding the frequency of any one type of health condition; i "cancer clusters." However, what Bloom omits is ATSDR's acknowledgement that th

Health Department Study was of the sort which "cannot link reported illnesses to site contaminants." See ATSDR, "Pfohl Brothers Landfill, Cheektowaga, Erie County, New York," CERCLIS No. NYD980507495, Nov. 2, 1995, at 39, excerpts of which are attached herein as Exhibit F. In other words, the 1990 study was not designed to *find* the causation links Plaintiffs must establish in order to prevail in their claims. ATSDR itself went on to conclude that people in the past "were likely exposed" to contaminants from this site, that the removal and remedial actions taken in recent years had greatly reduced the likelihood of exposure, but that the past health hazard could not be determined because ATSDR had insufficient data on groundwater contamination. Exhibit F at 1.

Finally, Bloom states that a March 1991 Department of Health study found increased area cancer rates only for prostate cancer among men and breast cancer among women. Bloom Affidavit at 15. This clearly misstates the actual findings, which were that the Department found a statistically significant excess of prostate cancers in men, and a statistically significant excess of *all newly diagnosed cancers in women*, including particularly breast cancers. New York State Dep't of Health, "Cancer Incidence in the Cheektowaga/Ellicott Creek Area, Erie County, New York," March 1991, at 4, attached herein as Exhibit G.

Bloom's creative restatement of the facts cannot form the basis for an order denying Plaintiffs discovery. See Bloom Affidavit at ¶33 ("the studies are not presently offered [by Defendants] as conclusive on causation issues."). Even if Bloom's statements about public studies concerning the site were correct, however, Plaintiffs would be entitled to discovery in order to investigate their claims. Plaintiffs require records and data concerning releases from the facility during prior years, from which data they will calculate the dose received by Plaintiffs

in the vicinity of the facility during those years. A regulatory agency, by contrast, evaluates whether or not a site is a current or potential future hazard to public health or the environment. See, e.g., "Draft Baseline Human Health Risk Assessment, Pfohl Brothers Landfill," Vol. I, Nov. 1991, at 3-20, attached herein as Exhibit H ("A baseline risk assessment evaluates current and future risks in the absence of remediation."). Cook v. Rockwell Int'l Corp., 147 F.R.D. at 243-4 (rejecting Defendants' claim that Plaintiffs be required to rely solely on public studies in constructing their dose reconstruction studies, and concluding that such analysis can rarely be based on current measurements of contaminants in air, soil and the bodies of plaintiffs). While Plaintiffs may rely upon existing studies, and may be compelled to distinguish them where they do not support Plaintiffs' case, this Court has no authority to deny Plaintiffs meaningful discovery on the merits of their claims simply because government studies exist.

D. Defendants' Assertions Concerning the Content of Medical Records are Misleading and Lend No Support to their Contention that Plaintiffs Should Come Forward with Specific Causation Evidence Prior to Discovery on the Merits.

In a further attempt to support their legal arguments, Defendants again rely on Bloom's defective Affidavit to set forth highly selective "facts" regarding individual Plaintiffs' medical histories, apparently in support of Ms. Bloom's medical conclusions. See Bloom Affidavit, ¶36. Without setting forth any credentials (other than the fact that she is a lawyer), Ms. Bloom makes wide-ranging medical and scientific conclusions with respect to the cause and "established" risk factors for particular cancers. Id. Ms. Bloom is not a doctor or a scientist, and her opinions as to medical causation and her interpretations of medical records must be disregarded.

In addition to the affiant's lack of competency in the medical field, the medical "facts"

alleged in the affidavit are misleading and taken out of context. For example, Ms. Bloom reports that plaintiffs Gale Frazer and Gail Joyce have a family history of cancer. What Ms. Bloom fails to mention is that both Ms. Frazer and Ms. Joyce have breast cancer, *and that neither woman has a family history of breast cancer*. See Medical Records of Gale Frazer, attached herein as Exhibit I; Medical Records of Gail Joyce, attached herein as Exhibit J. As a further example, Ms. Bloom reports that Marie Martzolf has a family history of cancer, specifically, her father and brother. Ms. Bloom omits the fact that Ms. Martzolf grew up on Aero Road during the 1930s and 1940s with her father and brother.

Defendants' provision of a few selective "facts" about selective plaintiffs, along with the medical opinion of their counsel, fails to support their requested radical discovery relief. Ms. Bloom's lack of personal knowledge and expertise would disqualify her from providing the sort of testimony contained in her affidavit in a court of law or in support of a motion for summary judgment; therefore, such "testimony" should not be accorded any weight in support of this motion. See CPLR 3212 (b).

E. Cases Cited by Defendants Provide No Support for Entry of the Order They Seek.

In support of their contention that orders like the one sought here are "frequently" employed in toxic tort cases, Defendants cite several inapposite cases which provide no support for the relief sought here. In fact, only Lore v. Lone Pine Corp., an unreported New Jersey state court case, even arguably supports the entry of an order like that sought by Defendants. But even that case is not persuasive authority here, because Lone Pine was not decided under New York law, and because it was wrongly decided.

In the Lone Pine case, 464 plaintiffs sued the operator of a landfill, together with numerous waste generators. Various case management orders provided at least part of the relief Defendants seek here by requiring that plaintiffs provide affidavit evidence of a prima facie case. In that case, however, the New Jersey state court judge ordered that plaintiffs produce this evidence of specific causation because the court had determined that the face of the pleadings revealed no prima facie claim for personal injuries or property damage, a finding which has not been made here. Lore v. Lone Pine Corp., No. L33606-85 (N.J. Superior Court, Nov. 18, 1986), slip op. at 1.[10] The opinion does not state, however, that the court required the production of such evidence prior to the conduct of merits discovery, a significant feature of the relief sought here. As such, the Lone Pine case provides only lukewarm support for the Defendants' position. What is clear, however, is that the trial judge issued his ruling not because the law required or permitted that result, but because he believed that the law *ought* to require that, "prior to the institution of such a cause of action, attorneys for plaintiffs must be prepared to substantiate, to a reasonable degree, the allegations of personal injury, property damage and proximate cause." Slip op. at 3. As discussed above, New York requires no such detailed submission as a prerequisite to discovery, and the Lone Pine case does not contain a correct statement of the law applicable in New York state courts. As such, the case does not provide a basis upon which the Court may grant Defendants' motion.[11]

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[10] This case is attached to Defendants' Memorandum of Law.

[11] Moreover, neither Adinolfe v. PJP Landfill, slip op., Aug. 1987 (N.J. Super. L. Hudson Co.) nor the Lone Pine case were designated for publication by the New Jersey state judges authoring the opinions. New Jersey prohibits the citation of unreported cases as precedent. N.J. Rules of Gen. Applic., Rule 1:36 (1995). States enact procedural rules barring the citation of unreported opinions because such opinions are not intended to add to the jurisprudence of the forum state. Since such cases do not comprise the decisional law in the state in which they were decided, it makes little sense to adopt them as guidance or precedent here.

The other cases relied on by Defendants involved no relief even remotely resembling their proposed order. See Abuan v. General Elec. Co., 1992 WL 535958 (D.C. Guam 1992) (granting summary judgment pursuant to Federal Rule of Civil Procedure 56). Renaud v. Martin Marietta Corp., 972 F.2d 304 (10th Cir. 1992) (affirming summary judgment pursuant to Federal Rule of Civil Procedure 56). Eggar v. Burlington Northern R.R., 1991 WL 315487 (D. Mont. 1994) (dismissing plaintiffs' case after concluding that plaintiffs' expert causation testimony failed the Daubert admissibility standard). New Jersey Dep't of Envtl. Protection v. Gloucester Envtl. Management Servs., Inc., 138 F.R.D. 421 (D. N.J. 1991) (payment of attorneys' fees by liason counsel). None of these cases required plaintiffs to prove their claims before having an opportunity for discovery.

F. Granting Defendants' Motion Would Place Untenable Burdens upon Plaintiffs Because It Is Inconsistent with the Nature of the Scientific Inquiry Employed in Toxic Tort Cases.

Requiring Plaintiffs to produce specific causation evidence at the outset of litigation, prior to any discovery on the merits, would impose significant unfair burdens upon Plaintiffs. In this toxic tort case, Plaintiffs are required to prove that their exposure to chemicals from the Pfohl Brothers Landfill occurred at such significant levels that they received a dose of particular toxins (or a mixture thereof) large enough to cause them to develop disease. Data relevant to the amount and character of the waste disposed at the landfill over the years is crucial to Plaintiffs' calculations of dose because individual causation is a function of chemical toxicity, exposure and dose.[21]

While Plaintiffs do have access to public reports and documents relevant to the liability facts in this case, Plaintiffs have not yet acquired any discovery from Defendants on the merits of this case. In contrast, Defendants have been provided with significant documentation from Plaintiffs (in the form of medical records) going to the merits of Plaintiffs' claims. Governmental studies do provide some useful information, but they were designed to evaluate current hazards, rather than the extent of contamination many years ago, when Plaintiffs were being exposed. See Exhibit H. Plaintiffs require discovery of documents revealing which wastes were disposed of in what volumes by which Defendants. In addition, they require data about planned and unplanned releases from the facility, and about Defendants' knowledge of those releases. These documents are in the exclusive possession of Defendants.

The case management order Defendants seek turns Plaintiffs' case on its head by requiring that Plaintiffs provide evidence of individual causation--that is, evidence that exposure to a particular toxin or combination of toxins occurred, which exposure was great enough to cause (and did in fact cause) Plaintiffs to suffer particular diseases--prior to their being provided *any* discovery aimed at determining facts related to exposure and dose. Such data would include Defendant company documents describing waste shipments into and out of the disposal facility, the timing of those shipments, the chemical content of those disposed waste shipments, and the design and operation of the landfill. Much of this data was not publicly reported prior to 1971,

[21] Boston, G., "A Mass-Exposure Model of Toxic Causation: The Content of Scientific Proof and the Regulatory Experience," 18 Col. J. Envtl. L. 181, 213-18 (1993) (noting that the circumstances of exposure and dose must be considered specifically in order to determine whether it is reasonable for an identified illness or symptom to occur in a particular person)

when the landfill closed,[22] and such documents are key to Plaintiffs' reconstruction of the dose of toxins to which they were exposed in years past. Asking Plaintiffs' experts to render opinions without the benefit of a site visit, without the benefit of any discovery as to the actual volumes or types of waste disposed of at the facility, without discovery as to the historic performance of the landfill as constructed, and without any discovery as to what Defendants knew about the integrity of the facility over the years, would essentially force Plaintiffs to "put the cart before the horse."

A case directly on point is Cook v. Rockwell Int'l Corp., 147 F.R.D. 237 (D. Colo. 1993). Plaintiffs in that case were persons living in the vicinity of the Rocky Flats nuclear weapons facility. The Defendants moved for a stay of discovery early in the litigation, claiming, like Defendants here, that discovery should not be permitted "because the case had no factual basis." Id. at 240. Also like Defendants here, they argued that documents in the public domain, together with the limited set of "core" documents ordered produced in the case management order, were a "complete collection of the relevant information available..." Id. at 243. The magistrate directed the plaintiffs to provide a specific statement of facts supporting each person's claim, including the identification of each substance to which that person was exposed, the amount of exposure, and an identification of any expert relied upon to establish exposure and causation, much like the order sought here. Id. at 240-1. Plaintiffs' requests for additional discovery were denied.

On Plaintiffs' appeal of the magistrate's order, District Judge Kane concluded that the

[22] For example, recordkeeping provisions of the Solid Waste Disposal Act (as amended by the Resource Conservation and Recovery Act, or RCRA) were not enacted until 1976. 42 U.S.C. § 6922 (a)(1).

magistrate had put plaintiffs "between a rock and a hard place" because, as in this case, publicly available data, standing alone, provided an inadequate scientific basis to support plaintiffs' dose reconstruction studies. Id. at 243. Judge Kane held that Plaintiffs need not be required to submit their expert reports until they had been provided a fair opportunity to identify, procure and digest any relevant documents produced through additional discovery. Id. at 245. Judge Kane also noted that expert reports involving dose reconstruction could rarely be based on present-day measurements of existing levels of contamination present in environmental media, and that experts preparing such reports would need to review data on both consumption and emissions of hazardous material over time. Id. at 243-44 ("Proof of pathway [to exposure], medical and economic causation in hazardous waste cases can be difficult to adduce. Usually, neither the chemicals in question nor their action in the environment can be directly observed." Id., quoting 3 Susan M. Cooke, The Law of Hazardous Waste, §17.02[2][b] (1992))

Granting Defendants' motion for a case management order here would likewise put Plaintiffs "between a rock and a hard place," and Plaintiffs would be put in such an untenable position prior to any showing that discovery will in any way harm or burden Defendants. Like Plaintiffs in Cook v. Rockwell, Plaintiffs here would be severely hamstrung in their ability to obtain scientific data on historical operations necessary to conduct their dose reconstruction studies, the bulk of which data is in the exclusive possession of Defendants. Defendants are well aware that their insistence that Plaintiffs submit evidence of specific causation at the outset of this litigation, before any investigation into Defendants' knowledge concerning exposure issues, places Plaintiffs in the "no-win" position of either presenting a medical case based on incomplete exposure evidence or failing to comply with the Court's case management order.

Both horns of this dilemma leave Plaintiffs vulnerable to premature dismissal of their claims which is undeniably the goal of Defendants' motion.

G. The "Need to Coordinate Discovery" in the State and Federal Cases Provides No Support for Entry of Defendants' Order.

Defendants suggest that the only way for this Court to coordinate discovery with the federal court would be to adopt its proposed order. Implicit in this suggestion is an assumption by Defendants that the federal court will adopt its order. The federal court hearing is scheduled for September 4, 1996, and there has been no indication to date that the federal court has or will adopt Defendants' case management order.

Plaintiffs have filed papers in the federal court in opposition to Defendants' motion. See Exhibit A, and have filed their own Motion for Case Management Order in both courts. Plaintiffs submit that their case management order would allow the courts to coordinate discovery in an efficient and just manner. See Manual for Complex Litigation (Third) (1995) § 21.422 ("It will rarely be possible for counsel and the court to determine conclusively early in the litigation what discovery will be necessary.... [F]or effective discovery control, therefore, the court should direct initial discovery at matters--witnesses, documents, information--that appear pivotal.") Plaintiffs have structured their case management orders so that the state court action will proceed more rapidly than the federal action due to the lack of statute of limitations issues in the state court cases. See Letter of Laraine Kelley (Oct. 24, 1995) [attached as Exhibit K]. Plaintiffs' case management order would allow for discovery of the numerous issues in this case to proceed in an organized fashion and as rapidly as is reasonably possible. It is a reasonable alternative to the highly inequitable and impermissible "case management order"

sought by Defendants.

Because the case management order sought by Defendants would work a significant hardship on Plaintiffs, and because it is contrary to governing law and operable scientific principles, Plaintiffs ask this Court to deny Defendants' motion for a case management order.

WHEREFORE, Plaintiffs respectfully request that Defendants' Motion for Case Management Order be DENIED in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing *Plaintiffs' Memorandum of Law In Opposition to Defendants' Motion For a Case Management Order and Exhibits* was forwarded to the following counsel via facsimile (with out exhibits) and Federal Express (with exhibits), on the 23nd of August, 1996.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing *Plaintiffs' Memorandum of Law In Opposition to Defendants' Motion For a Case Management Order and Exhibits* was forwarded to the following counsel by depositing same in a postage paid envelope and delivering to the custody of the U.S. Postal Service, on the 23nd of August, 1996:

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ERIE

IN RE: PFOHL BROTHER LANDFILL LITIGATION

THIS DOCUMENT RELATES TO:

Frazer, et. al. v. Westinghouse, et. al.
Index No. I 1995-195

Ewert, et. al. v. Westinghouse, et. al.
Index No. I 1995/2302

Cline, et. al. v. Westinghouse, et.al
Index No. I 1995/4024

EXHIBIT A

TO PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS'
MOTION FOR A CASE MANAGEMENT ORDER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IN RE: PFOHL BROTHERS LANDFILL LITIGATION

MASTER FILE NO.
95-CV-0020A

THIS DOCUMENT RELATES TO:
ALL ACTIONS

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR CASE MANAGEMENT ORDER

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I.

FACTUAL BACKGROUND

This is a toxic tort suit filed on behalf of individual plaintiffs who lived, participated in recreational activities, and/or worked in the immediate vicinity of the Pfohl Brothers Landfill in Cheektowaga, New York, which operated from 1932 until 1971. During its years of operation, the landfill accepted hazardous and solid wastes from municipalities, manufacturers and utilities. Among the hazardous wastes disposed of at the site are known carcinogens, including benzene, dioxin and polychlorinated biphenyls (PCBs).[1] The site has been placed on the National Priorities List, and is currently being administered under the federal "Superfund" program.

Plaintiffs filed four separate federal actions between January and June of 1995.[2] These actions were later consolidated by order of this Court.[3] Defendants include the owners and operators of the landfill, together with individual waste generators who disposed of waste products at the landfill over its years of operation.[4] Plaintiffs, asserting claims sounding in negligence, gross negligence and strict liability, contend that they were exposed to hazardous chemicals

[1] See Federal Agency for Toxic Substances and Disease Registry (ATSDR) report, "Pfohl Brothers Landfill, Cheektowaga, Erie County, New York," November 2, 1995, at 3 (attached to Defendants' Motion as Exhibit 2).

[2] Plaintiffs filed a fifth federal action, Robert S. Fiess et al. v. Westinghouse, et al., 96-CV-395, on June 17, 1996.

[3] See Exhibit A, Order Consolidating Actions, February 15, 1996.

[4] The waste generators sued as Defendants in this action were each identified by the New York State Department of Environmental Conservation as probable generators of hazardous, as opposed to non-hazardous, waste disposed of at the Landfill. Technical Environmental Consultants, Inc., "Pfohl Brothers Landfill Site Phase I Document Review," Aug. 1988; Interagency Task Force on Hazardous Waste, "Draft Report on Hazardous Waste Disposal in Erie and Niagara Counties, New York," March 1979.

emanating or released from the Pfohl Brothers Landfill, and that those exposures caused them to develop disease, primarily various forms of cancer.

After the four federal actions were consolidated for purposes of discovery, this Court entered a case management order, limiting the initial phase of discovery to the issue of the statute of limitations. See "First Case Management Order" attached herein as Exhibit B. That phase of discovery has not yet been completed and, according to the limits imposed by the initial case management order, Plaintiffs have obtained no discovery on the merits of the issues in dispute to date. In the course of responding to Defendants' discovery on the issue of statute of limitations, however, Plaintiffs have tendered to Defendants releases providing them with access to Plaintiffs' medical records, which documentary evidence comprises a significant portion of the merits-related documents in Plaintiffs' possession.

Pursuant to the initial Case Management Order, the parties conferred on or about May 1 in an attempt to come to an agreement on a second case management order staging the next phase of this litigation. No agreement was reached, and Defendants subsequently filed their Motion for a Case Management Order. Plaintiffs oppose Defendants' motion, and have filed their own Motion for Case Management Order as an alternative to Defendants' proposal.

II.

ARGUMENT

Although innocuously styled a motion seeking a "case management order," nothing in Defendants' motion has anything whatsoever to do with managing the progress of this case or narrowing the issues in dispute. Under the guise of seeking Court intervention to "manage" this Case, Defendants actually seek an order completely denying Plaintiffs any discovery on the merits

of this case until each of them produces an expert report sufficient to establish:

> 1. Each individual plaintiff's alleged exposure to particular substances at the Pfohl landfill as to time, place, nature (air, water, soil, etc.), degree and duration;
>
> 2. Each plaintiff's alleged injury(s); and
>
> 3. Causation—specifically, a showing, in evidentiary form, by a medical/scientific expert on behalf of each plaintiff which establishes (i) that plaintiff was exposed to an identified substance(s) at the Landfill in an amount or at levels capable of causing illness or disease (with appropriate factual and scientific support), and; (ii) to a reasonable degree of medical/scientific certainty (with appropriate scientific support), that the referenced exposure was the competent producing cause of the injury complained of by each plaintiff.

Defendants' Notice of Motion, ¶A. Put more succinctly, Defendants ask this Court to rewrite the Federal Rules of Civil Procedure to require that, prior to being entitled to avail themselves of discovery in a civil action, personal injury plaintiffs must come forward with sufficient evidence to withstand a motion for summary judgment or a directed verdict on the issue of exposure and specific causation. See, e.g., In re Joint Eastern & Southern District Asbestos Litig., 964 F.2d 92, 96 (2d Cir. 1992) (Expert's opinion that asbestos caused Plaintiff's injuries, when based upon exposure facts, medical records review, occupational and medical history, and expertise, were sufficient to withstand motion for summary judgment on the issue of causation in a toxic injury suit). Because the "case management" scheme Defendants would have this Court impose is fundamentally flawed from a scientific perspective and would place significant and unfair burdens on Plaintiffs, and because the Federal Rules of Civil Procedure do not provide the trial court with the unbridled discretion to rewrite the Federal Rules of Civil Procedure to require that Plaintiffs produce sufficient causation evidence to withstand a motion for summary judgment or a directed verdict at the threshold of litigation, Plaintiffs ask this Court to deny Defendants' motion, and to adopt the Case Management Order proposed by Plaintiffs.

A. **Because the Federal Rules of Civil Procedure Do Not Permit this Court to Require Plaintiffs to Put on a "Prima Facie" Case at the Outset of Litigation, Prior to the Conduct of Discovery, Granting Defendants' Motion Would Constitute an Abuse of Discretion.**

Defendants ask this Court to stay discovery until Plaintiffs produce an expert report sufficient to establish a quantum of proof which is all that would be necessary to withstand a motion for summary judgment in this case. In re Joint Eastern & Southern District Asbestos Litigation, 964 F.2d 92, 96 (2d Cir. 1992). Defendants contend that because Rule 26(a)(2)(B) "expressly provide[s]" for expert reports like the one they seek, and because Rule 16 provides the Court with broad authority to manage its cases, this Court should grant their motion. Significantly, Defendants seek this stay from discovery without even attempting any showing of good cause such as would be required for a protective order under Federal Rule 26(c), or any showing that this Court could dispose of this case as a matter of law under Rule 56. Instead, to buttress their meager legal argument, Defendants provided an "affidavit" in which defense counsel claims that because her view of the facts leads her to the conclusion that Plaintiffs' case lacks legal or factual support, Plaintiffs should be denied the opportunity to even try and prove their claim. See Bloom Affidavit, attached to Defendants' Notice of Motion.

Defendants' motion should be denied because this Court is without power to grant the draconian relief sought by Defendants. To do so would be tantamount to amending the Federal Rules of Civil Procedure to impose new impediments upon claimants seeking discovery in federal civil litigation. This Court lacks the power to enact such amendments to the federal rules.

Rule 26 provides parties to civil litigation the right to obtain discovery relevant to pending

actions. Fed. R. Civ. P. 26(b)(1). Civil suits are commenced, such that they become "pending actions," by filing a complaint with the district court. Fed. R. Civ. P. 3. Federal Rule of Civil Procedure 8 describes the necessary elements of a Rule 3 "complaint," requiring that complaints include a "short and plain" statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). The purpose of Rule 8 is to determine how much information must be contained in the pleading. Franz v. U.S. Powerlifting Fed'n, 836 F.2d 1063, 1067-8 (7th Cir. 1987); Cook v. Rockwell Int'l Corp., 147 F.R.D. 237, 247 (D. Colo. 1993). Rule 11 supplements Rule 8 by mandating that counsel's signature on the complaint constitute a certification that those "short and plain" statements have evidentiary support, or are likely to have such support after a reasonable opportunity for further discovery, and that the claim supported by those factual statements is warranted by existing law or by a nonfrivolous argument for its extension. Fed. R. Civ. P. 11(b)(1), (2), (3). Taken together, these rules fully describe the requirements that must be met before a party can be deemed to have effectively commenced a civil action in federal court.

Once a claimant has satisfied Rules 8 and 11—and Defendants have offered no argument that Plaintiffs have failed to do so—Rule 26 provides no basis for denying parties access to discovery at the outset of a pending action: once a federal suit has been commenced, Rule 26 provides a broad grant of authority for parties to obtain discovery about "any matter, not privileged, which is relevant to the subject matter involved in the pending action...." Fed. R. Civ. P. 26(b)(1). Broad discovery serves the "useful purpose" of making trial "less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958). In sum,

then, satisfying Rules 8 and 11 entitles a claimant to federal discovery:

> Rule 8 determines how much information has to be in the complaint....Rule 11 requires not that counsel *plead* facts, but that counsel *know* facts after conducting a reasonable investigation, and then only enough to make it reasonable to press litigation to the point of seeking discovery. Rule 11 neither modifies the 'notice pleading' approach of the federal rules nor requires counsel to prove the case in advance of discovery.

Franz, 836 F.2d at 1067-68 (emphasis in original); Wade v. Johnson Controls, Inc., 693 F.2d 19, 22 (2d Cir. 1982) (Dismissal of a complaint before discovery is a drastic step, and fact that parties are unlikely to prevail on their claims does not justify denying them an opportunity to litigate those claims); Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 95 (3d Cir. 1988) (A requirement that counsel, before filing a complaint, secure the type of proof necessary to withstand a motion for summary judgment would set a pre-filing standard beyond that contemplated by Rule 11); Cook, 147 F.R.D. at 248.

Contrary to Defendants' suggestion, Rule 16 does not permit a district court to eviscerate a party's right to seek discovery. Rule 16 provides the district court with express authority to manage its case load by exercising control over the timing and scheduling of discovery. Fed. R. Civ. P. 16(a)(2) & (b). It permits the Court to enter scheduling orders limiting the time provided to complete discovery, narrowing discovery issues, and making other provisions "appropriate in the circumstances of the case." Fed. R. Civ. P. 16(b)(3), (4) & (6). The U.S. District Court for the Western District of New York has adopted its own version of Rule 16, effectively roumnizing certain of the time constraints and limitations contemplated in Rule 16. See Local Rule 16.1(a). But neither the text of Rule 16 nor the caselaw interpreting it permit the Court to completely deny litigants who have properly filed federal claims access to the federal discovery process in the name

of efficiency and narrowing the issues. In two cases cited by Defendants, the courts merely confirmed the unarguable proposition that structured proceedings pursuant to Rule 16 can be used to save time and effort. In re San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007 (1st Cir. 1988); In re Joint Eastern and Southern Districts Asbestos Litig., 129 F.R.D. 434, 435 (E.D.N.Y., S.D.N.Y., & N.Y. Sup. Ct. 1990). Neither case involved the denial of discovery contemplated here.

While Plaintiffs agree that Rule 16 allows for efficient case management through scheduling and staging of discovery, the Rule does not permit the Court to "narrow the issues" by requiring Plaintiffs to prove their case before they receive any discovery. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (Discovery itself is designed to help define and clarify the issues); Manual for Complex Litigation (Third) (1995) § 21.422 ("It will rarely be possible for counsel and the court to determine conclusively early in the litigation what discovery will be necessary.... [F]or effective discovery control, therefore, the court should direct initial discovery at matters—witnesses, documents, information—that appear pivotal").

To read Rule 16 as broadly as the Defendants suggest is to divest other federal rules of their meaning. Effectively, Defendants request this Court to use Rule 16 to add any number of additional requirements to Rules 8 and 11, which heretofore defined when a claim has effectively been stated, entitling the claimant to "obtain discovery ... which is relevant to the subject matter involved in the pending action" under Rule 26(b)(1).[3] Such a reading emasculates specific discovery provisions guaranteeing parties such rights as "tak[ing] testimony ... without leave of

[3] Indeed, Local Rule 28(d) expressly provides, "Except as otherwise stipulated by the parties or ordered by the Court, formal discovery shall commence upon issue being joined in any case." Local Rule 28(d).

court."[4] "serv[ing] ... written interrogatories" after an initial pretrial conference, or serving requests for production of documents after an initial pretrial conference.[5] Most importantly, Defendants' reading of Rule 16 directly conflicts with Rule 26(c), which provides the trial court specific authority to protect a party from discovery. Fed. R. Civ. P. 26(c). If, as Defendants argue, the trial court could completely insulate one party from discovery by exercising the general case management authority granted in Rule 16, defendants seeking broader protection than Rule 26(c) provides could obtain it without having to show good cause, as required by Rule 26(c). Fed. R. Civ. P. 26(c); Penthouse Int'l Ltd. v. Playboy Enters., Inc., 663 F.2d 371, 391 (2d Cir. 1981); Leucadia, Inc. v. Applied Extrusion Technologies, Inc., 998 F.2d 157, 166 (3d Cir. 1993); Bridge C.A.T. Scan Assocs. v. Technicare Corp., 710 F.2d 940, 944-45 (2d Cir. 1983) (Rule 26(c) is not a blanket authorization for the court to prohibit disclosure of information whenever it deems it advisable, but is rather a grant of power to impose conditions on discovery in order to prevent injury, harassment, or abuse of the court's processes); United States v. Talco Contractors, Inc., 153 F.R.D. 501, 513 (W.D.N.Y. 1994) (same).[6]

[4] Fed. R. Civ. P. 30(a)(1), 31(a)(1)

[5] Fed. R. Civ. P. 33(a), 26(d).

[6] Fed. R. Civ. P. 34(a).

[7] While the federal rules do provide the trial court with discretion to stay discovery in certain circumstances, such orders are typically entered only after a proper motion for summary judgment or a protective order has been raised and sustained, and only after the parties have already been provided with substantial opportunity for discovery. See, e.g., Gray v. Town of Darien, 927 F.2d 69, 74 (2d Cir. 1991)(Trial court committed no error when it denied plaintiff's motion to re-open discovery where plaintiffs had failed to seek discovery in the period provided by the trial court); Ayyoan v. Hull, 932 F.2d 1572, 1580 (11th Cir. 1991)(If significant discovery has been obtained and it appears that further discovery would not be helpful in resolving the issues, a request for further discovery is appropriately denied); SD-FLO, Inc. v. SFHC, Inc., 917 F.2d 1507, 1514 (10th Cir. 1990)(Where plaintiffs failed to make diligent use of the discovery period provided by the court, it was not an abuse of discretion to refuse to re-open the discovery period). Here, by contrast, Defendants have

Defendants' reliance upon Rule 26(a)(2)(B) as authority for their request is similarly misplaced. Defendants argue that their proposed order is no more than an extension of the Rule 26(a)(2)(B) requirement regarding submission of expert reports. Again, Defendants read the rule far too broadly. Rule 26(a)(2)(B) does require that *both* parties submit expert reports, and that such reports contain all opinions the expert will offer at trial, together with facts and information about the experts' qualifications. However, the rule does not provide that one of the parties be required to submit such reports *prior to obtaining discovery*, which is the particular relief sought by Defendants here. Rule 26(a)(2)(B) is simply a procedural tool intended to make pre-trial discovery of experts more meaningful by imposing a duty to provide a more comprehensive written report about the expert's testimony before trial. Advisory Committee Notes to 1993 Amendments to Rule 26(a)(2). Consistent with that goal, the default submission date contemplated by the rule is 90 days before trial, not at the outset of litigation, prior to any merits discovery. Fed. R. Civ. P. 26(a)(2)(C). Federal Rule 26(a)(2)(B) is clearly a procedural device designed to provide more meaningful discovery, not a tool to eliminate discovery. It provides no support for Defendants' contention that Plaintiffs should be required to provide evidence of a prima facie case prior to obtaining any discovery of Defendants on the merits of their claims.

B. **Defendants' Claim that Plaintiffs Have Improperly Joined Parties in this Litigation Is Meritless and Provides No Support for their Request that Discovery Be Stayed.**

As further support for their proposed case management order, Defendants maintain that

filed neither a motion for summary judgment nor a motion for protective order, and Plaintiffs have been provided with no discovery on the merits thus far.

"there are serious threshold issues of misjoinder that must be resolved before discovery proceeds." Defendants' Memorandum of Law at 9. The issue of joinder, however, has little or nothing to do with the remedy Defendants seek in their Motion for Case Management Order, which is that Plaintiffs come forward with specific causation evidence without obtaining discovery from any parties to this litigation.

Defendants submit the affidavit of Laurie Styka Bloom in support of their claim of misjoinder, which allegedly justifies entry of an order requiring Plaintiffs to come forward with specific causation evidence prior to being permitted any formal discovery. However, Ms. Bloom's "affidavit" is fatally defective and cannot be considered evidence. The alleged affidavit, which contains "facts" supporting the motion for a case management order (¶¶14-21), statements regarding the content of certain studies conducted by various public agencies (¶¶22-24), statements regarding the alleged state of medical and scientific knowledge as it relates to "signature" cancers (¶25), and "facts" gleaned from Plaintiffs' medical records, *fails to contain a single allegation that any of the assertions contained therein are facts within Ms. Bloom's personal knowledge*. See Bloom Affidavit. Indeed, certain of the "facts" contained in Ms. Bloom's affidavit are clearly outside her area of expertise, particularly those statements purporting to represent that specific substances cause certain particular types of cancer (see, e.g., ¶25), a matter clearly within the purview of a medical doctor or other scientific expert, not the lawyer for the Defendants.

Courts in this district have repeatedly held that affidavits must be made on personal knowledge, and must show affirmatively that the affiant is competent to testify as to the matters stated therein. Universal Maintenance, Inc. v. Amherst Painting, Inc., No. 94-CV-0875E(H),

1995 WL 737927 (W.D.N.Y. Dec. 7, 1995) (affidavits submitted in support of what "appears to be loosely fashioned" as a motion for summary judgment required to be made on personal knowledge, and required to show that the affiant is competent to testify) (copy attached herein as Exhibit C); United States v. Rondon, No. 95-CV-0321E(M), 1996 WL 107123 (W.D.N.Y. Feb. 27, 1996) (affidavit of attorney could not be considered because it failed to satisfy personal knowledge and competence requirements) (copy attached herein as Exhibit D); Schiess-Fromen Corp. v. S.S. Emmailor, 574 F.2d 123, 126 (2d Cir. 1978) (same); Union Ins. Soc'y of Canton, Ltd. v. William Gluckin & Co., 353 F.2d 946, 952 (2d Cir. 1965) (same); New York State Energy Research & Dev. Auth. v. Nuclear Fuel Servs., Inc., 561 F.Supp. 954, 960 (W.D.N.Y. 1983) (disregarding matters in an attorney's affidavit that the attorney obviously was unable to have personal knowledge of). Bloom's affidavit meets neither the competence nor personal knowledge requirements, and this Court should not consider it.

Based on the defective Bloom affidavit, Defendants argue that joinder is not proper because the plaintiffs do not have the same injury, the same circumstances of exposure, and are not grouped along family lines or by allegedly responsible defendants. Bloom Affidavit at ¶¶4, 8, 15-20. But if Defendants believe parties have been improperly joined, they should file a motion to sever under Rules 20 and 21, which they have failed to do. Had they done so, however, their remedy would be the addition or subtraction of parties, and not a requirement that Plaintiffs produce a prima facie case on the merits of their claim before being provided discovery on the merits of that claim. Fed. R. Civ. P. 21.

Not only is Defendants' misjoinder argument misplaced, it is also without merit. Rule 20 specifically permits parties to be joined as plaintiffs in one action if they assert:

> any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action...

Fed. R. Civ. P. 20(a). Joinder as a defendant is proper if:

> there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action

Id. Rule 20 has been interpreted to encourage the "broadest possible scope of action consistent with fairness to the parties." United States v. Yonkers Board of Education, 518 F.Supp. 191 (S.D.N.Y. 1981), quoting United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966).

Plaintiffs in this action have all lived, worked or participated in recreational activities in the immediate vicinity of the now-abandoned Pfohl Brothers Landfill located in Cheektowaga, New York. Plaintiffs claim that they were exposed to hazardous and toxic chemicals released or emanating from the landfill, and that Defendants were negligent in, at a minimum, disposing of hazardous wastes in a landfill not appropriately constructed for such disposal activities, and that they continued to generate wastes for disposal in this facility after they knew or should have known that the landfill failed to contain the wastes. The transaction or series of transactions of interest to Plaintiffs is the periodic disposal and ongoing management of hazardous wastes at the Pfohl Brothers Landfill between 1932 and 1971. Issues common to the plaintiffs include the extent of the generators' state of knowledge about the suitability of the landfill, the nature and quantity of the releases of hazardous toxins, separately or in combination, from the landfill over the relevant years, together with scientific questions concerning possible interactions among

chemicals disposed of at the Landfill[10] and the causal relationship between the calculated doses of hazardous materials received by Plaintiffs and their resultant diseases. Questions common among the defendants include whether or not disposal of hazardous waste at the Pfohl Brothers Landfill was an abnormally dangerous activity, the extent to which the generators are jointly and severally liable for indivisible injuries under state common or statutory law, the negligence of the owner/operator of the Pfohl Brothers Landfill, and the vicarious liability of the generators for any negligence on the part of the owner/operator.

Far from helping their cause, Defendants' misjoinder "examples" clearly illustrate the need for additional discovery as a prerequisite to the "narrowing" of substantive issues in this case. See Bloom Affidavit at 10-11. The first scenario, for example, purports to demonstrate the "manifest injustice and inefficiency" of allowing discovery to proceed where one defendant has sent only one toxic substance to the site and where this toxic substance is linked to only one disease, a disease not suffered by all Plaintiffs entitled to discovery. All that is "manifest" in this scenario, however, is that the "injustice" complained of can only be evaluated if the Plaintiffs know—which they clearly do not—which Defendants disposed of what chemicals during particular time periods. Defendants are currently the only parties in a position to know which toxic substances each of them sent during various time periods. This Court should not deny discovery

[10] See Upton, A., Kneip, T., Tomolo, T., "Public Health Aspects of Toxic Chemical Disposal Sites," 10 Annual Rev. Public Health 1, 4 (1989) (noting that a major source of uncertainty [in developing appropriate dose-response analyses] stems from the fact that chemicals at disposal sites are encountered in mixtures rather than in pure form; consequently, "the possibility of synergistic or other more complex interactions between them must also be considered.") (copy attached herein as Exhibit E); Sullivan, J. & Krieger, G., Hazardous Materials Toxicology (1992) at 17 (same).

based on phantom scenarios only the Defendants are in the position to verify. Hachette Distribution, Inc. v. Hudson County News, Inc., 136 F.R.D. 356, 358 (E.D.N.Y. 1991) (Discovery should be stayed only when there are no factual issues in need of exploration and the issues before the court are purely legal questions that are potentially dispositive); Transunion Corp. v. PepsiCo., Inc., 811 F.2d 127, 130 (2d Cir. 1987) (same). Discovery is clearly needed, and Defendants' arguments merely serve to emphasize that need.

Finally, this Court ruled on the matter of whether or not common questions exist sufficient to support the joinder of parties when it issued its order consolidating all of the Plaintiffs' claims for purposes of pretrial discovery. See Exhibit A, Order Consolidating Actions, February 15, 1996. The order was entered into in order to reduce unnecessary duplication and expense in the discovery phase of these cases. It is disingenuous for Defendants to fail to object to consolidation in February and then to use misjoinder as a "ground" supporting their motion for a draconian case management order in May. The Court should consider this point waived, and, in any event, misjoinder provides no support for Defendants' motion.

C. Defendants' Assertions Concerning the Content of Public Studies Are Misleading and Lend No Support to their Contention that Plaintiffs Should Come Forward with Specific Causation Evidence Prior to Discovery on the Merits.

Defendants attempt to buttress their legal arguments with "facts" set forth in the Bloom Affidavit at ¶¶23-25, contending that these "facts" demonstrate that the case management order they seek is appropriate. As stated above, however, the Bloom Affidavit is fatally defective and constitutes nothing more than the argument of counsel. Additionally, Bloom's statements about

the factual record are misleading; read in a more objective light, the facts clearly demonstrate th need for additional discovery. Defendants cannot make misleading statements about the state c knowledge regarding a hazardous landfill site, and, on the basis of those statements, obtain radica relief that would rewrite the discovery rules.

The misleading nature of Bloom's statements is exemplified by her claim that a 1993 Ne York State Department of Environmental Conservation report "concluded that there was n evidence of ... off-site migration" of materials at the Pfohl Brothers Landfill. See Affidavi ¶23(A), at 14. Statements contained in that 1993 report conflict with Bloom's conclusion. Fo example, at page 3 of the report the Department states that the clean-up remedy selected for th site "will control the off-site migration of contaminants and eliminate the potential routes o exposure to the public and the environment" and states that a slurry wall will be installed "t contain the wastes and eliminate migration of contaminants." See Exhibit F, "1993 Off-si Remedial Investigation," New York State Dep't of Envtl. Conservation, at 3. Such remedi activities would hardly be necessary if there had been no migration of chemicals from the landfil

Similarly, Bloom states at ¶14(b) that the Agency for Toxic Substances and Disea Registry (ATSDR) found that a June 1990 study by the New York Department of Health foun "no unusual pattern" regarding the frequency of any one type of health condition; i.e., no "cance clusters." However, what Bloom omits is ATSDR's acknowledgement that the 1990 Healt Department Study was of the sort which "cannot link reported illnesses to site contaminants." Se ATSDR, "Pfohl Brothers Landfill, Cheektowaga, Erie County, New York," CERCLIS N NYD980507495, Nov. 2, 1995, at 39, excerpts of which are attached herein as Exhibit G. In other words, the 1990 study was not designed to *find* the causation links Plaintiffs must establi

in order to prevail in their claims. ATSDR itself went on to conclude that people in the past "were likely exposed" to contaminants from this site, that the removal and remedial actions taken in recent years had greatly reduced the likelihood of exposure, but that the past health hazard could not be determined because ATSDR had insufficient data on groundwater contamination. Exhibit G at 1.

Finally, Bloom states that a March 1991 Department of Health study found increased area cancer rates only for prostate cancer among men and breast cancer among women. Bloom Affidavit at 15. This clearly misstates the actual findings, which were that the Department found a statistically significant excess of prostate cancers in men, and a statistically significant excess of *all newly diagnosed cancers in women*, including particularly breast cancers. New York State Dep't of Health, "Cancer Incidence in the Cheektowaga/Ellicott Creek Area, Erie County, New York," March 1991, at 4, attached herein as Exhibit H.

Bloom's creative restatement of the facts cannot form the basis for an order denying Plaintiffs discovery. Even if Bloom's statements about public studies concerning the site were correct, however, Plaintiffs would be entitled to discovery in order to investigate their claims. Plaintiffs require records and data concerning releases from the facility during prior years, from which data they will calculate the dose received by Plaintiffs in the vicinity of the facility during those years. A regulatory agency, by contrast, evaluates whether or not a site is a current or potential future hazard to public health or the environment. See, e.g., "Draft Baseline Human Health Risk Assessment, Pfohl Brothers Landfill," Vol. I, Nov. 1991, at 3-20, attached herein as Exhibit I ("A baseline risk assessment evaluates current and future risks in the absence of remediation."); Cook v. Rockwell Int'l Corp., 147 F.R.D. at 243-4 (rejecting Defendants' claim

that Plaintiffs be required to rely solely on public studies in constructing their dose reconstruction studies, and concluding that such analysis can rarely be based on current measurements of contaminants in air, soil and the bodies of plaintiffs). While Plaintiffs may rely upon existing studies, and may be compelled to distinguish them where they do not support Plaintiffs' case, this Court has no authority to deny Plaintiffs meaningful discovery on the merits of their claims simply because government studies exist.

D. Defendants' Assertions Concerning the Content of Medical Records and Interrogatory Answers are Misleading and Lend No Support to their Contention that Plaintiffs Should Come Forward with Specific Causation Evidence Prior to Discovery on the Merits.

In a further attempt to support their legal arguments, Defendants again rely on Bloom's defective Affidavit to set forth highly selective "facts" regarding individual Plaintiffs' medical and exposure histories, apparently in support of Ms. Bloom's medical conclusions. See Affidavit, ¶26 at 18-21. Without setting forth any credentials (other than the fact that she is a lawyer), Ms. Bloom makes wide-ranging medical and scientific conclusions with respect to the cause and "established" risk factors for particular cancers. Id. Ms. Bloom is not a doctor or a scientist, and her opinions as to medical causation and her interpretations of medical records must be disregarded.

In addition to the affiant's lack of competency in the medical field, the medical "facts" alleged in the affidavit are misleading and taken out of context. For example, Ms. Bloom asserts that plaintiffs contracted cancer before they were exposed to the site, and she lists one plaintiff, Lorraine Brzezicki, in support of this assertion. While it appears that Ms. Brzezicki was

diagnosed with cervical cancer prior to her exposure to the site, approximately thirteen years later Ms. Brzezicki was diagnosed with breast cancer. See Medical Records of Lorraine Brzezicki, attached herein as Exhibit J. Ms. Brzezicki's breast cancer diagnosis occurred many years after her exposure to the landfill, and her medical records do not link her breast cancer to her cervical cancer. Similarly, Ms. Bloom characterizes Evo Astor's colon cancer as "a condition from which he suffered but not related to the cause of his death." Yet, Mr. Astor's death certificate characterizes his cancer as a "significant condition" and as a "condition contributing to [his] death." See Certificate of Death of Evo Astor, attached herein as Exhibit K. Ms. Bloom was also misleadingly selective in her choice of medical records to attach in apparent support of her opinion regarding "established risk factors." For instance, she attached a hospital record of plaintiff Mary Ann Farino in which Ms. Farino's consulting physician noted that she consumes four to five drinks containing alcohol per evening. Two days later, another consulting physician documented that Ms. Farino drinks four to five alcoholic beverages *one evening per week*. See Medical Records of Mary Ann Farino, attached herein as Exhibit L.

Similarly, the selective description of Plaintiffs' exposure histories in the Bloom affidavit is also misleading. For example, Ms. Bloom states that Rose Freier "never lived near the site." What Ms. Bloom omits is that for twenty years Mrs. Freier accompanied her husband, who was an active landlord for two properties located near the landfill, on excursions near the site. See Plaintiff's Answers to Defendants' Interrogatories, attached herein as Exhibit M. Nor does Ms. Bloom mention the fact during these and other excursions in the vicinity of the landfill, Mrs. Freier swam in pools filled with well water. Id. Ms. Bloom is equally dismissive of the significant exposure histories of other Plaintiffs. See, e.g., Plaintiff's [Tab Fuqua's] Answers to

Defendants' Interrogatories, attached herein as Exhibit N (plaintiff played and camped in landfill area and fished and swam in lake near landfill); Plaintiff's [Donna McKowan's] Answers to Defendants' Interrogatories, attached herein as Exhibit O (plaintiff played in landfill and fished in lake near landfill).

Defendants' provision of selective "facts" about selective plaintiffs, along with the medical opinion of their counsel, fails to support their requested radical discovery relief. Ms. Bloom's lack of personal knowledge and expertise would disqualify her from providing the sort of testimony contained in her affidavit in a court of law or in support of a motion for summary judgment; therefore, such "testimony" should not be accorded any weight in support of this motion. See Fed. R. Civ. P. 56; Fed. R. Evid. 701, 702.

E. Cases Cited by Defendants Provide No Support for Entry of the Order They Seek.

In support of their contention that orders like the one sought here are "frequently" employed in toxic tort cases, Defendants cite several inapposite cases which provide no support for the relief sought here. In fact, only Lore v. Lone Pine Corp., an unreported state court case, even arguably supports the entry of an order like that sought by Defendants. But even that case is not persuasive authority here, because Lone Pine was not decided under the Federal Rules, and because it was wrongly decided.

In the Lone Pine case, 464 plaintiffs sued the operator of a landfill, together with numerous waste generators. Various case management orders provided at least part of the relief Defendants seek here by requiring that plaintiffs provide affidavit evidence of a prima facie case. In that case, however, the New Jersey state court judge ordered that plaintiffs produce this

evidence of specific causation because the court had determined that the face of the pleadings revealed no prima facie claim for personal injuries or property damage, a finding which has not been made here. Lore v. Lone Pine Corp., No. L33606-85 (N.J. Superior Court, Nov. 18, 1986), slip op. at 1.[11] The opinion does not state, however, that the court required the production of such evidence prior to the conduct of any merits discovery, a significant feature of the relief sought here. As such, the Lone Pine case provides only lukewarm support for the Defendants' position. What is clear, however, is that the trial judge issued his ruling not because the law required or permitted that result, but because he believed that the law *ought* to require that, "prior to the institution of such a cause of action, attorneys for plaintiffs must be prepared to substantiate, to a reasonable degree, the allegations of personal injury, property damage and proximate cause." Slip op. at 3. As discussed above, federal law requires no such detailed submission as a prerequisite to discovery, and the Lone Pine case does not contain a correct statement of the law applicable in the federal courts. As such, the case does not provide a basis upon which the Court may grant Defendants' motion.[12]

In re Love Canal Actions, another state court case, is distinguishable as well. The order adopted by the trial court in that case was also similar to the one sought by Defendants here, but that order was adopted only after plaintiffs' counsel had been litigating the merits of the Love Canal action for 10 years. In re Love Canal Actions, 547 N.Y.S. 2d 174, 177 (N.Y. Sup. Ct. 1989), aff'd as modified, 555 N.Y.S.2d 519 (A.D. 4th Dept. 1990). By contrast, Defendants' proposed "case management order" would completely prohibit Plaintiffs from obtaining discovery on the merits. In addition, in In re Love Canal Actions, the trial court's order was modified significantly on appeal because the appellate court concluded that the expert disclosure rule relied upon by the trial court—similar to Rule 26(a)(2)(B)—failed to grant the trial court the authority to require that plaintiffs provide the sort of affidavit evidence of specific causation ordered by the trial court, and sought by Defendants here. In re Love Canal Actions, 161 A.D. 1169, 1169-70, 555 N.Y.S. 2d 519 (A.D. 1990). Plaintiffs were ultimately required to submit only a report from each expert and/or treating physician expected to testify at trial, which report was to contain only a description of the subjects about which the expert would testify.

The other cases relied on by Defendants involved no relief even remotely resembling their proposed order. See Ahuan v. General Elec. Co., 1992 WL 535958 (D.C. Guam 1992) (granting Rule 56 summary judgment); Eggar v. Burlington Northern R.R., 1991 WL 315487 (D. Mont. 1994) (dismissing plaintiffs' case after concluding that plaintiffs' expert causation testimony failed the Daubert admissibility standard); New Jersey Dep't of Envtl. Protection v. Gloucester Envtl. Management Servs., Inc., 138 F.R.D. 421 (D. N.J. 1991) (payment of attorneys' fees by liason counsel). None of these cases required plaintiffs to prove their claims before having an opportunity for discovery.

[11] This case is attached to Defendants' Memorandum of Law.

[12] Moreover, the Lone Pine case was not designated for publication by the New Jersey state judge authoring the opinion. New Jersey prohibits the citation of unreported cases as precedent. N.J. Rules of Gen. Applic., Rule 1:36 (1995). States enact procedural rules barring the citation of unreported opinions because such opinions are not intended to add to the jurisprudence of the forum state. Since such cases do not comprise the decisional law in the states in which they were decided, it makes little sense to adopt them as guidance or precedent in this federal court case.

F. Granting Defendants' Motion Would Place Untenable Burdens upon Plaintiffs Because It Is Inconsistent with the Nature of the Scientific Inquiry Employed in Toxic Tort Cases.

Requiring Plaintiffs to produce specific causation evidence at the outset of litigation, prior to any discovery on the merits, would impose significant unfair burdens upon Plaintiffs. In this toxic tort case, Plaintiffs are required to prove that their exposure to chemicals from the Pfohl Brothers Landfill occurred at such significant levels that they received a dose of particular toxins (or a mixture thereof) large enough to cause them to develop disease. Data relevant to the amount and character of the waste disposed at the landfill over the years is crucial to Plaintiffs' calculations of dose because individual causation is a function of chemical toxicity, exposure and dose.[13]

While Plaintiffs do have access to public reports and documents relevant to the liability facts in this case, Plaintiffs have not yet acquired any discovery from Defendants on the merits of this case. In contrast, Defendants have been provided with significant documentation from Plaintiffs (in the form of medical records) going to the merits of Plaintiffs' claims. Governmental studies do provide some useful information, but they were designed to evaluate current hazards, rather than the extent of contamination many years ago, when Plaintiffs were being exposed. See Exhibit J. Plaintiffs require discovery of documents revealing which wastes were disposed of in what volumes by which Defendants. In addition, they require data about planned and unplanned releases from the facility, and about Defendants' knowledge of those releases. These documents are in the exclusive possession of Defendants.

The case management order Defendants seek turns Plaintiffs' case on its head by requiring that Plaintiffs provide evidence of individual causation—that is, evidence that exposure to a particular toxin or combination of toxins occurred, which exposure was great enough to cause (and did in fact cause) Plaintiffs to suffer particular diseases—prior to their being provided *any* discovery aimed at determining facts related to exposure and dose. Such data would include Defendant company documents describing waste shipments into and out of the disposal facility, the timing of those shipments, the chemical content of those disposed waste shipments, and the design and operation of the landfill. Much of this data was not publicly reported prior to 1971, when the landfill closed,[14] and such documents are key to Plaintiffs' reconstruction of the dose of toxins to which they were exposed in years past. Asking Plaintiffs' experts to render opinions without the benefit of a site visit, without the benefit of any discovery as to the actual volumes or types of waste disposed of at the facility, without discovery as to the historic performance of the landfill as constructed, and without any discovery as to what Defendants knew about the integrity of the facility over the years, may very well leave Plaintiffs vulnerable to exclusion of their experts' causation testimony due to their failure to consider such standard categories of evidence in making their decision. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 79 (1993).

A case directly on point is Cook v. Rockwell Int'l Corp., 147 F.R.D. 237 (D. Colo. 1993). Plaintiffs in that case were persons living in the vicinity of the Rocky Flats nuclear weapons facility. The Defendants moved for a stay of discovery early in the litigation, claiming

[13] Bosso, G., "A Mass-Exposure Model of Toxic Causation: The Content of Scientific Proof and the Regulatory Experience," 18 Col. J. Envtl. L. 181, 213-18 (1993) (noting that the circumstances of exposure and dose must be considered specifically in order to determine whether it is reasonable for an identified illness or symptom to occur in a particular person).

[14] For example, recordkeeping provisions of the Solid Waste Disposal Act (as amended by the Resource Conservation and Recovery Act, or RCRA) were not enacted until 1976. 42 U.S.C. § 6922 (a)(1).

like Defendants here, that discovery should not be permitted "because the case had no factual basis." Id. at 240. Also like Defendants here, they argued that documents in the public domain, together with the limited set of "core" documents ordered produced in the case management order, were a "complete collection of the relevant information available..." Id. at 243. The magistrate directed the plaintiffs to provide a specific statement of facts supporting each person's claim, including the identification of each substance to which that person was exposed, the amount of exposure, and an identification of any expert relied upon to establish exposure and causation, much like the order sought here. Id. at 240-1. Plaintiffs' requests for additional discovery were denied.

On Plaintiffs' appeal of the magistrate's order, District Judge Kane concluded that the magistrate had put plaintiffs "between a rock and a hard place" because, as in this case, publicly available data, standing alone, provided an inadequate scientific basis to support plaintiffs' dose reconstruction studies. Id. at 243. Judge Kane held that Plaintiffs need not be required to submit their expert reports until they had been provided a fair opportunity to identify, procure and digest any relevant documents produced through additional discovery. Id. at 245. Judge Kane also noted that expert reports involving dose reconstruction could rarely be based on present-day measurements of existing levels of contamination present in environmental media, and that experts preparing such reports would need to review data on both consumption and emissions of hazardous material over time. Id. at 243-44 ("Proof of pathway [to exposure], medical and economic causation in hazardous waste cases can be difficult to adduce. Usually, neither the chemicals in question nor their action in the environment can be directly observed." Id., quoting 3 Susan M. Cooke, The Law of Hazardous Waste, §17.02[2][b] (1992)).

Granting Defendants' motion for a case management order here would likewise put Plaintiffs "between a rock and a hard place," and Plaintiffs would be put in such an untenable position prior to any showing that discovery will in any way harm or burden Defendants. Like Plaintiffs in Cook v. Rockwell, Plaintiffs here would be severely hamstrung in their ability to obtain scientific data on historical operations necessary to conduct their dose reconstruction studies, the bulk of which data is in the exclusive possession of Defendants. Defendants are well aware that their insistence that Plaintiffs submit evidence of specific causation at the outset of this litigation, before any investigation into Defendants' knowledge concerning exposure issues has occurred, places Plaintiffs in the "no-win" position of either presenting a medical case based upon incomplete exposure evidence or failing to comply with the Court's case management order. Both horns of this dilemma leave Plaintiffs vulnerable to premature dismissal of their claims, which is undeniably the goal of Defendants' motion. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 79 (1993); Renaud v. Martin Marietta Corp., 749 F.Supp. 1545, 1548-53 (D. Colo.), aff'd, 972 F.2d 304 (10th Cir. 1992).

Because the case management order sought by Defendants would work a significant hardship on Plaintiffs, and because it is contrary to governing law and operable scientific principles, Plaintiffs ask this Court to deny Defendants' motion for a case management order.

WHEREFORE, Plaintiffs respectfully request that Defendants' Motion for Case Management Order be DENIED in all respects.

Respectfully submitted,

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Application for Admission
Pro Hac Vice Pending

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the attached Plaintiff's Memorandum in Opposition to Defendants' Motion for Case Management Order was hand delivered on July 12, 1996, to the attorneys for the defendants herein, namely: NIXON, HARGRAVE, DEVANS & DOYLE, 1600 Main Place Tower, Buffalo, New York 14202-3716, and the same was forwarded by depositing same in a postage paid envelope and delivering to the custody of the U.S. Postal Service on July 12, 1996 to: EDWARDS & ANGELL, 750 Lexington Avenue, New York, New York 10022; DAMON & MOREY LLP, 1000 Cathedral Place, 298 Main Street, Buffalo, New York 14202-4096; JAECKLE, FLEISCHMANN & MUGEL, Fleet Bank Building, 12 Fountain Plaza, Buffalo, New York 14202; and HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR, 1800 One M&T Plaza, Buffalo, New York 14203.

DATED: July 12, 1996
Buffalo, New York

LARAINE KELLEY

Extensive discovery is necessary in this case because Plaintiffs have the burden of proving that exposures to various toxic substances caused them to develop the personal injuries they have alleged. In order to document the extent and nature of the Plaintiffs' exposures, Plaintiffs must have access to data, documents, and testimony regarding the amount and character of waste disposed at the landfill during the entire course of the 40-year history of landfill operations. Plaintiffs must have access to discovery regarding what substances and materials were disposed of, how and when they were disposed of, and how they were transported. The discovery materials related to such historical disposal of hazardous wastes will likely constitute hundreds of thousands of pages of documents, all of which will need to be reviewed, indexed, and summarized to enable Plaintiffs' expert witnesses to reconstruct exposures. Moreover, Plaintiffs will likely conduct dozens of depositions of employees and former employees of defendants, as well as other third party witnesses, with respect to the historical disposal of materials at the facility.

In addition to the essentially archaeological review of information regarding what happened at the site many years ago, Plaintiffs will have to conduct discovery regarding the recent and current conditions at the site and the surrounding neighborhood. Although some of this information is already publicly available, Plaintiffs' experts will conduct their own studies regarding off-site contamination emanating from the site, and Defendants will turn over any additional materials regarding current conditions at and around the site that have not been made public.

Finally, with respect to issues regarding liability and the imposition of punitive damages, Plaintiffs will seek to discover the extent of the knowledge of the generator and transporter Defendants as to the suitability of the landfill and the potential harmful effects of transporting and dumping hazardous wastes at the site. Again, such issues will require review of thousands of pages

of documentary materials from all of the defendants, and will also required that many of Plaintiffs take depositions.

The issues encompassed by this case, including Plaintiff-specific issues not even discus above, are numerous, complex, and highly discovery-intensive. Plaintiffs' CM constitutes a reasonable plan and schedule for conducting the discovery that will be required, good cause exists for its adoption.

Respectfully submitted,

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Application for Admission Pro Hac Vice Pending

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the attached Notice of Motion and Motion for Second Case Management Order was hand delivered on July 12, 1996, to the attorneys for the defendants herein, namely: NIXON, HARGRAVE, DEVANS & DOYLE, 1600 Main Place, Tower, Buffalo, New York 14202-3716; and the same was forwarded by depositing same in a postage paid envelope and delivering to the custody of the U.S. Postal Service on July 12, 1996 to: EDWARDS & ANGELL, 750 Lexington Avenue, New York, New York 10022; DAMON & MOREY LLP, 1000 Cathedral Place, 298 Main Street, Buffalo, New York 14202-4096; JAECKLE, FLEISCHMANN & MUGEL, Fleet Bank Building, 12 Fountain Plaza, Buffalo, New York 14202; and HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR, 1800 One M&T Plaza, Buffalo, New York 14203.

DATED: July 12, 1996
Buffalo, New York

LARAINE KELLEY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IN RE: PFOHL BROTHERS LANDFILL LITIGATION

MASTER FILE
95-CV-0020A

THIS DOCUMENT RELATES TO:
ALL ACTIONS

SECOND CAS MANAGEMEN ORDER

Pursuant to the Federal Rules of Civil Procedure, the Local Rules of Practice f Western District of New York and the Manual for Complex Litigation, the court issues this Management Order #2 ("CMO-2") in order to provide for an orderly process for discover to conserve judicial resources.

I. LITIGATION BACKGROUND

A. These cases seek monetary damages for injury and death resulting from al exposure to toxic and hazardous substances from the Pfohl Brothers Landfill in Cheekto New York. All of the plaintiffs or their decedents lived, worked and/or recreated in the vi of the landfill. Defendants and third-party defendants consist of the alleged owners, oper generators or haulers of alleged toxic and hazardous substances to the landfill during the p of its operation from approximately 1930 to 1974.

To date, the plaintiffs have commenced this litigation by five separa onse Complaints. There are also a number of cases pending in New York State Supreme Court, County, which involve different groups of plaintiffs. Plaintiffs anticipate the filing of addi claims in one or both of the above jurisdictions.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IN RE: PFOHL BROTHERS LANDFILL LITIGATION

MASTER FILE NO.
95-CV-0020A

THIS DOCUMENT RELATES TO:
ALL ACTIONS

NOTICE OF MOTION

PLEASE TAKE NOTICE that Plaintiffs in the above-styled action will move this Court, before the Hon. Magistrate Judge Leslie G. Foschio, at the U.S. Courthouse, 68 Court St., Buffalo, New York, at a date and time to be set by the Court, to adopt the Plaintiffs' proposed Second Case Management Order, a copy of which is attached hereto.

Dated: July 12, 1996
Buffalo, New York

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Application for Admission
Pro Hac Vice Pending

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Pfohl Brothers; Pfohl Brothers Enterprises; and Paul M. Pfohl

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IN RE: PFOHL BROTHERS LANDFILL LITIGATION

MASTER FILE NO.
95-CV-0020A

THIS DOCUMENT RELATES TO:
ALL ACTIONS

PLAINTIFFS' MOTION FOR SECOND CASE MANAGEMENT ORDER

In order to promote the efficient conduct of this highly complex, multi-party toxic tort action, Plaintiffs respectfully move this Court adopt their proposed Second Case Management Order ("CMO-2"), which they have presented as an alternative to the highly inequitable and impermissible "case management order" sought by Defendants. Plaintiffs' proposed CMO-2 would allow discovery of the numerous issues in this case to proceed in an organized fashion and as rapidly as is reasonably possible. The complexity and document-intensiveness of those issues constitutes sufficient "good cause" for this Court to extend the discovery cut-off date here beyond the six months ordinarily contemplated by Local Rule 16.1(a).[1]

[1] Indeed, Defendants acknowledge that "[d]iscovery in these cases will be difficult and protracted." Affidavit of Laurie Bloom in Support of Liaison Group Defendants' Motion for a Second Case Management Order at 10, ¶18.

B. The cases were brought in distinct groups, and will in the future be brought in groups in order to limit the burden on plaintiffs of preparing simultaneous discovery responses for all claims. This organizational method will be maintained for the purposes of discovery, except where issues of general application apply.

C. Given the large number of plaintiffs presently in the action, and those to be joined, as well as the number of defendants, it appears to the Court that a second CMO is required to provide for the fair and efficient management of all cases. This order shall have the force and effect of a discovery order under Federal Rule of Civil Procedure 26.

D. The majority of the defendants and third-party defendants in this action, to wit: Westinghouse Electric Corporation, General Motors Corporation, Trico Products Corporation, Curtis Wright Corporation, Occidental Chemical Corporation, Laidlaw Waste Systems, Inc., Warner Lambert Company, Ford Motor Company, New York State Electric and Gas Corporation, Niagara Mohawk Power Corporation, Browning Ferris Industries, Inc., Dresser Industries, Inc., Litton Industries, Inc. and Waste Management of New York, Inc. (liaison group defendants), are consolidating certain defense efforts, and have designated Nixon, Hargrave, Devans and Doyle LLP to act as liaison counsel on their behalf.

E. The majority of the owner/operator defendants in this action, to wit: Pfohl Brothers, Pfohl Brothers Enterprises, Paul M. Pfohl, and Lancaster Stone Products Corp., are consolidating certain defense efforts, and have designated Jaeckle, Fleischmann & Mugel to act as liaison counsel on their behalf.

F. The Town of Cheektowaga has commued with individual counsel. To date, there has been no counsel appearance on behalf of Richard Pfohl. The Court encourages the remaining defendants to join in or otherwise cooperate with the Liaison Group in the coordination of joint

defense efforts and the sharing of costs associated with those efforts. If the parties are unable to agree on this matter, the Court will entertain applications for appropriate relief.

II. STATUTE OF LIMITATIONS

Pursuant to an initial Case Management Order ("CMO-1") entered in this c February 2, 1996, Plaintiffs responded to discovery directed solely to the statute of limit defense. Interrogatories on this issue were served on October 25, 1995, by the liaison defendants. Plaintiffs waived the 25 Interrogatory Rule with regard to these Interrogatories.

Plaintiffs have filed their responses to these Interrogatories as to all claims now filed. Plaintiffs have provided liaison counsel with full medical authorizations.

Consequently, there shall be no further discovery permitted on this issue prior to the filing of motions for summary judgment.

The First Case Management Order ("CMO-1") directed Defendants to file any motions for summary judgment based on the statute of limitations defense by June 15, 1996. The motions have not been filed to date. On May 8, 1996, Defendants filed a motion to compel regarding Plaintiffs' responses to interrogatories and requests for production directed to statute of limitations issues. The Court has not yet ruled on this motion. In the event that Plaintiffs are required to supplement their responses, they shall do so as follows:

For plaintiffs in Complaint #1, on or before 45 days of the date of this CMO-2 or the date of the order requiring supplementation, whichever is later;

For plaintiffs in Complaint #2, on or before 60 days of the date of this CMO-2 or the date of the order requiring supplementation, whichever is later;

For plaintiffs in Complaint #3, on or before 75 days of the date of this CMO-2 or the date of the order requiring supplementation, whichever is later;

For plaintiffs in Complaint #4, on or before 90 days of the date of this CMO-2 or the date of the order requiring supplementation, whichever is later.

If supplementation is required, Defendants shall file statute of limitations motions for summary judgment on or before 120 days of the date of this CMO-2, or the date of the order requiring supplementation by Plaintiffs, whichever is later. If statute of limitations motions for summary judgment are not filed by this deadline, then the right to file such motions shall be waived. If supplementation by Plaintiffs is not required, Defendants shall file statute of limitations motions for summary judgment on or before 30 days of the date of this CMO-2 or the date of the order declining to require supplementation, whichever is later. If statute of limitations motions for summary judgment are not filed by this deadline, then the right to file such motions shall be waived. Plaintiffs are to respond to the summary judgment motions, if any, on or before 60 days of the date of filing of the motions. Reply papers, if any, shall be served within 30 days of the date of filing of the response.

Arguments before the court will proceed thereafter at the Court's convenience.

In the event that cases are filed after the date of entry of Case Management Order #1 (including, but not limited to, Robert S. Fiels et al. v. Westinghouse, et al., 96-CV-395), interrogatories and document requests which are limited to statute of limitations issues shall be responded to within sixty (60) days of service of such limited requests.

III. DISCOVERY SCHEDULE

As directed by the First Case Management Order, the parties have met and conferred in an attempt to develop a Second CMO. Because the parties have highly divergent positions with respect to the manner in which the litigation should proceed, a Second CMO could not be agreed upon by the parties.

Discovery unrelated to the statute of limitations for both plaintiffs and defendants shall commence immediately.

A. Interrogatories

Defendants may serve one common set of Interrogatories pursuant to FRCP 33. Defendants shall not duplicate inquiries covered as part of the statute of limitations discovery. Defendants shall be limited to 40 Interrogatories.

The response time for plaintiffs with regard to Interrogatories and any other additional discovery which has not been assigned a specific deadline in this CMO-2 shall be phased consistent with the groupings contained in the individual Summonses and Complaints, i.e.

- As to the first filed Summons and Complaint ("Complaint #1"), Raymond Freier, et al. v. Westinghouse, et al., 95-CV-0020, responses shall be completed within 60 days of service of the Interrogatories unrelated to the statute of limitations.

- As to the second filed Summons and Complaint ("Complaint #2"), Rose Barr, et al. v. Westinghouse, et al., 95-CV-0170, responses shall be completed 30 days after the due date for the Freier responses, above.

- As to the third filed Summons and Complaint ("Complaint #3"), Grace A al. v. Westinghouse, et al., 95-CV-0247, responses shall be completed 30 days after the due date for the Barr responses above.

- As to the fourth filed Summons and Complaint ("Complaint #4"), Geraldine Davies, et al. v. Westinghouse, et al., 95-CV-0444, responses shall be completed 30 days after the due date for the Astor responses above.

Cases filed subsequent to the issuance of Case Management Order #1 (including, but not limited to, Robert S. Fiels et al. v. Westinghouse, et al., 96-CV-395) shall proceed in the same fashion, i.e. responses will be provided within 60 days after receipt of Interrogatories or other request directed to a Complaint.

Plaintiffs may serve initial Interrogatories on the defendants pursuant to FRCP 33 on or after the date of this CMO-2. The 25 Interrogatory rule set forth in FRCP 33 shall not apply to Plaintiffs with regard to these interrogatories. The response time for defendants shall be 60 days for Interrogatories.

B. Document Requests

A common document request pursuant to FRCP 34 was served upon plaintiffs by liaison counsel on October 25, 1995. Plaintiffs have already responded to the requests related to the statute of limitations. Plaintiffs shall respond to the remaining requests as follows:

For plaintiffs in Complaint #1, on or before 60 days of the date of this CMO-2;

For plaintiffs in Complaint #2, on or before 75 days of the date of this CMO-2;

For plaintiffs in Complaint #3, on or before 90 days of the date of this CMO-2;

For plaintiffs in Complaint #4, on or before 105 days of the date of this CMO-2.

In the event that cases are filed after the issuance of Case Management Order #1 (including, but not limited to, Robert S. Fiels et al. v. Westinghouse, et al., 96-CV-395), document requests which are related to issues other than the statute of limitations shall be responded to within 60 days of service of such requests.

Plaintiffs may serve initial document requests pursuant to FRCP 34 on or after the date of this CMO-2. The response time for defendants for document requests shall be 60 days. Defendants shall provide plaintiffs with access to documents at a single central document production location, to be chosen by defendants. Documents shall be at the single central document production location and available for plaintiffs to review within 30 days of the date of defendants' initial response to the document requests.

C. Depositions of Plaintiffs and Defendants

Depositions may be noticed no earlier than September 16, 1996, with regard to any plaintiff. Depositions shall proceed in staggered fashion, i.e. depositions of the plaintiffs in Complaint #1 shall be completed in advance of depositions of plaintiffs in Complaint #2, etc. Depositions of defendants may be noticed at any time following September 16, 1996. The ten deposition limitation set forth in FRCP 30(a)(2) shall not apply to depositions of plaintiffs or defendants.

D. Non-Party Discovery

Service by any party of non-party deposition notices or subpoenas shall be in compliance with FRCP 30 and 45. No third party depositions shall be conducted before September 16, 1996, except for good cause shown. The ten deposition limitation set forth in FRCP 30(a)(2) shall not apply to depositions of third parties.

E. Other Discovery Devices

This CMO-2 is not intended to limit the parties' use of discovery methods not specified herein, nor is it intended to limit or curtail the parties' rights under the Federal Rules of Civil Procedure except as specified herein.

F. Non-expert Discovery Deadline

Subject to further meetings with Magistrate Judge Foschio, it is the intention and desire of the parties to complete all formal discovery other than discovery related to expert witnesses by December 31, 1997.

G. Expert Disclosure and Depositions

Plaintiffs shall disclose their experts pursuant to FRCP 26(a)(2) on or before March 1, 1998, or 60 days after the completion of non-expert discovery, whichever is later. Defendants shall disclose their experts pursuant to FRCP 26(a)(2) on or before April 15, 1998, or 45 days after the disclosure of plaintiffs' experts, whichever is later.

Any party may elect, pursuant to FRCP 30, to depose those expert witnesses relied upon by the opposing party. The ten deposition limitation set forth in FRCP 30(a)(2) shall not apply to depositions of expert witnesses. All depositions of expert witnesses shall be completed within six months of expert disclosure.

H. Exceptions to Deposition Schedule

It is recognized that some circumstances may warrant the taking of certain depositions before the dates specified above, e.g., age, health or pending absence from the area. The Court directs the parties to cooperate in identifying those individuals whose circumstances may require a deposition earlier than the dates specified above. The Court further directs that the parties use their best efforts to agree upon these earlier depositions. In the event that there can be no agreement, the Court will entertain applications for appropriate relief.

IV. SERVICE UPON EXISTING DEFENDANTS

In recognition of the cost to plaintiffs of individual service upon the filing of additional claims, the Court orders that service of a copy of any pleading (including but not limited to Summonses and Complaints for additional claims) upon counsel of any defendant who has appeared by counsel in any action subject to this order shall be deemed sufficient service for the commencement of any additional claims. Service upon liaison counsel is sufficient for those defendants who are members of the liaison group mentioned above, and service upon any additional counsel for that party is not necessary.

V. THIRD-PARTY ACTIONS

Third-party actions shall be commenced as to existing claims within 60 days of this order. Additional third-party claims with regard to any newly filed claims shall be commenced within 60 days of the filing of the newly filed claims. If additional information should become available during discovery regarding the identity of other potential third-party defendants, leave of Court to add additional third-party defendants shall be sought promptly upon discovery of information concerning the identity of the third-party defendants.

To the extent that cross-claims and third-party claims for contribution have been asserted by some or all of the defendants, such claims are deemed denied without the necessity of pleading.

Discovery regarding cross-claims and third-party claims may commence immediately.

Should any defendant file a third-party complaint for contribution, each defendant shall be deemed to have filed a third-party complaint against the third-party defendants named

therein without the necessity of additional pleading. Nothing in this provision shall prevent any party from filing a pleading expressly refusing to assert claims or expressly admitting rather than denying such claim.

If any amended complaint is filed in this action, no party who has already answered and against whom no new allegations are made need file an additional answer.

All answers filed to date or hereafter filed shall be deemed to include cross-claims for indemnity and contribution made by the answering party against all other defendants or third-party defendants to the extent that such claims for contribution and indemnity are based upon common law or upon statute or upon contractual or quasi-contractual obligations arising out of the relationships by which the material at issue was handled. Claims for contribution or indemnity arising out of facts specific to an individual party (such as express contractual indemnity) must be specifically plead. All claims for indemnification and contribution automatically asserted by provision of this order, or by specific pleadings, shall be deemed to be denied without necessity of filing a specific pleading. Nothing in this provision shall prevent any party from filing a pleading expressly refusing to assert such claims or expressly admitting, rather than denying, such claims.

In the event that a new party is joined, such as by amended complaint or third-party complaint, such newly joined party shall be deemed to have been made a defendant upon a cross-claim for contribution and indemnity asserted by every other defendant, as if it had been a party in this lawsuit at the time of the entry of this order. Likewise, each new party shall be deemed to have denied those cross-claims.

VI. RETENTION OF RELEVANT MATERIALS

All parties and their counsel are directed to preserve any information in their possession, custody, or control that constitutes or contains material or information that is believed to be relevant to this matter. All parties and their counsel are directed to take all reasonab to communicate the requirements of this provision to any persons who must know of provision in order for it to be effective

IT IS SO ORDERED

Honorable Leslie G. Foschio
United States Magistrate Judge

DATED: July _____, 1996

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IN RE: PFOHL BROTHERS
LANDFILL LITIGATION

95-CV-0020A

This document relates to:
All Actions

EXHIBITS TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR CASE MANAGEMENT ORDER

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EXHIBIT C

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June 17, 1996

Ms. Carol Browner
Administrator
Environmental Protection Agency
401 M Street, S.W.
Washington D.C. 20460

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

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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 th 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 adjudicator 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."

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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 revie 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. Th 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

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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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CERTIFICATE OF SERVICE

This is to certify that on this 16th day of July 1996, a true and correct copy of the foregoing Petition was sent by certified mail, return receipt requested, to the following individuals:

Ms. Janet Reno
U.S. Attorney General
Department of Justice
Constitution Ave. & 10th St., NW
Washington, DC 20530

The Honorable George Bush
Governor of Texas
P.O. Box 12428
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The Honorable Dan Morales
Attorney General of Texas
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Mr. Barry McBee, Chairman
Texas Natural Resource Conservation Commission
P.O. Box 13087
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Mr. Dan Pearson
Executive Director
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LIST OF EXHIBITS FOR EDF PETITION TO EPA

1. Letter from Gregg Cooke, Chief, Environmental Protection Division, Texas Attorney General's Office to Pat Gaskins, Office of Congressional Relations, EPA, March 30, 1993, regarding public participation in enforcement proceedings as related to NPDES programs.

2. Letter from George Alexander, Regional Counsel, EPA Region VI to Gregg Cooke, May 5, 1993, regarding public participation in enforcement proceedings as related to NPDES programs.

3. "A Review of Recent Decisions on Public Participation by the Texas Natural Resource Conservation Commission," by Henry, Lowerre, Johnson, Hess & Frederick.

4. Sample TNRCC Notices of Application for UIC Permits.

5. Package of documents related to Tokyo Electron America's claims of confidentiality and PODER's efforts to participate in the permitting process.

6. Texas Attorney General's Office Opinion on Federal Clean Air Act, Title V, November 11, 1993.

EXHIBIT D

VERNON'S TEXAS SESSION LAW SERVICE 1997
Seventy-Fifth Legislature, 1997 Regular Session

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Additions are indicated by < < + Text + > > ; deletions by < <- Text -> >
Changes in tables are made but not highlighted.

CHAPTER 206
H.B. No. 3459
ENVIRONMENT--ENVIRONMENTAL HEALTH AND SAFETY AUDITS

AN ACT

relating to environmental and health and safety audits; providing a penalty.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Section 5(b), Texas Environmental, Health, and Safety Audit Privilege Act (Article 4447cc, Vernon's Texas Civil Statutes), is amended to read as follows:

< < TX CIV ST Art. 4447cc > >

(b) Except as provided in Sections 6, 7, < < + and + > > 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; < < + or + > >

(2) < <- a criminal proceeding; or -> >

< <- (3) -> > an administrative proceeding.

SECTION 2. Section 6, Texas Environmental, Health, and Safety Audit Privilege Act (Article 4447cc, Vernon's Texas Civil Statutes), is amended by amending Subsection (b) and adding Subsection (e) to read as follows:

< < TX CIV ST Art. 4447cc > >

(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;

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(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 < < + of + > > < <- 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.

< < + (e) Nothing in this section shall be construed to circumvent the protections provided by federal or state law for individuals that disclose information to law enforcement authorities. + > >

SECTION 3. Section 6(d), Texas Environmental, Health, and Safety Audit Privilege Act (Article 4447cc, Vernon's Texas Civil Statutes), is amended to read as follows:

< < TX CIV ST Art. 4447cc > >

(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 < < + is subject to any penalty provided in Chapter 552, Government Code + > > < <- 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 4. Section 7(d), Texas Environmental, Health, and Safety Audit Privilege Act (Article 4447cc, Vernon's Texas Civil Statutes), is amended to read as follows:

< < TX CIV ST Art. 4447cc > >

(d) A person claiming the privilege is subject to sanctions as provided by Rule 215 of the Texas Rules of Civil Procedure < < + or to a fine not to exceed $10,000 + > > if the court finds < < + , consistent with fundamental due process, + > > that the person intentionally or knowingly claimed the privilege for unprotected information as provided in Section 8 of this Act.

SECTION 5. Section 7(a), Texas Environmental, Health, and Safety Audit Privilege Act (Article 4447cc, Vernon's Texas Civil Statutes), is amended to read as follows:

< < TX CIV ST Art. 4447cc > >

(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:

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(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.

SECTION 6. Section 9, Texas Environmental, Health, and Safety Audit Privilege Act (Article 4447cc, Vernon's Texas Civil Statutes), is amended to read as follows:

< < TX CIV ST Art. 4447cc > >

Sec. 9. < <- COURT - > > REVIEW < < + OF PRIVILEGED DOCUMENTS BY GOVERNMENTAL AUTHORITY + > > < <- AND DISCLOSURE - > > . (a) < < + Where an audit report is obtained, reviewed, or used in a criminal proceeding, the administrative or civil evidentiary privilege created by this Act is not waived or eliminated for any other purpose + > > < <- 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) < < + Notwithstanding the privilege established under this Act, a regulatory agency may review information that is required to be available under a specific state or federal law, but such review does not waive or eliminate the administrative or civil evidentiary privilege where applicable + > > < <- 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) < < + If information is required to be available to the public by operation of a specific state or federal law, the governmental authority shall notify the person claiming the privilege of the potential for public disclosure prior to obtaining such information under Subsection (a) or (b) + > > < <- 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) < < + If privileged information is disclosed under Subsection (b) or (c), on + > > < <- 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; - > >

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< <- (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 < < + Section 8 + > > < <-this section - > > . A party < < + having received information under Subsection (b) or (c) + > > < <- 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 < < + of privileged information + > > < <- , 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 7. Sections 10(a), (b), (d), (f), and (h), Texas Environmental, Health, and Safety Audit Privilege Act (Article 4447cc, Vernon's Texas Civil Statutes), are amended to read as follows:

< < TX CIV ST Art. 4447cc > >

(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 < < + or + > > < <- , - > > 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 < < + or imminent and substantial risk of serious injury + > > to one or more persons at the site or < <-substantial - > > off-site < < + substantial actual harm or imminent

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and substantial risk of + > > harm to persons, property, or the environment.

(d) The immunity established by Subsection (a) of this section does not apply and an administrative < < + or + > > < <- , - > > 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 < < + ; or + > >

< < + (5) the violation has resulted in a substantial economic benefit which gives the violator a clear advantage over its business competitors + > > .

(f) In a civil < < + or + > > < <- , - > > 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.

(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 < < + significant + > > < <- 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.

< < Note: TX CIV ST Art. 4447cc > >

SECTION 8. This Act takes effect September 1, 1997, and applies only to an environmental or health and safety audit prepared on or after that date.

SECTION 9. 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.

Passed by the House on April 29, 1997, by a non-record vote; passed by the Senate on May 10, 1997, by a viva-voce vote.

Approved May 21, 1997.

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Effective September 1, 1997.

TX LEGIS 206 (1997)

END OF DOCUMENT

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BIOGRAPHY
OF
KAY GUNDERSON REEVES

Kay Gunderson Reeves was born in Miller, South Dakota in 1960. She received her Bachelor's Degree in Political Science from the University of California at Berkeley in 1982. After moving to Texas in 1982, Ms. Reeves worked at the Texas Legislature for many years. She graduated from the University of Texas Law School in December, 1990, and practiced law in Austin, Texas for several years. She has represented plaintiffs in toxic tort litigation with the firm Baron & Budd since 1994.

STRATEGIES FOR TOXIC TORT LITIGATION -

"I Love This Game"

Defandants' Position

"Where's The Beef?"

WES HARRIS

WHERE'S THE BEEF?

Mass Tort or Masquerade: Does it have to be a million dollar question?

Wesley N. Harris
Kelly, Hart & Hallman
Fort Worth

NINTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

July 31 and August 1, 1997

WHERE'S THE BEEF?[1]

I.

Mass Tort or Masquerade: Does it have to be a million dollar question?

A variety of cases fit the description "toxic tort litigation." While in many instances a single plaintiff sues a single defendant for personal injuries alleged to have been caused by exposure to chemicals or products containing allegedly hazardous materials, it is more often multiple plaintiffs who claim to be harmed. Dozens, hundreds, or even thousands, of plaintiffs may allege harm caused by a single defendant, or small group of defendants; for example, manufacturers of breast implants or asbestos. Increasingly, a large group of plaintiffs sues a large group of defendants, alleging either that exposure to a combination of their products or by-products harmed them, or that it is impossible to prove which individual chemical or combination thereof caused the harm.

The latter cases, with hundreds of plaintiffs, and any number of defendants most keenly present the problem described by the famous advertising slogan chosen as a whimsical moniker for this inquiry: Where's the beef? Here "beef" symbolizes "substance" or, as in the famous Wendy's ads, "meat." Less obviously, "beef" means "complaint" or "problem," as in the old Joe Pine show, which provided a forum for a variety of cranks to air their grievances, perched in a construction on the sound stage known as the "beef box."

A more important and telling distinction among multiple plaintiff cases, whether involving a small group or large group of defendants, is one which will sound somewhat obvious, if not pedestrian, but it proves to be surprisingly difficult to establish in a court of law. The distinction is between a case that is of dubious merit, based upon inadmissible "junk

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[1] The written materials for this presentation were authored by Wesley N. Harris, Robert S. Pressley, and Karen M. Lebowitz, of the Fort Worth and Austin offices of Kelly, Hart & Hallman, P.C.

science," and a case likely to have merit, based upon legitimate scientific evidence, which should be subject to a full trial on the merits. The primary approaches being used by courts to deal with the administration of a case brought by hundreds of plaintiffs are the "bellwether case," or test case, using hopefully representative plaintiffs, and a bifurcated trial, separating general causation from specific causation and damages. Each of these approaches raises many issues, but neither necessarily allows the court to relieve the parties of an expensive trial and discovery regime before making a determination on the merits, or answering the question "Where's the beef?" The focus of this inquiry is to identify procedural approaches to allow the parties to join issues and dispose of beefless, nothing-burger cases. Separating mass tort from masquerade, in our current system, can be an expensive proposition.

II.

Competing Paradigms

Traditionally, experts are designated after substantial factual discovery has taken place, or even after the close of fact witness depositions. This can be described as the "classic paradigm." In a case with hundreds of plaintiffs and dozens of defendants, there will be complex issues of exposure pathways, dosages, and medical causation. Some of these issues are common to all plaintiffs and defendants, but in many cases have specific or individual issues for both plaintiffs and defendants. In such a case, literally hundreds of depositions might be taken as part of the factual discovery, and millions of dollars spent, before discovery is taken of the parties' experts. Many courts have recognized that the classic paradigm results in huge expenditures of fees before addressing certain threshold issues.

The "emerging paradigm" places causation first. The idea behind the emerging paradigm is to conserve judicial resources, promote efficient use of the system, and reduce costs for litigants. By placing the causation aspect of the case first, the court may identify those lacking

merit where admissible expert testimony cannot be garnered by a plaintiff. Unfortunately from the defendant's perspective, Texas civil procedure is not structured to allow the trial court's decision to admit expert testimony to be tested on appeal until after a full trial on the merits, absent agreement by the parties. Much of the recent caselaw arises in the context of appellate courts being called upon, after a trial on the merits, to review the decision of the trial court to admit or exclude expert testimony.[2] With a few notable exceptions, the opinions are written after a full trial on the merits and appeal. Under these circumstances, the efficiencies engendered by the emerging paradigm are lost when the trial court admits unreliable expert testimony, because there is no procedure to allow for its review after less than a full trial on the merits.

Basically, there are three, possibly four, ways to bring the issue of admissibility of scientific evidence to a head in advance of trial: (1) motion to dismiss on the basis that plaintiffs failed to comply with a case management or *Lone Pine* Order; (2) motion for summary judgment, (3) bifurcated proceeding, trying general causation in the first stage, and (4) *Robinson*[3] or gatekeeper hearing (sometimes referred to as a motion in limine). If the Court excludes the plaintiff's expert's testimony in any of these contexts, except in the gatekeeper hearing, it results in judgment for the defendant and appeal rights for plaintiff. However, if the Court does not exclude testimony, then presumably the motion to dismiss, motion for summary judgment, and possibly general causation trial, do not result in a final judgment in plaintiff's favor, and defendant has no appellate rights. A bellwether, or test case, does result in a final judgment,

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2 *See, e.g., Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497 (Tex. 1995), and *North Dallas Diagnostic Center v. Dewberry*, 900 S.W.2d 90 (Tex. App. - Dallas 1995, writ denied). *See also, Merrell Dow Pharm., Inc. v. Havner*, ____ S.W.2d, ___ (Tex. 1997), which reversed the trial court after finding plaintiff's scientific evidence to be insufficient, even though admissible.

3 *E.I. DuPont De Nemours & Co. v. Robinson*, 923 S.W.2d 549.

and does not require the same extensive discovery as a trial on the merits for some hundreds of plaintiffs, but nevertheless requires significant additional discovery of facts from defendants, as well as representatives and plaintiffs themselves, and exposes defendants to risks of issue preclusion in future trials. Accordingly, the bellwether case or test case, while perhaps the most efficient way to bring the admissibility of scientific evidence to a head on appeal, still is not entirely satisfactory.

This paper discusses each of these procedural approaches to bring the causation issue before the court short of a full trial on the merits, and the unlikelihood that a negative result for defendant is appealable. In conclusion, an alternative procedure allowing interlocutory appeals on decisions regarding scientific evidence, which the Texas Supreme Court could adopt in mass tort cases, is proposed.

III.

Motion to Dismiss

A. Power to Require Plaintiffs to Submit Causation Evidence

After entry of a case management order requiring Plaintiffs to produce causation evidence (often called a *Lone Pine* order), the defense can move for dismissal of those plaintiffs who do not comply with the order.[4] Plaintiffs will likely counter that the trial court is unauthorized to issue a *Lone Pine* type of order requiring the plaintiffs to provide causation evidence in the first place.[5] However, recent Texas decisions support the trial court's authority to require plaintiffs to produce causation evidence in advance of trial.

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[4] *See* L. Goldenthal, Toxic Tort - Case Management Orders, Eighth Annual Texas Environmental Superconference 1996, for a discussion of case management orders and *Lone Pine* orders.

[5] For a compendium of plaintiffs' lawyers' gripes about *Lone Pine* orders, *see* Maierson and Huart, *The Lone Pine Debacle or How a Toxic Order Leached from New Jersey to Texas*, Medley's Emerging Toxic Torts, Vol. 5, #10 (Aug. 23, 1996).

In *Abarca v. Adco Products, Inc.*, the trial court issued an order requiring the plaintiffs to submit evidence pertaining to (1) the nature, duration and amount of exposure to any chemical, (2) physicians' testimony that each plaintiff suffered injury as a result of exposure to those chemicals, (3) the type of injury suffered as a result of exposure, and (4) the chemicals that caused the injury.[6] The plaintiffs sought relief from that *Lone Pine* type of order by filing a petition for a writ of mandamus. The plaintiffs argued that the appellate court should vacate the trial court's order because there was no requirement to prove a *prima facie* case of causation prior to trial.[7] Without ruling on the substantive issues, the appellate court denied the plaintiffs' petition, as did the Texas Supreme Court.[8] The *Abarca* decision and the court's inherent power to manage a case[9] allow defendants to argue that Texas trial courts are authorized to require plaintiffs to provide causation evidence during the pre-trial stage of litigation. Defendants also could rely on *Able Supply Co. v. Moye,*[10] which held that the trial court should require plaintiffs to submit causation evidence to defendants during pre-trial discovery,[11] when arguing that the court may issue a *Lone Pine* order.

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6 No. 95-4858-F (214th Dist. Ct. Nueces County, order of July 12, 1996).

7 Petition for writ of mandamus, *Abarca v. Westergreen*, No. 96-0911 (Tex. 1996).

8 Despite rejecting the mandamus petition, the appellate courts did not address the authority of the trial court to issue a *Lone Pine* order.

9 A trial court has inherent power to sanction bad faith conduct during the course of litigation that interferes with the administration of justice or the preservation of the court's dignity and integrity. *Metzger v. Sebek*, 892 S.W.2d 20, 51 (Tex. App. -- Houston [1st Dist.] 1994, writ denied).

10 898 S.W.2d 766, 771-73 (Tex. 1995).

11 *See also In re Love Canal Actions*, 547 N.Y.S.2d 174, 176 (N.Y.S.Ct. 1989) (holding that procedural rules required plaintiffs to provide defendants with causation evidence prior to trial).

B. Standard for Granting Motion to Dismiss

Plaintiffs typically argue that non-compliance with a case management order by failing to produce causation evidence does not support dismissal. That position could be difficult to oppose because the Texas courts do not have a well developed standard to determine when a trial court should grant a motion to dismiss based on the plaintiffs' failure to comply with a case management order. However, Texas case law is well developed regarding sanctions that are appropriate for discovery abuses in general, which is a situation sufficiently analogous to use as a starting point to argue that "death sanctions" are available for a failure to comply with a case management order.

The Texas Supreme Court in *TransAmerican Natural Gas v. Powell* recognized that the trial court has a great deal of discretion when deciding on an appropriate sanction for discovery abuses under Rule 215.[12] However, the trial court's discretion has limits. The decision to impose sanctions will be set aside if the trial court judge's decision is a clear abuse of discretion.[13] The test for an abuse of discretion is whether the trial court acted without reference to any guiding rules or principles, or whether under the circumstances of the case the trial court's action was arbitrary or unreasonable.[14]

The Texas Supreme Court has developed rules applicable to decisions regarding sanctions for discovery abuses. According to the Court, all sanctions must be "just."[15] The *TransAmerican* Court created a two pronged test to determine if a sanction is "just." First, "a

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12 811 S.W.2d 913, 918 (Tex. 1991).

13 *Koslow's v. Mackie*, 796 S.W.2d 700, 704 (Tex. 1990).

14 *Id.*

15 *TransAmerican,* 811 S.W.2d at 917.

direct relationship must exist between the offensive conduct and the sanction imposed."[16] That means the sanction must remedy the prejudice caused the innocent party and punish the actual offender. Before the trial court may impose a "death sanction," it must determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both.[17] Second, the sanction must not be excessive.[18] According to the Houston Court of Appeals, Fourteenth District, the most important factors to consider when determining the appropriateness of sanctions under the second prong of the test are deciding whether (1) lesser sanctions would promote compliance and discourage further abuse, (2) the sanctions are no more severe than necessary to satisfy the legitimate purposes of a sanction, and (3) the hindrance of the discovery process justifies a presumption that the resisting party's claims lacks merit.[19] It is not clear whether the court must take all of those factors into consideration.[20]

Of particular interest regarding the second prong of the test is the *TransAmerican* Court's statement that if a party refuses to produce material evidence after the trial court imposes a lesser sanction, the court may presume that an asserted claim lacks merit and dispose of it.[21] The courts, however, typically impose the "death sanction" of dismissal only after finding

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16 *Id.*

17 A lawyer cannot shield its client from sanction, but a party must bear some responsibility for its counsel's discovery abuses when it is or should be aware of counsel's conduct and the violation of discovery rules. Yet, a party should not be punished for counsel's conduct in which it is not implicated apart from having entrusted to counsel its legal representation. *Id.* at 913.

18 *Id.* at 917.

19 *Butan Valley, N.V. v. Smith*, 921 S.W.2d 822, 831 (Tex. App. -- Houston [14th Dist] 1996 n.w.h.). The Texas Supreme Court notes that the last of the three factors is perhaps the most significant to consider. *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 850 (Tex. 1992).

20 *Andras v. Memorial Hosp. System*, 888 S.W.2d 567, 571 (Tex. App. -- Houston [1st Dist.] 1994, writ denied).

21 *TransAmerican*, 811 S.W.2d at 918.

numerous, egregious discovery violations such as repeated failure to comply with case management orders.[22] It appears that the Texas Supreme Court's overriding concern is to restrict dismissal for failure to comply with discovery requirements to those instances where "a party has so abused the rules of procedure, despite imposition of lesser sanctions, that the party's position can be presumed to lack merit and it would be unjust to permit the party to present the substance of that position before the court."[23]

The *TransAmerican* opinion resulted in some confusion in the appellate courts as to whether the trial court must impose a "lesser sanction" before it imposes a "death penalty" sanction such as striking pleadings and dismissing a case. The Texas Supreme Court, in *GTE Communications v. Tanner*, made clear that "[c]ase determinative sanctions may be imposed in the first instance only in exceptional cases when they are clearly justified and it is fully apparent that no lesser sanctions would promote compliance with the rules."[24] Along that line, the *Andras v. Memorial Hospital* opinion provides an example of a "lesser sanction." That court determined that a warning indicating that failure to comply with a discovery order would result in dismissal

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22 *See e.g., Berry-Parks Rental Equip. v. Sinsheimer*, 842 S.W.2d 754, 758 (Tex. App. -- Houston [1st Dist.] 1992, no writ) (trial court showed the "patience of Job" before dismissing the plaintiffs' claim after imposing lesser sanctions); *Allied Chem. Co. v. Dehaven*, 824 S.W.2d 257, 262 (Tex. App. -- Houston [14th Dist.] 1992, no writ) (upholding trial court's decision to strike defendant's answer noting failure of defendant to make witnesses available for depositions, failure to provide affidavits regarding witnesses, failure to produce documents, and that the trial court had imposed lesser sanctions); *Jefa Co. v. Mustang Tractor & Equip. Co.*, 868 S.W.2d 905, 910 (Tex. App. -- Houston [14th Dist.] 1994, writ denied) (upholding trial court's decision to strike plaintiffs' pleadings, noting plaintiffs' failure to produce subpoenaed documents the court compelled the plaintiff to produce after court had imposed lesser sanctions, and that plaintiff was not in compliance with two court orders when the defendant sought sanctions); *Gentry v. Weaver Dev. Co.*, 909 S.W.2d 606, 615 (Tex. App. -- Fort Worth 1995, n.w.h.) (upholding dismissal and noting discovery abuses after court issued discovery order including failure to appear at deposition, failure to produce documents, counsel's misrepresentations to the court, and failure to comply with temporary injunction, and indicating that the trial court had previously imposed lesser sanctions).

23 *Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991). *See also Hamill v. Level*, 917 S.W.2d 15, 16 (Tex. 1996) (reversing lower court and holding that death sanction was inappropriate because the sanctioned conduct did not justify presumption that claims were meritless).

24 856 S.W.2d 725, 729 (Tex. 1993). *See also CRSS Inc. v. Montanari*, 902 S.W.2d 601, 612 (Tex. App. -- Houston [1st Dist.] 1995, writ denied) (overturning trial court's decision to impose "death sanction" because trial court did not first impose a "lesser sanction").

was a "lesser sanction."[25] After the plaintiff in *Andras* failed to produce discoverable material, the trial court dismissed the case, a decision which was upheld by the appellate court. The key seems to be inclusion in the case management order of an *Andras*-type warning so that the plaintiffs' failure to comply allows dismissal under *TransAmerican* while meeting the requirement under *GTE* regarding "lesser sanctions."

C. Argument in Favor of Dismissal

In a multi-plaintiff case in which plaintiffs fail to comply with a *Lone Pine* order, dismissal may be appropriate under the first prong of the *TransAmerican* test for two reasons. First, the sanction would be directly related to the offensive conduct because it would penalize the plaintiffs who failed to produce the very evidence needed to prove an essential element of one of their claims. Second, the sanction would remedy the prejudice caused the defendants because the defendants would no longer be forced to defend against a lawsuit that appears to be without merit, or proceed without information about the basis for the claims against them.

As for the second prong of the test, dismissal is no more severe a remedy than necessary, assuming the court has issued a number of orders requiring the plaintiffs to produce causation evidence, but the plaintiffs failed to comply with the orders. If the court issues a warning, an additional argument is available that the court imposed "lesser sanctions," but that they did not result in the plaintiffs providing defendants with the requested information. Finally, the plaintiffs' failure to comply, even after receiving a "lesser sanction," provides a basis for presuming that their claims are without merit and that dismissal is warranted.

The trial court may decide to follow opinions from other jurisdictions in which courts have dismissed cases when the plaintiffs failed to provide causation evidence. The *Lone Pine*

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[25] 888 S.W.2d at 572.

opinion, for example, dismissed plaintiffs' case and criticized the tactic of "moving things along without complying with discovery orders, hoping that some of the defendants, to avoid further delay and expense, would recommend a settlement of the case."[26] The court in *Adinolfe v. PJP Landfill*[27] refused to allow plaintiffs to "rely on the fact that there was exposure to toxic chemicals and that is enough;" instead, the court dismissed the case.[28] In addition, Illinois courts, among others, have found that the plaintiffs' failure to comply with a case management order to certify that their alleged injuries were caused by the defendants justifies dismissal.[29]

D. Options if Motion to Dismiss is Denied

There is not much likelihood that immediate interlocutory review is available if the court denies a motion to dismiss.

1. Appeal

An order overruling a motion to dismiss is an interlocutory order. The Court of Appeals may not review that type of an order absent specific statutory authorization to do so.[30] There

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26 *Lore v. Lone Pine Corp.*, #L3306-85 (N.J. Super. Ct., Nov. 18, 1986) at p. 4.

27 *Id.*

28 *Id.* (dismissing causes of action where, 14 months after lawsuits were filed, plaintiffs failed to comply with case management order and there was a complete absence of causal evidence in the record).

29 *See, e.g., Atwood v. Warner Elec. Brake & Clutch Co.*, 605 N.E.2d 1032, 1038 (Ill. App. Ct. 1992) (upholding trial court's decision to dismiss plaintiffs' claims with prejudice for failure to submit medical certifications indicating alleged injuries were caused by exposure to substances produced by defendants). Similarly, in *Schelske v. Creative Nail Design, Inc.*, the Montana Supreme Court recently upheld the trial court's grant of summary judgment where the plaintiffs failed to provide expert affidavits identifying the cause of alleged injuries. 1997 Mont. Lexis 6, No. 96-153 (Mont. Sup. Ct. Jan 2, 1997); *see also Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 838 (5th Cir. 1996) (upholding summary judgment in favor of defendant after trial court struck plaintiffs' expert's evidence for failure to comply with case management order); *Abuan v. General Electric Co.*, 1992 WL 535958 (D. Guam February 25, 1992) (granting defendant's motion for summary judgment where plaintiff failed to comply with case management order requiring plaintiff to provide expert's report indicating injuries were caused by exposure to substances attributable to defendant). Cf. *Rush v. Fieldcrest Cannon Inc.*, No. 96-127 (Ark. Sup. Ct. December 16, 1996) (upholding trial court's decision to dismiss plaintiff's case for failure to comply with discovery order requiring plaintiff to limit number of experts).

30 *Marulanda v. Mendez*, 489 S.W.2d 128, 129 (Tex. Civ. App. -- San Antonio 1972, no writ); *Culligan Soft Water Serv. v. State*, 385 S.W.2d 613 (Tex. Civ. App. -- San Antonio 1964, writ ref'd n.r.e.).

is no statutory authority for the appellate court to review the trial court's decision on a motion to dismiss on an interlocutory basis. Therefore, it does not appear that a defendant could quickly appeal the trial court's decision should it ultimately deny a motion to dismiss.

2. Mandamus

When a court enters a final judgment in a case in which, among other things, a motion to dismiss has been filed, an appeal is available.[31] Generally speaking, a trial court's decision to deny a motion to dismiss is not a proper subject of a mandamus action.[32] As discussed below, mandamus may be available in situations where an appeal is not an "adequate" remedy, but no Texas court has held an appeal of a decision regarding dismissal to be an inadequate remedy.

E. Pros and Cons

The greatest advantage in pursuing the motion to dismiss option is that, in many cases, plaintiffs will be unable to provide affidavits or other documents sufficient to establish causation. If the court repeatedly requires plaintiffs to produce causal evidence and they fail to do so, defendant may then argue that the plaintiffs' inability or unwillingness to provide that evidence should create a presumption that the plaintiffs' claims lack merit and should be dismissed.

However, there are at least two significant concerns with taking this approach. First, most courts will not dismiss a cause of action unless the plaintiffs have engaged in a pattern of egregious behavior. It would be up to the individual judge in each case to conclude that dismissal is appropriate even if the plaintiffs do not respond to a second or third order to

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31 *See Low v. King*, 867 S.W.2d 141, 142 (Tex. App. -- Beaumont 1993, orig. proceeding) (indicating that a trial court's order denying a motion to dismiss may be appealed).

32 *Tilton v. Marshall*, 925 S.W.2d 672, 675 (Tex. 1996) (ruling that mandamus was not available to overturn trial court's decision denying motion to dismiss fraud cause of action); *Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 59 (Tex. 1991).

produce causation evidence. Second, if the trial court denies the motion to dismiss, appellate review of that decision is unlikely until after a full trial on the merits.

IV.

Motion for Summary Judgment

A. Standard for Granting Motion for Summary Judgment

To prevail on a motion for summary judgment, movant has the burden of demonstrating that there exists no genuine issue of material fact, and that movant is entitled to judgment as a matter of law.[33] One way to meet that standard is to affirmatively disprove one of the essential elements of the plaintiffs' cause of action, or prove an affirmative defense.[34] For example, evidence sufficient to disprove the plaintiffs' negligence theory shifts the burden from the moving party. The opposing party must then submit evidence into the record in support of their theory of the case.[35] Of course, the disadvantage to pursuing this option is that movant has to "tip its hand." Recent changes made by the Texas Supreme Court to the summary judgment rule may provide a second and more advantageous way to meet the standard. The Texas rule currently in effect does not allow a defendant to obtain a summary judgment merely by showing that the plaintiff has "no evidence" in support of at least one essential element of its claim, as is allowed under the federal rules.[36] However, beginning on September 1, 1997, a new rule

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33 *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991).

34 *Doe v. Boys Clubs*, 907 S.W.2d 472, 476-77 (Tex. 1995).

35 *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995) (once defendant produces evidence to establish right to summary judgment, plaintiff must present evidence sufficient to raise fact issue); *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991) (if an interested expert witness presents legally sufficient evidence in support of a motion for summary judgment, the opposing party must produce other expert testimony to controvert the claims); *Summers v. Fort Crockett Hotel, Ltd.*, 902 S.W.2d 20, 25 (Tex. App. -- Houston [1st Dist.] 1995, writ denied) (agreeing with defendant's position that plaintiff has the burden of raising an issue of material fact once the defendant provides evidence to support its motion for summary judgment).

36 *Smithkline Beecham Corp. v. Doe*, 903 S.W.2d 347, 355 (Tex. 1995). *See Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989) (discussing different standards relied on by Texas and federal courts when deciding

takes effect and it appears as though the courts could grant a motion for summary judgment similar, if not identical to, the federal "no evidence" standard. The Texas Supreme Court has adopted a "no evidence" standard and has hinted that standard will apply retroactively.

Even if the new summary judgment rule does not apply retroactively, a movant may argue that the trial court could grant a motion for summary judgment on another ground. The Texas Supreme Court, in *Merrell Dow Pharm., Inc. v. Havner,* recently cited a number of cases that granted the defendants' motion for summary judgment on the ground that the plaintiffs' expert's evidence was legally insufficient.[37] The Court was not required to determine whether it is appropriate to rule on the legal sufficiency of evidence at the summary judgment stage, but the Court did not voice its disapproval of the courts that did so. Furthermore, the Court cited the passage of the *Daubert* opinion that states

> [I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment . . . and likewise to grant summary judgment.[38]

It appears from the Court's opinion that if an expert's opinion is not reliable, the expert's opinion will be insufficient to meet the plaintiff's standard of proof, and the court may determine whether the plaintiff has met its standard of proof at the summary judgment stage.

The Court noted that the *Robinson* factors relevant to determining admissibility also are relevant to determining the sufficiency of evidence.[39] Unfortunately, the Court did not provide

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motions for summary judgment).

37 __ S.W.2d __ (Tex. 1997), slip op. at 14-15.

38 *Id.* at 14.

39 *Id.* at 16.

useful guidance as to how the *Robinson* factors should be applied when determining the sufficiency of evidence. The Court simply notes that

> we emphasize that courts must make a determination of reliability from all the evidence. Courts should allow a party, plaintiff or defendant, to present the best available evidence, assuming it passes muster under *Robinson*, and only then should a court determine from a totality of the evidence, considering all factors affecting the reliability of particular studies, whether there is legally sufficient evidence to support a judgment.[40]

Defendants could rely on that language and argue that the trial court could determine whether the plaintiffs' evidence is legally sufficient to support a judgment during the pre-trial stage of the lawsuit.

B. Options if Court Denies Motion for Summary Judgment

If the court denies a motion for summary judgment, immediate appellate review is unavailable under the Texas Rules of Civil Procedure.

1. Appeal

Generally speaking, the denial of a motion for summary judgment is not immediately appealable.[41] Ordinarily, only final orders can be appealed.[42] Interlocutory orders can only be appealed if permitted by statute.[43] The Civil Practice and Remedies Code provides for interlocutory appeals in limited circumstances, none of which are applicable to this case.[44]

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40 *Id.* at 31.

41 *Novak v. Stevens*, 596 S.W.2d 848, 849 (Tex. 1980).

42 *City of Houston v. Kilburn*, 849 S.W.2d 810 (Tex. 1993).

43 *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266 (Tex. 1992).

44 TEX. CIV. PRAC. & REM. CODE § 51.014 (Vernon Pamph. 1996). An interlocutory appeal may be taken from orders regarding the appointment of receivers or trustees, class certification and certain temporary injunctions. Interlocutory appeal may also be taken from a denial of a motion for summary judgment that is based either upon the assertion of immunity by an officer or employee or the state or a political subdivision or upon a claim or defense by a member of the media arising under the First Amendment of the United States Constitution or Article 1, Section 8 of the Texas Constitution.

2. Mandamus

There is little chance that the courts would grant a request for mandamus to review the trial court's decision. The Texas Supreme Court has declined to substitute mandamus for an appeal of a trial court's ruling on a motion for summary judgment.[45]

C. Pros & Cons

The most significant concern in pursuing the summary judgment option before the "no evidence" rule takes effect, or if it is not held to apply retroactively, is that movant must submit its own expert evidence before the court will even consider whether the plaintiffs have submitted any causation evidence to support their claims. One concern with submitting expert testimony, however, is the potential for creating a material fact dispute. Also, it serves to educate the plaintiffs before they reveal the substance of their case. Assuming the "no evidence" rule will apply retroactively, the best strategy is to wait until at least September 1 to file a summary judgment motion.

V.

Bifurcated Proceeding

Another option is to bifurcate the litigation, resulting in something like a "mini-trial" on the "general causation" issue. The primary advantage of this strategy is the opportunity to exclude the plaintiffs' expert's evidence, and to argue both that the plaintiffs have "no evidence" regarding causation and that the court should enter a directed verdict for defendants under the Texas standard. A potential problem with pursuing this strategy, however, is that there is a Texas Supreme Court opinion that concludes bifurcation might be inappropriate.

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[45] *Humphreys v. Caldwell*, 888 S.W.2d 469 (Tex. 1994). The court previously ruled that mandamus is unavailable to challenge a decision on a motion for summary judgment. *Abor v. Black*, 695 S.W.2d 564, 567 (Tex. 1985).

A. Authority and Justification for Conducting a Bifurcated Proceeding

Three arguments support a bifurcated proceeding. First, the court has inherent powers it may rely on to aid in the exercise of its jurisdiction that allow a bifurcated proceeding.[46] How best to control the disposition of the case requires the judge to "weigh competing interests and maintain an even balance."[47] The competing interests in a multi-party case are best served by requiring the plaintiffs to provide some admissible causation evidence early in the case. If the court does not require the plaintiffs to prove their causation element up front, the defendants continue to be entangled in protracted litigation that "places significant strain on [their] resources and creates considerable pressure to settle the case, regardless of the underlying merits," which is a situation the courts should not favor when a procedural alternative is available.[48]

Second, the Texas Supreme Court's opinion in *Robinson* supports a decision to scrutinize the plaintiffs' evidence early in the case. In that case, the court found that "trial judges have a heightened responsibility to ensure that expert testimony show some indicia of reliability."[49] Because "[p]rofessional expert witnesses are available to render an opinion on almost any theory, regardless of its merit," and because, generally speaking, expert testimony has "become more crucial to the outcome of [a] case," the trial court would be well served by requiring the plaintiffs to meet their burden of proof on the causation issue before requiring the parties to engage in an expensive trial.[50] Evaluating the plaintiffs' expert's evidence at the outset of the

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46 *Public Util. Com'n v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988).

47 *Metzger v. Sebek*, 892 S.W.2d 20, 38 (Tex. App. -- Houston [1st Dist.] 1994, writ denied).

48 *See CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996) (indicating that mass tort litigation creates pressure to settle the case).

49 *E.I. Du Pont De Nemours & Co. v. Robinson*, 923 S.W.2d 549, 553 (Tex. 1995).

50 *Id.*

litigation allows the trial court to fulfill its Supreme Court-designated role of making "the initial determination whether the expert's opinion is relevant and whether the methods and research upon which it is based are reliable."[51]

Third, federal courts have relied on the United States Supreme Court's decision in *Daubert*[52] and have required plaintiffs to identify causation evidence at pre-trial "gatekeeper" proceedings.[53] In *Renaud v. Martin Marietta* for example, the trial court required the plaintiffs to present their causation evidence at a pre-trial hearing "as if they were presenting their case to the jury."[54] If the trial court found that the plaintiffs met their *prima facie* burden regarding causation, which was the same as the summary judgment burden, the court would allow the case to proceed to trial on a test-case basis.[55] For those plaintiffs failing to meet that burden, the trial court granted summary judgment for the defendant.[56] A similar type of proceeding would allow state courts to make efficient use of their limited resources and would allow the courts to dispose of meritless claims quickly.

However, the Texas Supreme Court's decision in *Transportation Ins. Co. v. Moriel*[57] presents a significant impediment to pursuing the bifurcated trial strategy. In that case,

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51 *Id.* at 558.

52 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 688 (1993).

53 *See e.g., Renaud v. Martin Marietta Corp.*, 749 F. Supp. 1545, 1548 (D. Colo. 1990) (holding a "mini-trial" to examine plaintiffs' causation evidence), *affm'd*, 972 F.2d 304 (10th Cir. 1992).

54 *Renaud*, 972 F.2d 304, 306 (10th Cir. 1992).

55 *Renaud v. Martin Marietta Corp.*, 749 F. Supp. 1545, 1548 (D. Colo. 1990).

56 *Id.* A similar approach was taken by the court in *Claar v. Burlington Northern Railroad Co.*, 29 F.3d 499 (9th Cir. 1994). In that case, the trial court ordered the plaintiffs to submit affidavits describing their exposure to the chemicals they claim harmed them. The court also ordered the plaintiffs' expert's to provide affidavits identifying the particular chemicals that caused the plaintiffs' injuries. *Id.* at 500. The court granted the defendants' motion for summary judgment after ruling that the plaintiffs' expert's evidence was inadmissible.

57 No such prohibition exists in federal court.

following *Iley v. Hugler*,[58] the Court held that, generally speaking, the trial court should not bifurcate liability and damages in a personal injury action.[59] *Moriel* disallows bifurcation of liability and damages, expressly excepting punitive damages from the prohibition. Defendants could argue that bifurcation of general causation, on one hand, from specific causation, liability, and damages, on the other, in a case with hundreds or even thousands of plaintiffs, is a different question than presented in *Moriel*, and is a procedure that should be allowed. Arguably, the prohibition against bifurcated trials should not apply to mass toxic tort cases because it results only in creating additional pressure for defendants to settle the case to avoid an expensive trial.[60]

B. Standard for Excluding Plaintiffs' Expert's Evidence

If the court grants a motion to litigate the general causation element of the plaintiffs' case first or the parties agree to do so, the *Robinson* opinion may support exclusion of plaintiffs' expert's evidence. The Texas Supreme Court in *Robinson* relied on the United States Supreme Court's *Daubert*[61] opinion and the Texas Court of Criminal Appeals decision in *Kelly v. State*[62] to fashion an expert testimony admissibility test. According to the *Robinson* Court, an expert witness must be qualified to testify, and the testimony must be relevant to the issues in the case and based on a reliable foundation.[63] As regards relevancy, the Court concluded that the testimony must be "sufficiently tied to the facts of the case that it will aid the jury in resolving

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58 311 S.W.2d 648 (Tex. 1958).

59 879 S.W.2d 10, 30 n.29 (Tex. 1994).

60 Another potential pitfall in seeking a bifurcated trial is the argument that one jury must hear both phases of the case. *See Hyman Farm Service v. Earth Oil & Gas*, 920 S.W.2d 452 (Amarillo 1996). *But see Greater Houston Transportation Company, Inc. v. Zrubeck*, 850 S.W.2d 579 (Tex. App. - Corpus Christi 1993).

61 509 U.S. 688 (1993).

62 824 S.W.2d 568 (Tex. Crim. App. 1992).

63 *Robinson*, 923 S.W.2d at 556.

a factual dispute."[64] With respect to reliability, the Court noted that "[s]cientific evidence which is not grounded 'in the methods and procedures of science' is no more than 'subjective belief or unsupported speculation'" and is unreliable and, therefore, inadmissible.[65]

C. Options if Court Denies Motion to Exclude Expert's Evidence in a General Causation Trial

There is little chance for an interlocutory appeal to the appellate court if the trial court denies a motion to exclude the expert's evidence in the general causation phase of a bifurcated trial. There is a better chance that the appellate court would grant a petition for writ of mandamus to review the trial court's decision.

1. Appeal

If the court denies defendants' motion to exclude the plaintiffs' expert's testimony, an appeal is not available until the court issues a final judgment, which would not happen until all issues are litigated at the end of the second phase of the trial.[66] A motion to exclude the expert's evidence would be "an evidentiary objection that can and should be re-urged at trial and then reviewed in the regular course of an appeal."[67]

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64 *Id.*

65 *Id.* at 557 (citing *Daubert*). The Texas courts have also overturned verdicts for plaintiffs when the expert evidence was: (1) based on assumptions and there was no evidence in support of the assumptions, *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497 (Tex. 1995); and (2) not based on well-grounded scientific knowledge or reliable testing. *North Dallas Diagnostic Center v. Dewberry*, 900 S.W.2d 90 (Tex. App. -- Dallas 1995, writ denied).

66 TEX. CIV. PRAC. & REM. CODE § 51.014 (Vernon Pamph. 1996).

67 *Southwestern Bell Telephone v. Sanderson*, 810 S.W.2d 485, 487 (Tex. App. -- Beaumont 1991, no writ) (defendant challenged court's decision not to strike plaintiffs' expert witness and prohibit use of physical evidence); *see also Pope v. Davidson*, 849 S.W.2d 916, 920 (Tex. App. -- Houston [14th Dist.] 1993, no writ) (relying on *Sanderson* and limiting expert's testimony to first of two reports generated by the expert).

2. Mandamus

According to the Texas Supreme Court in *CSR Ltd. v. Link*, the general rule is that mandamus is available "only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law."[68] More specifically, mandamus is not available to supervise or correct incidental pre-trial rulings when there is an *adequate remedy* by appeal.[69] Provided below are possible arguments to support a position that mandamus is appropriate under the two prongs of the *CSR* test if the trial court admits the expert's evidence.

a. Abuse of Discretion or Violation of Duty

Two potential arguments are available to demonstrate that the trial court's decision to deny a motion to exclude expert testimony constitutes a clear abuse of discretion under the first prong of the *CSR* test. First, a trial court's failure to apply the relevant legal standard makes mandamus available.[70] Second, even if the trial court applies the correct standard, mandamus is proper if the trial court could reasonably have reached only one decision, but failed to do so.[71] Under the second option, a clear failure to "apply the law correctly" constitutes an abuse of discretion for which mandamus is available.[72] Therefore, if the trial court denies a motion

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68 925 S.W.2d 591, 596 (Tex. 1996).

69 *N.H. Helicopters, Inc. v. Brown*, 841 S.W.2d 424, 426 (Tex. App. -- Dallas 1992, orig. proceeding), *citing Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex. 1990, original proceeding) (plea to the jurisdiction), *Abor v. Black*, 695 S.W.2d 564 (Tex. 1985) (plea in abatement), and *Hendrick Medical Center v. Howell*, 690 S.W.2d 42 (Tex. App. -- Dallas 1985, orig. proceeding) (venue determination).

70 *NCNB Texas Nat'l Bank v. Coker*, 765 S.W.2d 398, 400 (Tex. 1989).

71 *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

72 *Id.* (finding that trial court's erroneous interpretation of a Texas Supreme Court ruling was a clear abuse of discretion); *see also Chapa v. Garcia*, 848 S.W.2d 667, 668 (Tex. 1992) (same holding).

because it does not apply, or misapplies, the *Robinson* decision, an argument is available that mandamus is appropriate.[73]

b. Inadequate Remedy

The *CSR* opinion supports an argument that an appeal of a decision regarding admissibility is an inadequate remedy in mass tort cases. The *CSR* court granted a petition for writ of mandamus to decide a personal jurisdiction dispute in an asbestos lawsuit. The Court held that "under the circumstances of this case, the concerns of judicial efficiency in mass tort litigation combined with the magnitude of the potential risk for mass tort actions against the defendant makes ordinary appeal inadequate."[74] The Court did not state that those are relevant factors in every case. However, because the allegations in *CSR* are similar to those in mass toxic tort cases (plaintiffs' claim in *CSR* was for personal injury damages due to long-term exposure to a toxic substance), the same analysis might apply.[75]

(1) Judicial Efficiency

After a plaintiffs' victory in the general causation phase, the next phase is likely to be a trial of a group of specific plaintiffs, rather than all plaintiffs. Whether such a test case has

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[73] If the court does not rule on a motion to exclude, mandamus might be available to force the court to do so. *Cooke v. Millard*, 854 S.W.2d 134, 135 (Tex. App. -- Houston [1st Dist.] 1992, no writ) (noting that mandamus will lie to compel a trial judge to hear and rule on pending motions).

[74] *CSR Ltd. v. Link*, 925 S.W.2d 591, 597 (Tex. 1996).

[75] It is important to note that the *CSR* decision pertains to jurisdictional issues and, as such, the appellate court's conclusion regarding the availability of mandamus and the adequacy of appeal might be different "under the circumstances" of a case dealing with evidence admissibility issues. Mandamus might have been appropriate in *CSR* because if the defendant was correct in arguing the court was without jurisdiction to decide the case, an appeal would be inadequate to correct the trial court subjecting the defendant to a trial in the first place. An argument could be made that the *CSR* reasoning applies to admissibility issues because if the defendants are correct that the plaintiffs have no causation evidence, then the court should not subject the defendants to an unnecessary trial. Of course, the primary distinction between *CSR* and many toxic tort cases pending in Texas is that the defendants in *CSR* argued the court had no power to decide the case, while in most cases, the defendants can argue only that the court would eventually rule in their favor so there is no necessity in subjecting them to lawsuits that the plaintiffs cannot win.

collateral estoppel effect on defendants may depend on how the group of plaintiffs is chosen; due process concerns dictate that collateral estoppel may not apply unless the court finds that the group chosen as test plaintiffs representative of the larger group because chosen on a reliable scientific basis, such as "stratified random sampling."[76] Thus, the court may be in a position, if plaintiffs overcome the general causation hurdle in a bifurcated trial, of trying numerous cases before a final judgment has been decided on appeal. According to the *CSR* opinion, even though "increased cost and delay alone do not make an ordinary appeal an inadequate remedy," those are factors the courts consider along with whether an appeal makes the "most efficient use of the state's judicial resources" when determining whether to grant a writ of mandamus.[77]

The *CSR* court also considered the complexity and length of trial when deciding whether an appeal was judicially efficient. According to the *CSR* Court, asbestos toxic tort lawsuits require the State to expend "a large amount of its limited judicial resources resolving these massive controversies."[78] The court appears to have been concerned with the strain on judicial resources that would result if the parties seeking mandamus were required to wait until after trial to obtain appellate review of the trial court's ruling on jurisdiction. A decision to require all plaintiffs to prove that their causation evidence is admissible at an early stage conserves limited judicial resources and promotes the efficient use of the court system.

(2) Risk of Additional Lawsuits

The *CSR* court found that the "large number of lawsuits to which CSR could potentially be exposed is significant to our determination that appeal is not an adequate remedy in this

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76 *See In Re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997). For an excellent analysis of this decision, *see* Faulk and Meadows, *Building a Better Mousetrap? A New Approach to Trying Toxic Tort Cases*, Toxics Law Reporter May 7, 1997.

77 *CSR*, 925 S.W.2d at 596.

78 *Id.* at 597.

case."[79] The court seemed concerned that CSR might have to defend itself on the personal jurisdiction issue many more times against additional plaintiffs if an appeal was required to resolve the jurisdictional dispute. Defendants in a mass toxic tort lawsuit would find themselves in a similar situation if forced to appeal the trial court's decision to admit an expert's evidence.

(3) Appeal Causes Permanent Loss of Substantial Rights

Although not addressed in the *CSR* opinion, the Texas Supreme Court indicated in an earlier decision that the party seeking mandamus must show it is "in danger of permanently losing substantial rights" to demonstrate an appeal is inadequate.[80] Defendants in multi-plaintiff cases may meet that standard because, even if they win a test case on appeal, that victory does not put them in the same position as in a run-of-the-mill personal injury case. For example, in a typical personal injury case, all parties are bound by the decision of the appellate court. That would not be the case in a multi-plaintiff lawsuit because plaintiffs' counsel could revise their trial strategy for the remaining plaintiffs in the next trial. The crux of the argument is that mandamus is the appropriate remedy because it forces all plaintiffs to clear the "causation hurdle" at the same time to avoid giving an advantage to those plaintiffs not included in the test case. The *CSR* case addressed personal jurisdiction, but may provide a basis to argue for mandamus regarding the admissibility of causation evidence. Indeed, *CSR* might even support a departure from the general rules that mandamus is not appropriate to review the denial of a motion to dismiss or summary judgment.

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79 *Id.*

80 *Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304, 306 (Tex. 1994).

D. Pros & Cons

The greatest challenge in pursuing this option is to convince the court that it should allow trial of a portion of the case on the merits early in the litigation. No reported Texas cases rely on that type of bifurcated procedure. In fact, as discussed above, the most recent Texas Supreme Court case to address the issue, *Moriel*, suggests that bifurcation might be unavailable.

VI.

Motion to Exclude or Motion in Limine (for "Gatekeeper" Hearing)

A. Use of Motion

Technically, a motion in limine is a procedural device that permits a party to identify, before trial, certain evidentiary rulings that the court may be asked to make.[81] The order granting a motion in limine merely prohibits a party from asking the question or offering the evidence without first asking the court to rule on its admissibility outside the presence of the jury.[82] Whatever the ruling on the motion in limine, the party must still get the trial court to make a ruling on the admissibility of the evidence during the trial.[83] In Texas, at least, a motion in limine really is not the correct procedural vehicle to address the issue of whether scientific or medical expert testimony is sufficiently reliable to be admissible. Conversely, some federal courts, and other state courts, have allowed defendants to use a motion in limine like a motion to exclude evidence, and have excluded expert testimony and used such exclusion as a basis to dismiss plaintiff's claims before trial.[84]

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81 *Redding v. Ferguson*, 501 S.W.2d 717, 722 (Tex. App. - Fort Worth 1973, writ ref'd n.r.e.).

82 *Tempo Tamers, Inc. v. Crow-Houston Four, Ltd.*, 715 S.W.2d 658, 662 (Tex. App. - Dallas 1986, writ ref'd n.r.e.).

83 *Accord v. General Motors Corp.*, 669 S.W.2d 111, 116 (Tex. 1984).

84 *See, e.g., Sanderson v. International Flavors and Fragrances, Inc.*, 950 F.Supp. 991, 1004 (C.D. Cal. 1996) (granting summary judgment after granting defendants' motion to exclude testimony of plaintiff's experts

It may be that Rule 104 of the Texas Rules of Evidence provides a more appropriate procedural vehicle, something like the "motions in limine" which some federal courts and other state courts have used, to exclude expert testimony prior to trial. Rule 104(a) provides as follows:

> **Questions of Admissibility Generally**. Preliminary questions concerning the qualification 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 those with respect to privileges.

The rule does not state when such a hearing must be held. Typically, Rule 104 hearings are held outside the presence of the jury at trial, or immediately before trial in connection with other pre-trial matters. However, nothing would prevent a court from holding a Rule 104 hearing at an earlier stage in the proceeding, and ruling that specific evidence is unreliable and inadmissible.

B. Options If Court Denies Motion

A decision to deny the motion to exclude or the motion in limine is not a final judgment and not ripe for appeal. As discussed in section V, a defendant has an argument available that mandamus is available.

C. Pros & Cons

The motion to exclude option is consistent with the direction the Texas Supreme Court has taken recently. The court has made it clear that trial courts are to conduct "gatekeeper"

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on causation, because "absent her experts' testimony, plaintiff has no evidence of causation at all, and thus cannot withstand summary judgment on that issue"); *Goewey v. United States*, 1997 U.S. App. LEXIS 1328 (4th Cir. 1997) (affirming grant of summary judgment based on plaintiff's failure to present admissible expert testimony on medical causation); *McKenzie v. Westinghouse Elec. Corp.*, 674 A.2d 1167 (Pa. 1996), *appeal denied*, 1997 Pa. LEXIS 266 (1997) (court granted motion for summary judgment following grant of motion in limine to exclude expert testimony); *Norwest Bank v. Kmart Corp.*, No. 3:94-CV-78RM, N.D. Ind. (excluding expert's evidence because it was unreliable).

hearings, but has not made it clear at what point in the proceeding the hearing should be conducted. In fact, courts are beginning to conduct so-called *Robinson* hearings, which arguably are authorized under Rule 104. An advantage in pursuing this option is that it "fits in" with what the trial court should and may do. The defendant can argue that *Robinson* requires a "gatekeeper" hearing and Rule 104 provides the mechanism to conduct such a hearing at the pre-trial stage. The emerging paradigm based on *Lone Pine* supports holding such hearings after plaintiffs have provided *prima facie* causation evidence, but before extensive discovery and trial preparation.

A drawback to this approach is that Rule 104 obviously does not provide a mechanism for the court to dismiss a claim on the basis that plaintiffs have failed in their burden of proof. Moreover, if a party's expert witness is stricken, the party will certainly try to find another expert who passes muster, unless the court has entered a discovery deadline for the designation of experts which has passed. To remedy this shortcoming a "gatekeeper" hearing would need to be coupled with one of the other procedures identified herein: motion for summary judgment or bifurcated proceeding.

VII.

Conclusion.

The paradigm emerging from the *Lone Pine* case and cases in many jurisdictions which adhere to its doctrine, including a number of trial courts in Texas, represents a significant new tool available to courts and counsel to deal with mass toxic tort litigation. In conjunction with the Texas Supreme Court's directives in *Robinson* and *Havner*, which require the trial court to perform a "gatekeeper" function and set forth a reliability standard for the admissibility and sufficiency of expert testimony, the emerging paradigm, which requires a *prima facie* showing

by plaintiffs of general causation, can make it possible for defendants in mass toxic tort cases to demonstrate lack of merit of many cases much earlier in the proceeding. This approach represents a potential savings of judicial resources, attorneys' fees and other costs.

On the other hand, because none of the procedural devices which bring the issue before the court specifically allow for appeal or mandamus, much of the potential value of the emerging paradigm to the legal system and its litigants is lost. Promulgation of special rules to allow interlocutory appeals in mass tort cases of decisions by trial courts, that rule in favor of the admissibility of expert testimony, should be considered. One possibility would be to give the trial court discretion to certify issues relating to the admissibility of scientific testimony in cases involving some minimum number of plaintiffs for appeal, and perhaps allow for appellate review of the trial court's decision on whether or not to certify such issues. Obviously, many questions are raised by a suggestion to amend rules, but the cost to defend a mass toxic tort case through to an appealable judgment is high enough not only to justify the time and expense needed to propose and adopt a new rule in special cases, but also to justify whatever additional burden might be imposed on the appellate courts in reviewing admissibility questions in limited situations. Of course, the net effect on the work load of appellate courts might be a reduction, if a significant number of cases can be resolved because of the new appellate procedure.

The concept of "mature" versus "immature" toxic torts supports this notion.[85] Professor McGovern notes that a number of trials must have been completed before litigants in mass tort situations begin to get a feel for the relative merits and value of cases. Appeals of decisions regarding the admissibility of scientific evidence serve the same function of trials in maturing a particular would-be toxic tort. Allowing interlocutory appeals of scientific evidence

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[85] Francis E. McGovern, Symposium: National Mass Tort Conference, 73 Tex. L. Rev. 1821 (June 1995).

admissibility would accelerate the maturing process and ultimately result in preservation of judicial resources. After all, you can't see the bottom of the creek until the hogs get out of the water.

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TECHNICAL APPROACHES TO RESOLVING TOXIC TORT ISSUES

"We Do The Work So You Don't Have To"

DEVRAJ SHARMA

ENVIRONMENTAL DATA & INTERPRETATIONS: RESOLVING TOXIC-TORT LITIGATION ISSUES

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Abstract

The appropriateness, adequacy and accuracy of site data that are used by expert witnesses in toxic-tort litigation are matters which require closer attention than they have had. Interpretations of such data and their uses with mathematical model applications seldom receive the careful scrutiny they deserve. This paper presents the uses of modern graphical and computational techniques, embodied in one refined computational system known as **PM-DIAMOND^{C}**, which have been successfully applied to establish and evaluate the validity of data used to support expert testimony. Illustrative examples of both valid and invalid procedures, rarely revealed through pre-trial preparations, are selected for discussion from recently concluded litigation proceedings. It is contended that the standards for data presentation and discussion are thereby raised and some formidable requirements for the future have been set.

Introduction

The quantities of environmental data being introduced in toxic tort litigation proceedings are increasing at an appreciable rate. Connections and interactions between disparate sets of site data, derived through laboratory measurements, as well as the interpretations which scientific experts make of them are correspondingly voluminous and complex. When used in support of expert opinions, it becomes extremely difficult for other professionals as well as lay persons to evaluate their validity due to their volume, the complexity of information generated as well as the time available to do so.

Experience indicates that lack of detailed scrutiny to which data is subjected during expert investigations and even in pre-trial preparations, is common. When the necessary level of scrutiny is indeed received during or as a result of the discovery process, the consequences can be quite serious. At the very least, evidence dealing with environmental sciences that is presented in support of expert testimony becomes unconvincing to triers of fact. Failure of scientific testimony to stand up to confrontational scrutiny can, and has, lead to corresponding and significant lack of success in toxic tort proceedings. Establishing the reliability of data interpretations should lie at the core of sound investigative work by experts; testing hypotheses, evaluating alternative assumptions and conducting sensitivity analyses of significant parameters are effective means of doing so. Reliability, desired by all parties in conflicts, only comes with relentless attention to detail and complete understanding of all data components, not just those advantageous to one protagonist's point of view, as well as their interplay.

The purpose of this paper is to present uses of scientific techniques pioneered and effectively applied by the author and his colleagues to establish the validity as well as reliability of

environmental data such that they are comprehensible, cogently connected and persuasive to triers of fact.

Investigative Reality

Point measurements routinely made at boreholes, wells, hydropunch locations, etc. *remain* stock methods employed by scientists and engineers for *obtaining site data*. Most often site data are required on: geologic, hydrogeologic and hydrologic characteristics; background and site-caused concentrations of chemical species; historical site uses; and, performance evaluations of alternative man-made remedial actions. Undertaking spatial interpretations of data collected from all such point measurements at any contaminated site is therefore an essential component of site characterization investigations. The *basic premise* to which all investigators subscribe in varying degrees is that the closer such point measurements are located to each other, and the larger their number at the site, the *better* the resulting interpretations will be. Some do so implicitly while others are more explicit. The author's view, based upon experience, is that this premise may not always be valid and invariably leads to greater investigative costs. Figure 1 illustrates several alternative interpretations of identical data sets. Any one used to evaluate environmental risks and excavation remedies at contaminated sites influences costs significantly. A heavy price can also be paid when the selection of measurement locations is not influenced by *limits* of interpretations.

For most litigation-driven site characterization investigations of any size, the availability of time, budgets and manpower usually preclude anything but a small finite number of point-measurement locations from being sampled. If historical site-use practices are in contention, it may indeed be fruitless to even conduct such sampling long after the events claimed to cause the conflict have occurred. If sampling is undertaken, it is usually presumed that the outer envelope containing all sampling points is sufficient for the spatial characterization of areas affected by chemical concentrations and, thus, of conflict issues which require resolution. Rarely is this sufficiency or the accuracy of laboratory analysis of samples taken even questioned, let alone re-evaluated and supplemented where appropriate. Indeed if the resulting data are then embedded into mathematical models, these issues manifest themselves as entrenched boundary conditions that lead to implausible results. Such questioning and iterative re-evaluations are essential to develop unambiguous understanding of the very environmental issues in conflict and, through better focus, reduce investigative costs only to a necessary minimum. Illustrations of the significance of adopting such practices are provided in Figure 2 through Figure 6.

Once measurement data from all site sampling locations are assembled, investigators usually perform analyses and interpretations of various kinds to draw conclusions and to formulate opinions. The nature, comprehensiveness, accuracy and speed *of these two actions* alone vary widely with investigators or their teams. A large proportion of differences between expert opinions, and their very factual foundations, lies in the *consequences* of such variations. For

instance, assumptions are frequently made in order to overcome limitations in available data. While this is not in itself inappropriate, it is remarkable how often the validity of a significant assumption goes untested or that an opposite but equally valid assumption goes unevaluated. It is nearly as important to understand the nature and implications of assumptions experts make as it is to verify that implausible conclusions as well as errors have been excluded from their work products. This is exceedingly difficult to accomplish without participating directly in expert investigative work as will be apparent from examples illustrated in Figures 7 through 12.

It is sometimes suggested that the expense of systematic and comprehensive evaluations of data interpretations is unaffordable. This view seems to be rooted in the belief that only manual reviews of printed documents can achieve the aim of such evaluations. Computational methods have been clearly demonstrated to achieve this aim much more reliably and at a fraction of the cost; time savings thereby can be critically significant. It is quite feasible to select and implement *controls* to spatial interpretations of point-measurement values such that alternative results can be compared and contrasted with little manual intervention. Progressively refined interpretations can then be achieved through the iterative application of such controls. The type and effectiveness of controls depend upon the variable being so interpreted. For instance, interpretations of ground water levels as surface-elevation contours should always be checked against available ground surface elevation data in order to prevent implausible interpretations that might inadvertently be made, from being adopted. Similarly, predictions of ground water levels should always be checked against available bedrock elevation data in order to prevent implausible results from being relied upon. The consequences of not performing such checks can be severe. Where such controls are difficult or impossible to select, it will be necessary to evaluate alternative interpretations in some systematic and coherent manner. One effective way of doing so is to test for quantitative differences between *the consequences* of applying alternative interpretation techniques upon identical sets of data.

Unfortunately, not all scientific techniques available and used for performing spatial interpretations achieve the same or even a similar degree of scientific validity, meet controls effectively and provide equally accurate or even repeatable results. The methods by which any reasonably competent investigator can and should select an appropriate interpretive technique are rarely discussed and understood, especially by those who do not routinely adopt them for use. In a day and age when *commercially available software proliferate, the slick propaganda which usually accompanies their listed attributes stand to confuse and not educate* most investigators. It is thus easy to be seduced by the touted attributes of such software, especially those that embody techniques for spatial interpretation, rather than by an understanding of the reliability of the techniques themselves. This is a common pitfall which can and should be avoided. Figure 1 had previously compared the significant differences between interpretations of identical data prepared with different mathematical techniques.

A Concept That Works

A central concept of modern investigative methods is that all scientists and engineers should have unhindered access to computational facilities of sufficient power for conducting necessary data analyses and modelling investigations themselves. In this concept, each should have a hands-on capability for database management methods, of graphical analysis tools, of three-dimensional flow and solute transport mathematical models, of visualizing predicted results and of thorough documentation procedures. Such capability furthermore should be possessed by each engineer and scientist in a team whatever his or her position may be. For a variety of technical reasons, this concept has not reached widespread acceptance and requires some explanation.

In the author's concept, all scientific matters of investigations are intended to be dealt with directly by each engineer and scientist in a project team, no matter how senior the position occupied is. Thus, activities that concern field data assembly, data interpretations, making assumptions to overcome information deficiencies of any kind, selecting models and procedures for adapting, calibrating, verifying and applying them to make predictions, should be capable of being handled directly by each. No component of such activities should be considered unimportant or menial, and responsibilities for making important decisions at every level of detail, should not be abrogated. Through regular and frequently conducted technical discussions amongst professional scientific colleagues supported by independent reviews, the validity of scientific investigations and their findings should be subjected to internal peer reviews and cross-checks. Sadly, this occurs all to infrequently for the health of the scientific method to be preserved.

Implementation of the Concept

In undertaking investigations involving the geosciences, the *productivity of engineering and scientific staff* is probably the most important factor in determining the successful outcome. In most organizations, cost reduction considerations nowadays have dictated that most investigative tasks be undertaken by junior staff members while more senior staff perform tasks that are by nature supervisory and oriented toward reviews. Tasks involving data assembly and analyses are labor-intensive, normally require appreciable reflection and are thus considered tedious and even menial. Furthermore, reviews and supervisory comments are usually provided *after* investigative tasks are completed by using work products in hard copy forms. This practice is prone to serious error, can be scientifically unproductive and be particularly expensive for projects that are either long-lived or involve a large number of relatively small contaminated sites.

Implementing the concept presented here is somewhat at odds with conventional practices. When refined data analysis and modelling are involved, investigative skills and tools employed become crucially important. Generally speaking, if tools available to an investigator are primitive, then modelling and analysis tasks become very cumbersome, labor-intensive and thus

expensive to accomplish. If senior investigators only review the results of data manipulations, analyses or model applications undertaken by others but do *not* participate directly in selecting and implementing the scientific path followed to achieve them, the consequences are serious errors, greater inefficiency and increased costs. In many instances, conventional investigative practices lead to disastrous consequences to the client, to the firm awarded an investigative project, to law firms involved in pursuit of litigation goals or even to regulatory agencies charged with monitoring a remedial project's progression and outcome.

For instance, in the course of performing site investigations for selecting one effective remedy, junior staff of consulting organizations are forced to make assumptions to overcome data deficiencies. They are required to implement decisions involving scientific choices, as a matter of course. These assumptions and decisions are seldom, if ever, communicated to their senior staff colleagues, let alone be rigorously checked or subjected to their critical reviews even when they serve as experts in dispute resolution. Such matters may only be revealed to them quite late in a project's life cycle when it may be too late to implement proper approaches. Since junior staff members usually do not have the same level of expertise or experience as their seniors, the practical implications of implausible or invalid assumptions and decisions that are made may not be readily apparent to or be understood by them. Practical or legislative decisions that are based upon investigations that are undertaken in this manner are prone to serious error, as experience on a number of projects has clearly revealed.

In order to be productive, engineers and scientists should have unhindered access to the appropriate computing hardware and software systems. The most effective computing system hardware for such purposes is the modern desktop environment. Here, each user has his own computer processor, main memory space, screen display unit, keyboard and disk space. This processor may be linked through a network to other desktop systems as well as mainframes or minicomputers. From a productivity standpoint, a workstation combines the computational power of the traditional mainframe systems with a multi-tasking processor access at a desktop location. The speed of the workstation allows several complex modelling runs to be executed in parallel with efficiency and economy. Furthermore, the multi-tasking operating system in such a workstation allows the user to perform other tasks while this modelling run is being performed. The user can, for example, analyze the results of a previous run, or prepare the input for a subsequent run, or work on a totally unrelated task. Therefore, the users' time becomes the controlling factor, rather than the availability of computer time. In addition, the high resolution, large screen permits results to be displayed graphically with such resolution that they become easier to understand than tables of numbers contained in tables of great length.

Possessing powerful workstations, however, does not by itself guarantee any increased and refined scientific productivity. A variety of modern software tools are required for diagnostic and investigative tasks specific to data analysis and modelling functions. Suitable software tools

should be able to access and manipulate without requiring substantial manual intervention or hindrances, site and regional data assembled from a variety of sources, data used by mathematical models, and the predicted results they create, directly and seamlessly. For instance, with only a few computer keyboard keystrokes a user should be able to summon up any given data set or desired model result in a variety of graphical forms. Only tools specifically designed for use with complex data sets and mathematical models, fulfill this requirement. One such tool is Principia's proprietary graphics problem-solving environment referred to as **PM-DIAMOND**[c]. In addition to accessing modelling information, investigative software tools must also allow other tasks, such as merging data assembled in every conceivable format from various sources, to check data appropriateness and accuracy, to perform alternative data interpretations, to display field measurements and modelling results simultaneously, and to prepare input data sets for model applications, all without manual intervention. While it may be possible to use a whole suite of compatible software tools to perform individual tasks, it is desirable in the interests of efficiency and economy to have a single unified tool such as **PM-DIAMOND**[c] which allows users to perform all these tasks as well as those involving error checking, quality control and quality assurance, so that the user has a single unified interface to learn. In particular, the software tools should be able seamlessly to handle sets of data involving only 5 points just as easily as 50,000 points, or deal with 5 variables as conveniently as with 5,000.

In Conclusion

The author concludes with this observation: *It is impossible to conceive of circumstances in the future of environmental conflicts when less information, with less detail and less accuracy will be sufficient to achieve resolution. Unfortunately, finite time spans for investigative work when combined with budget constraints point to the need for vast increases in efficiency with which data are assembled and analyzed before being presented as support for expert opinions. One effective way to overcome such limitations is to employ a unified graphical problem-solving environment, the proper use of which can lead to credible and economical resolution of toxic-tort matters.* The illustrative examples presented in this paper were prepared in this way to reflect good science that will be universally recognized as such, not some esoteric variant. There is no substitute for very hard work in making such preparations.

Acknowledgment

The author wishes to acknowledge here the extraordinary contributions to the science of data analyses & mathematical modelling made by his staff colleagues Dr. Willem A. Schreüder and Mr. Steven E. Cole. The former for developing **PM-DIAMOND**[c] into the pinnacle of computational excellence and graphical elegance it occupies today. The latter for inventing novel methods of data analysis, an incomparable attention to detail and ever more novel graphical techniques for demonstrating their validity.

Figure 1:
Alternative Spatial Interpretations of Identical Values

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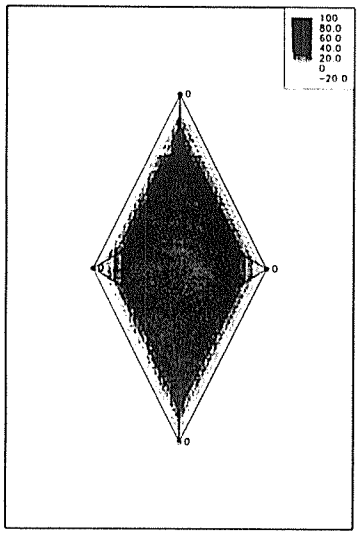
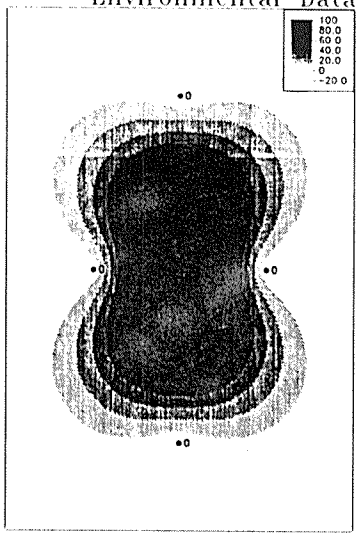
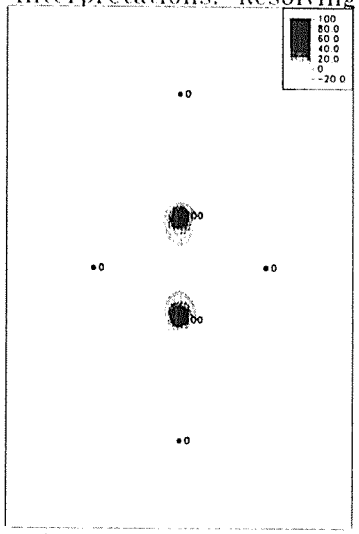


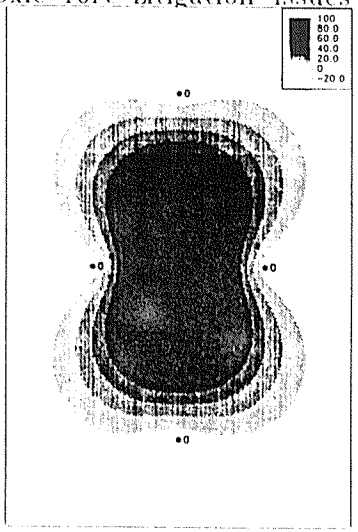
Triangulation With All Data



Kriging With All Data



Log Kriging With All Data



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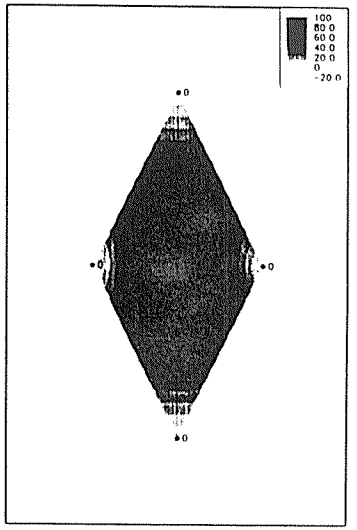
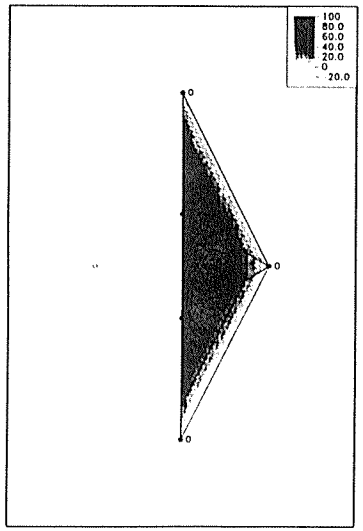
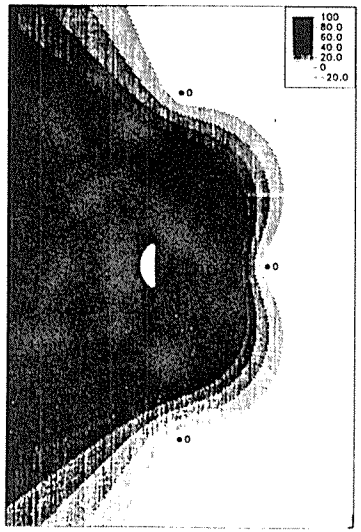


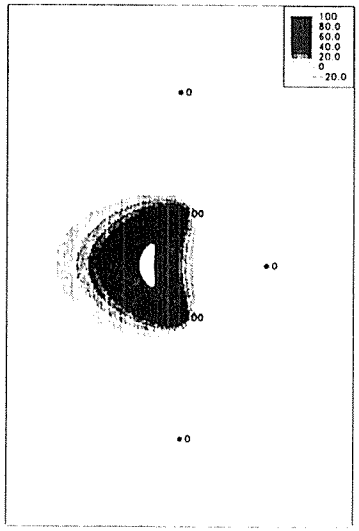
Limited Kriging With All Data



Triangulation With Partial Data



Kriging With Partial Data



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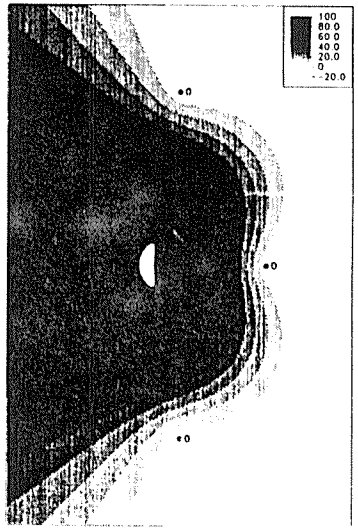

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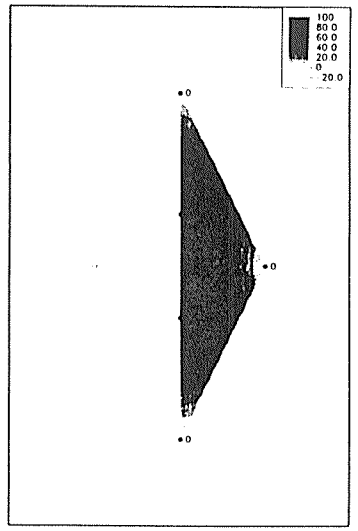

Limited Kriging With Partial Data

Figure 2:
Tetrachloroethene in Ground Water

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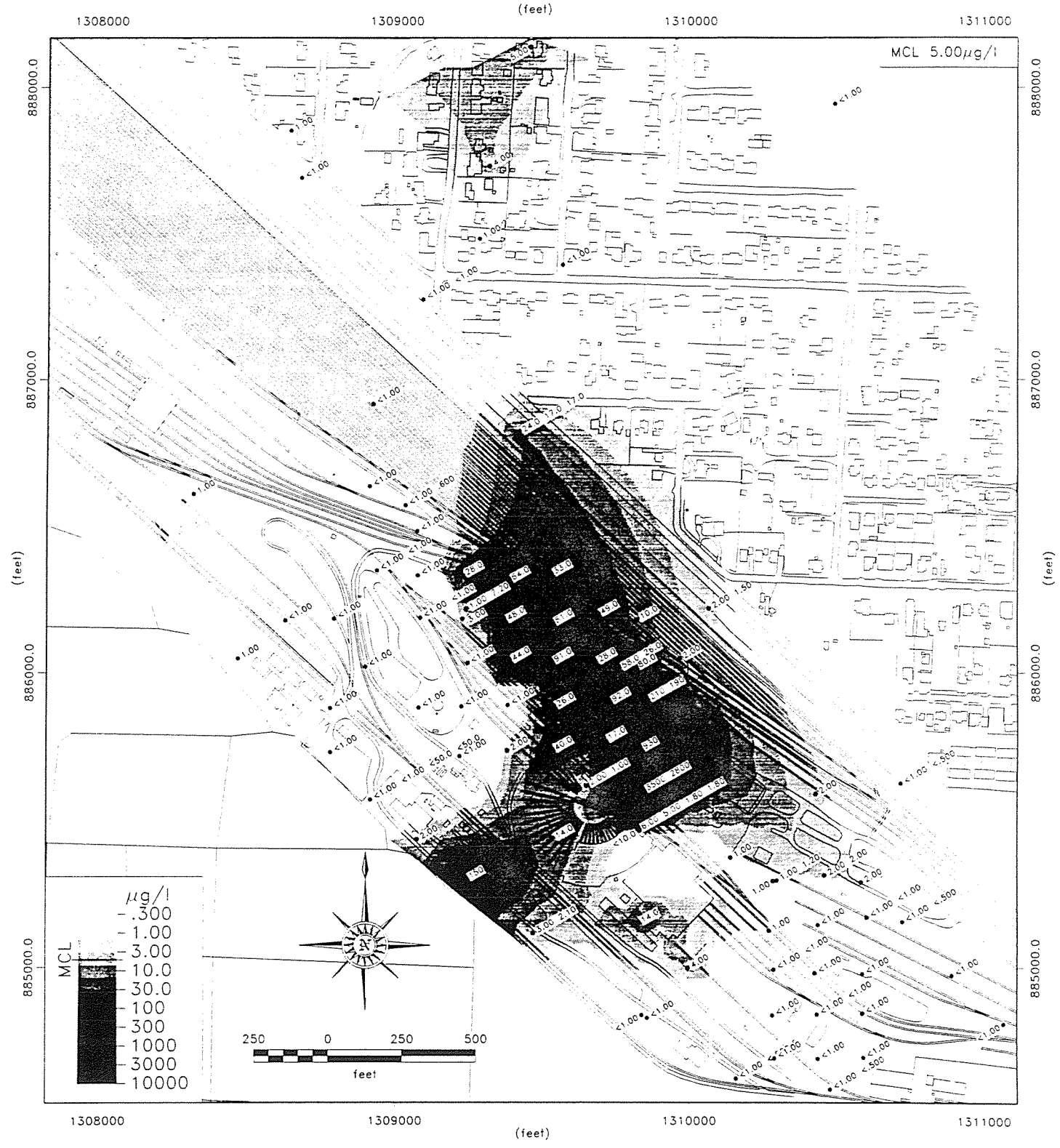
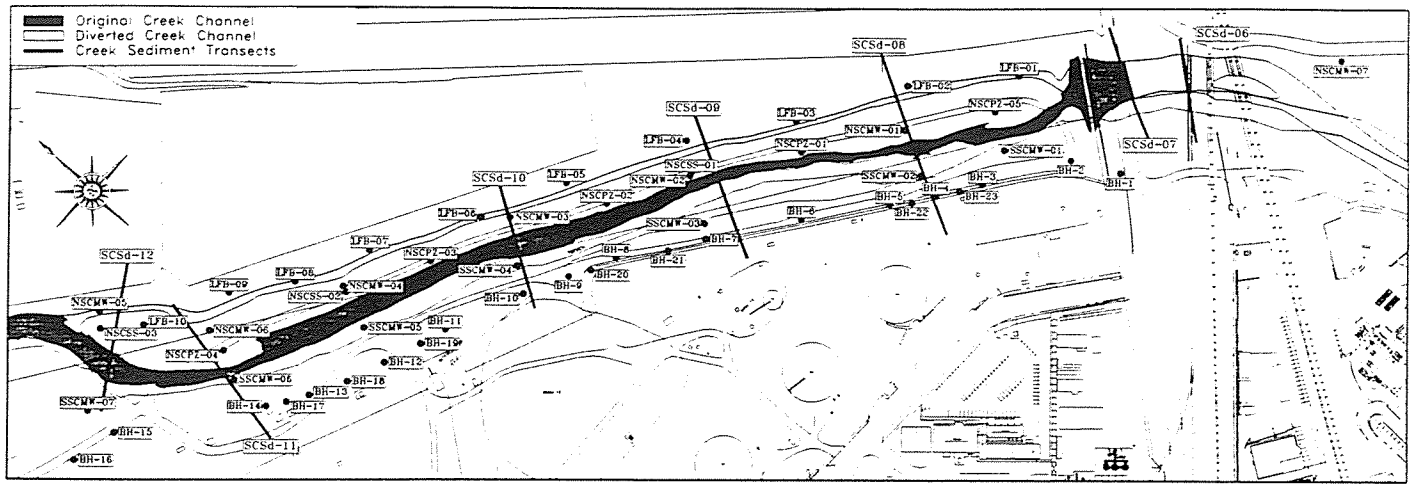
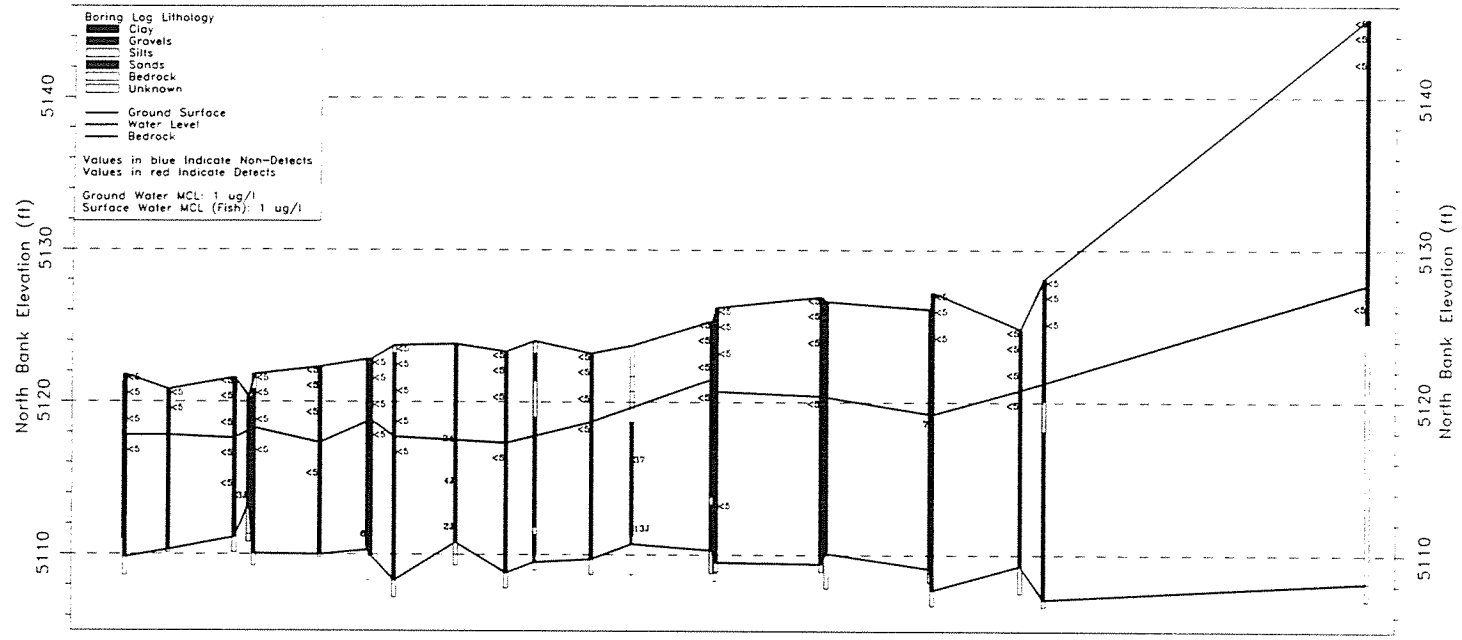


Figure 3:
Creek Soil Boring Samples: Benzene

Environmental Data & Interpretations: Resolving Toxic-Tort Litigation Issues





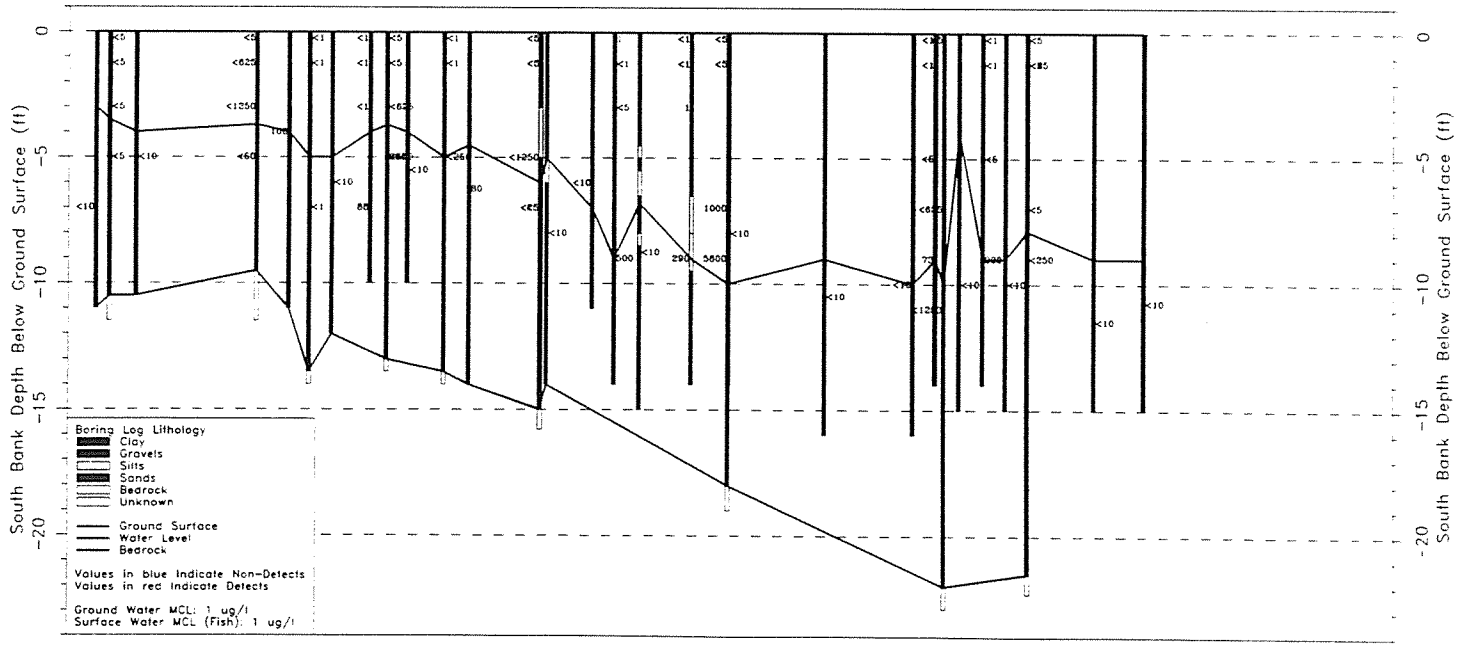


Figure 4:
Creek Soil Borings: SVOC's
Percentage of Detects

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Figure 5:
Creek Sediment Samples: Chrysene

Environmental Data & Interpretations: Resolving Toxic-Tort Litigation Issues

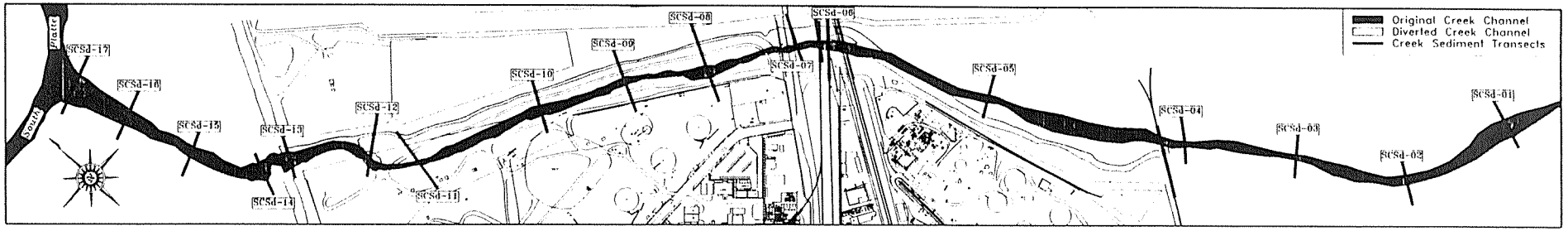

Figure 6:
Water Level & Free-Product Behavior: Cross Section C-C'

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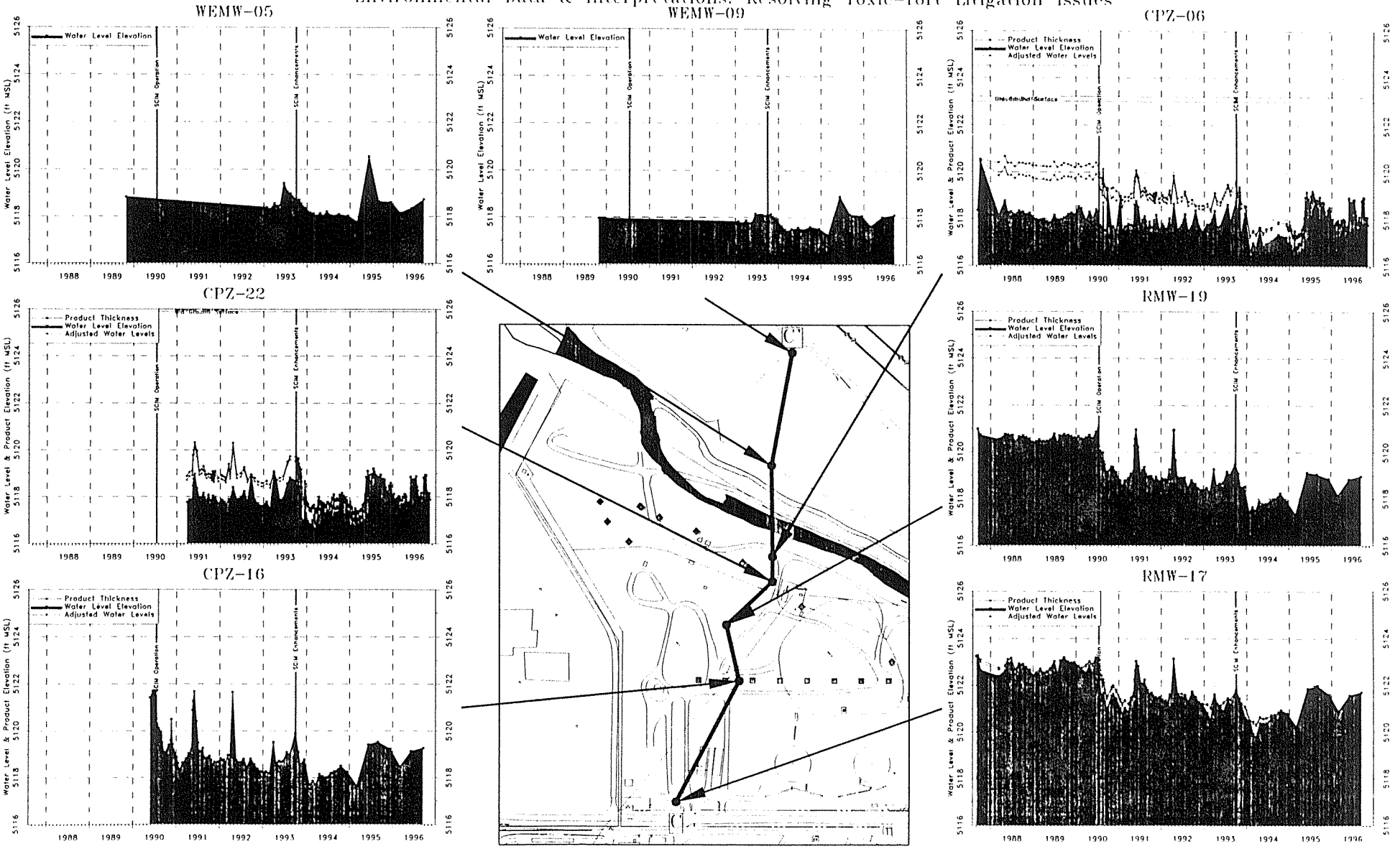

Figure 7:
Number of Monitor Wells & Chromium Measurements, by Year

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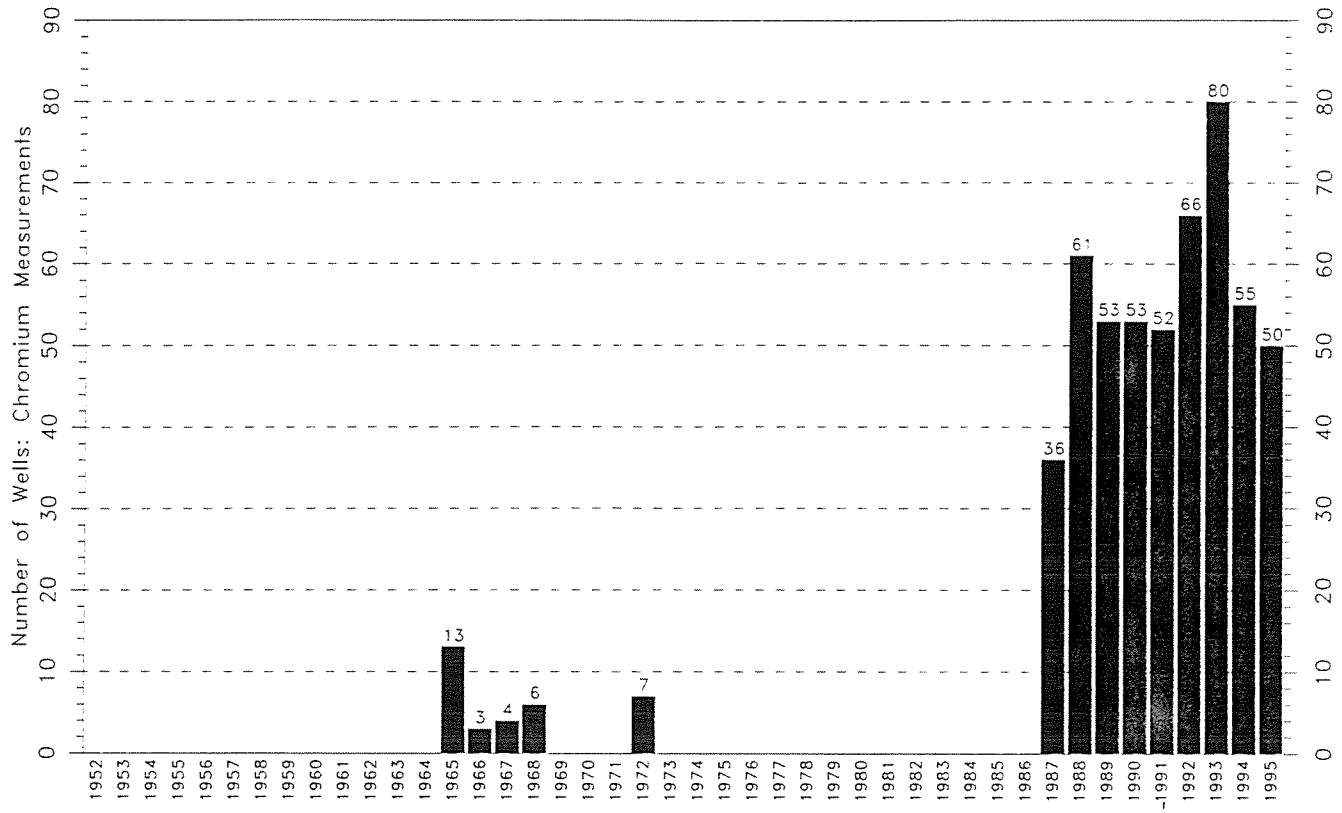
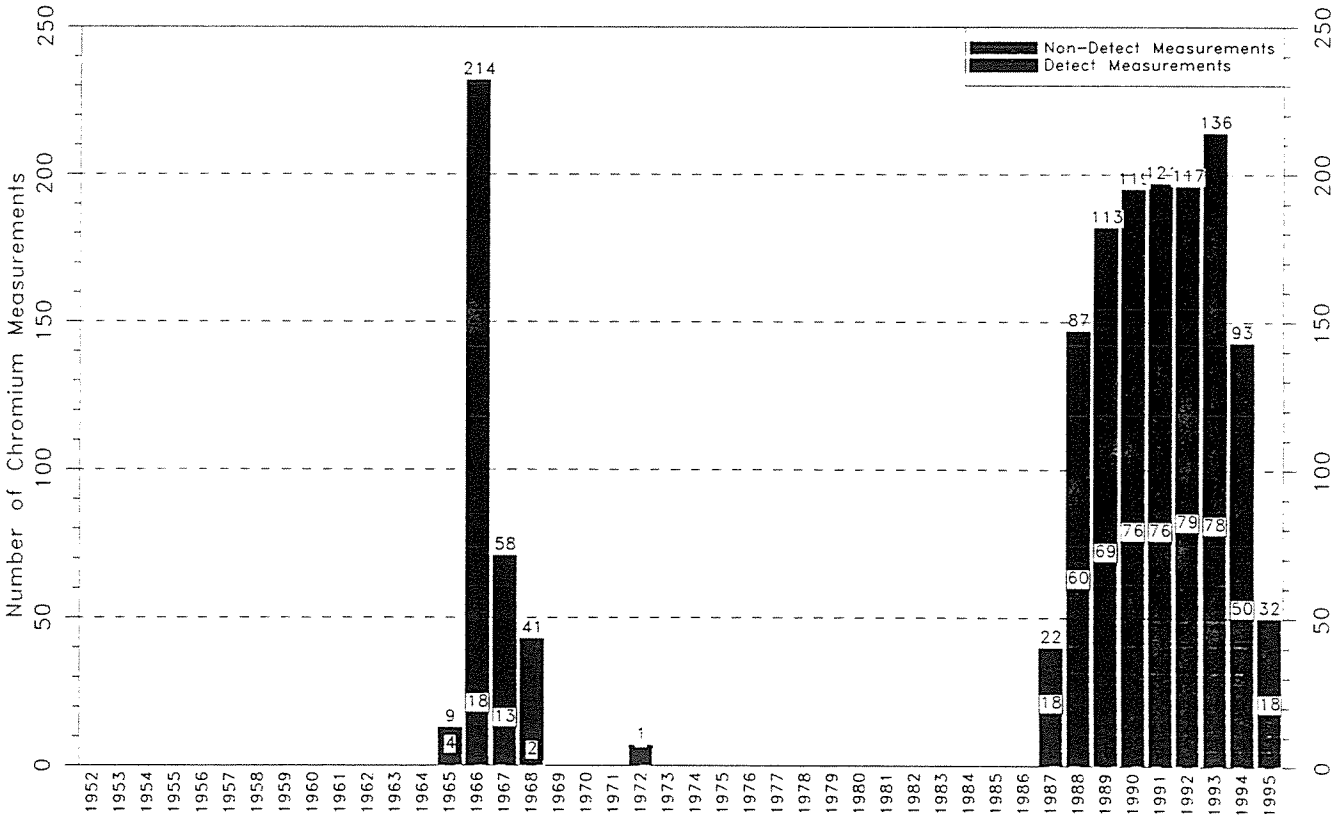


Number of Monitor Wells Sampled for Chromium



Number of Chromium Measurements Collected: Groundwater

Figure 8:
Interpretations of Chromium Concentration Measurements: Recent Changes With Time

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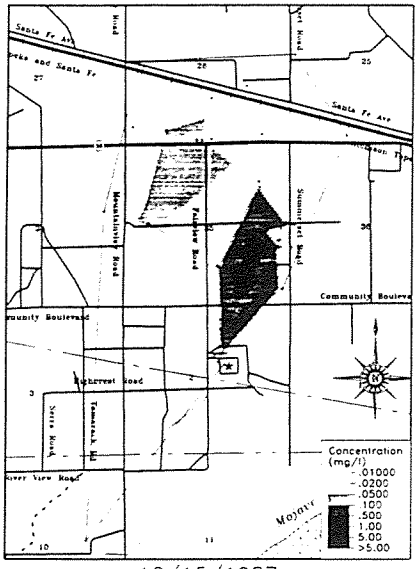

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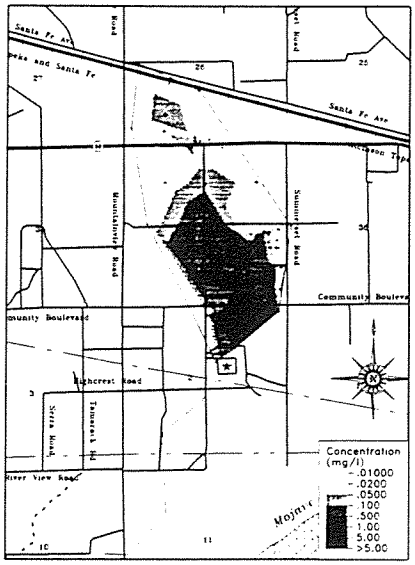

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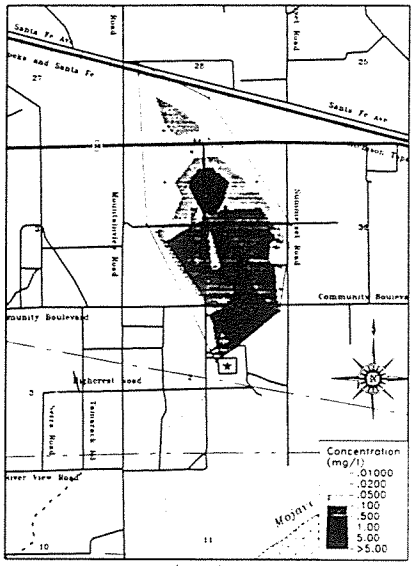

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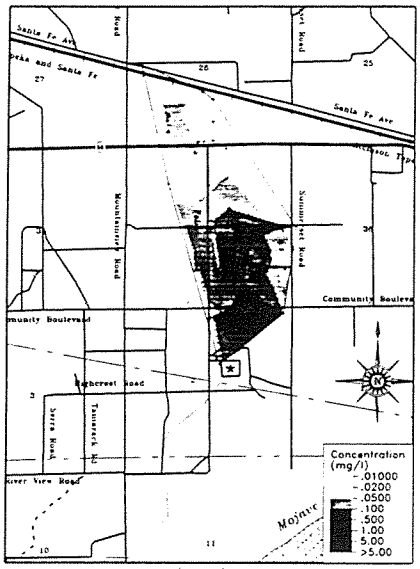

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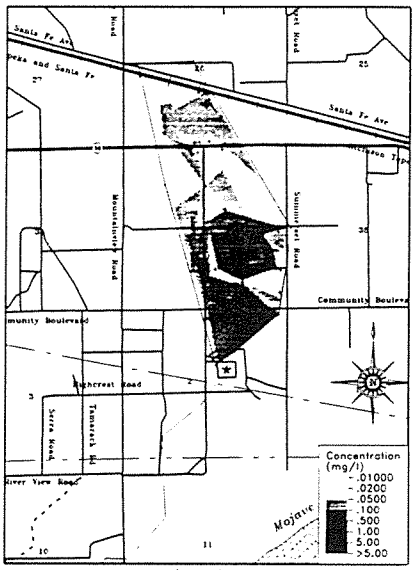

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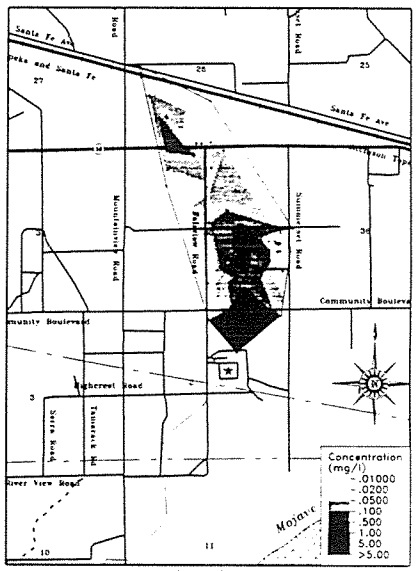

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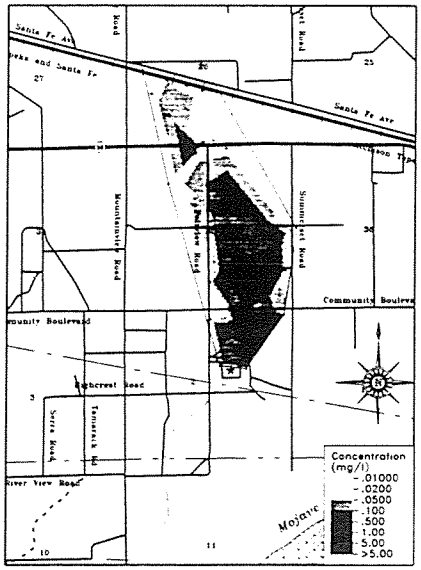

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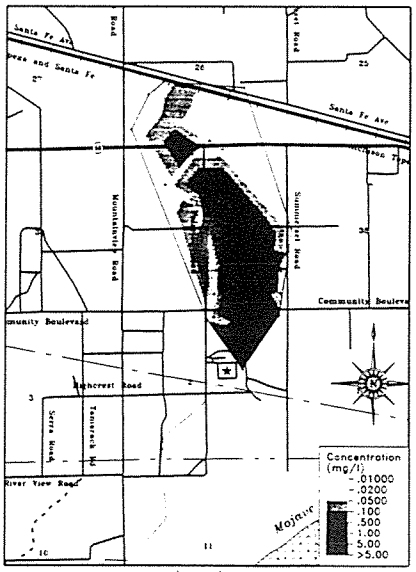

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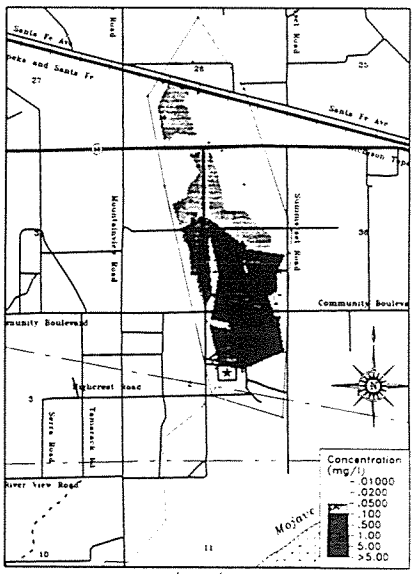

02/08/1995

Figure 9:
East-West Cross-Section: 1991
Northing: 511084 Feet (CA SPCS Zone V)

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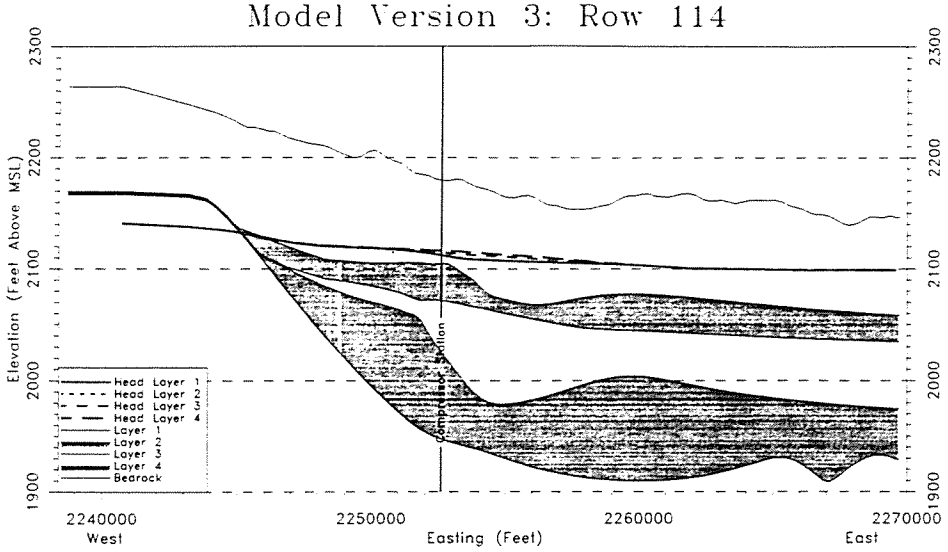
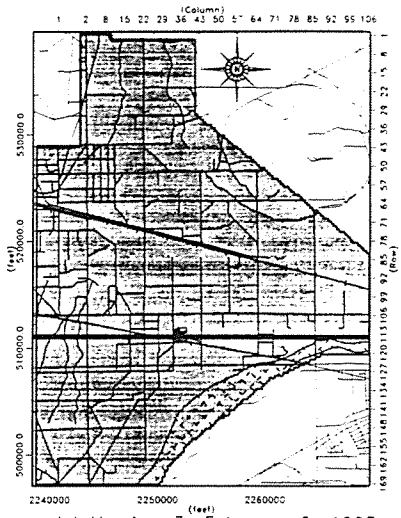
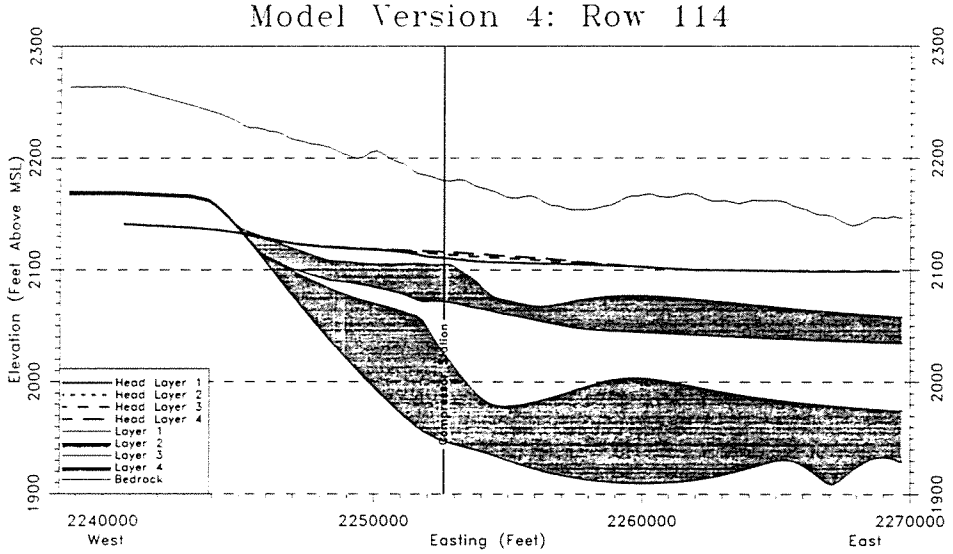
Model Version 3: Row 114

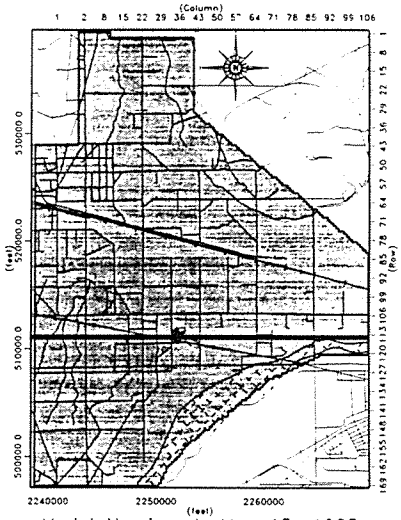




Model Version 3: February 6, 1995

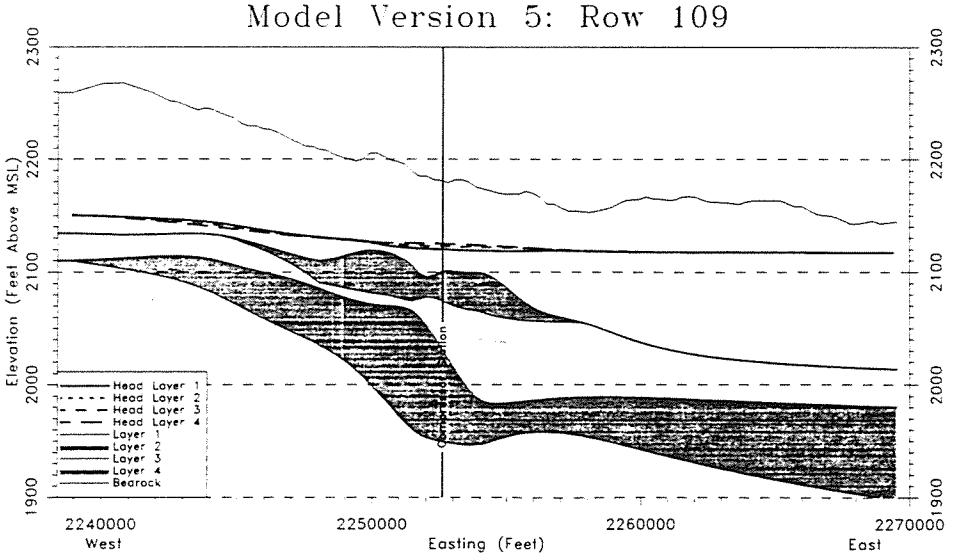
Model Version 4: Row 114

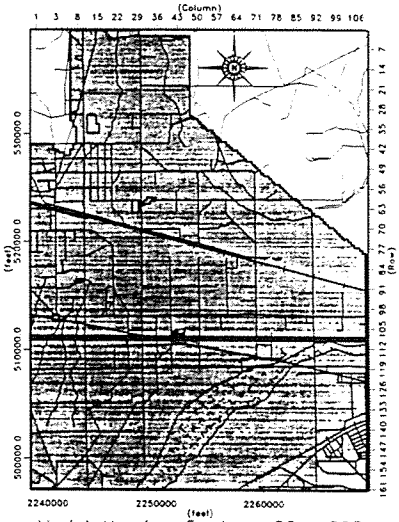




Model Version 4: May 15, 1995

Model Version 5: Row 109

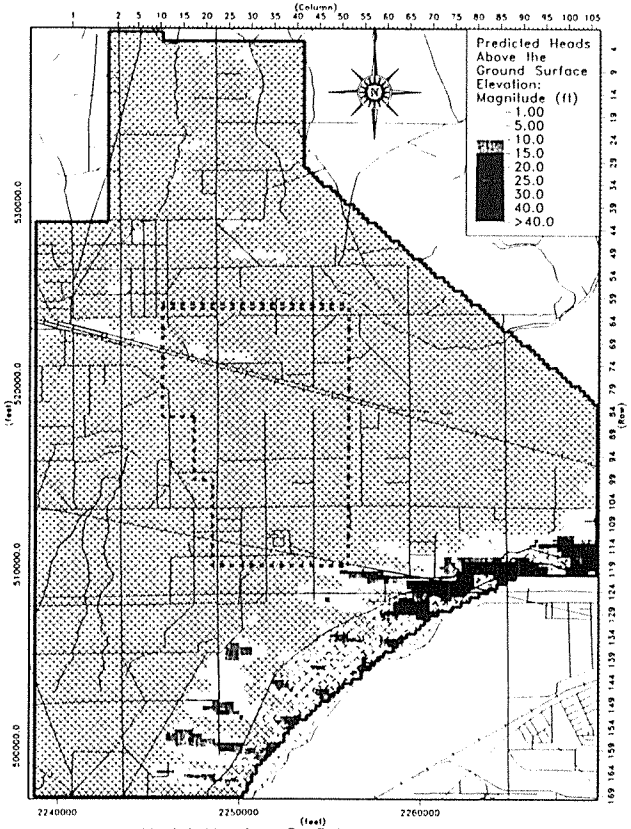




Model Version 5: June 20, 1995

Figure 10:
Defendant's Ground Water Models: Predicted Layer 1 Heads Above the Ground Surface Elevation; Magnitude

Environmental Data & Interpretations: Resolving Toxic-Tort Litigation Issues



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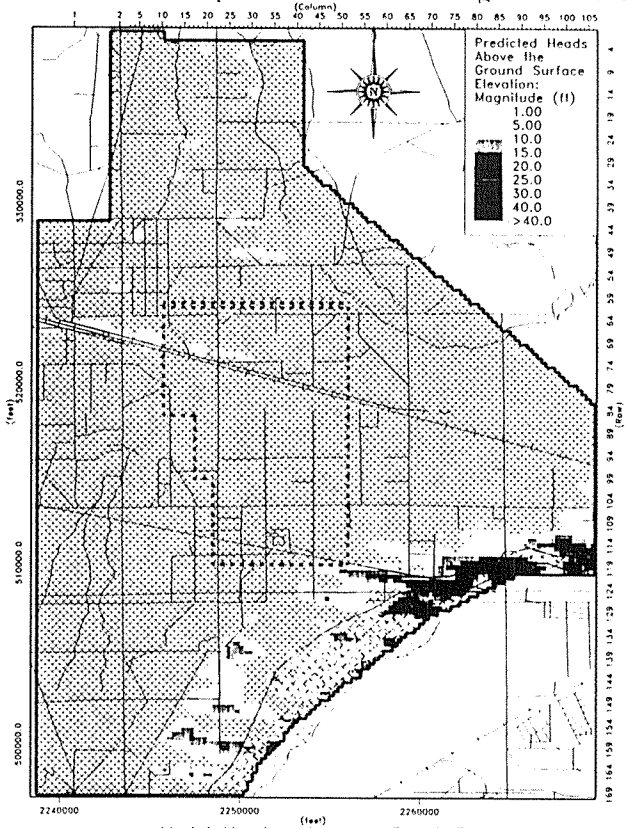

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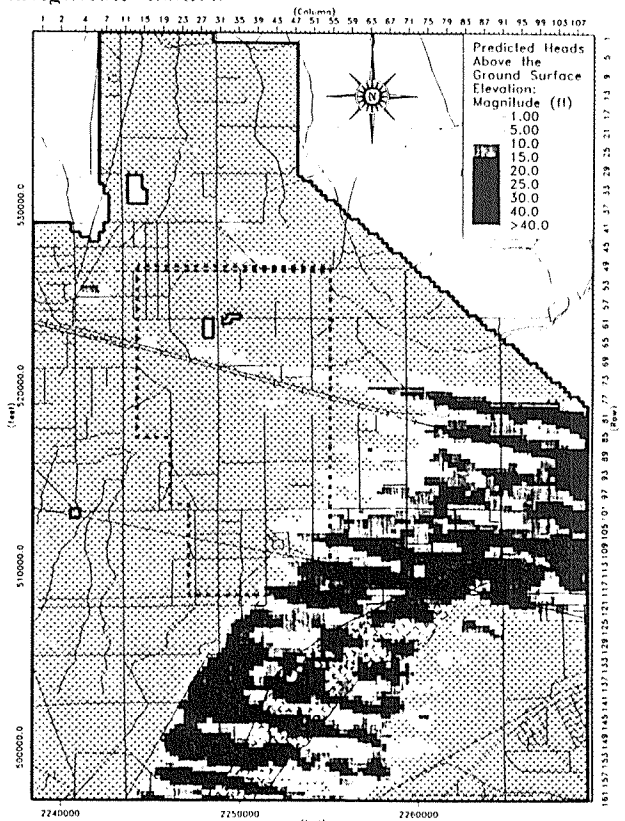
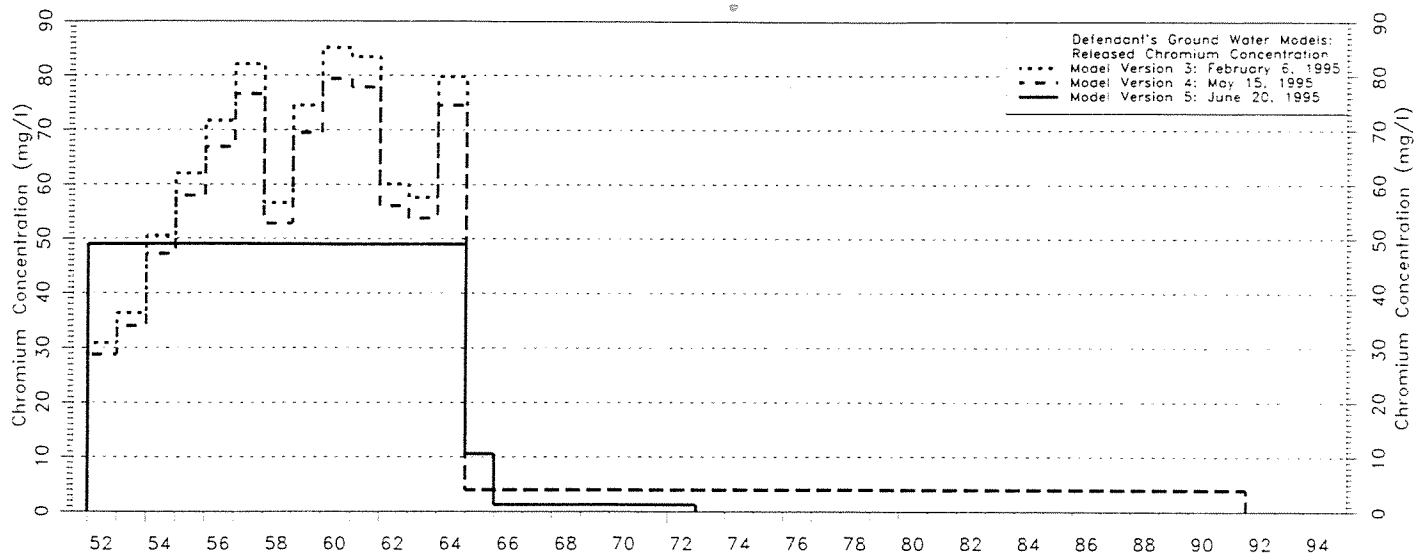


Model Version 5: June 20, 1995

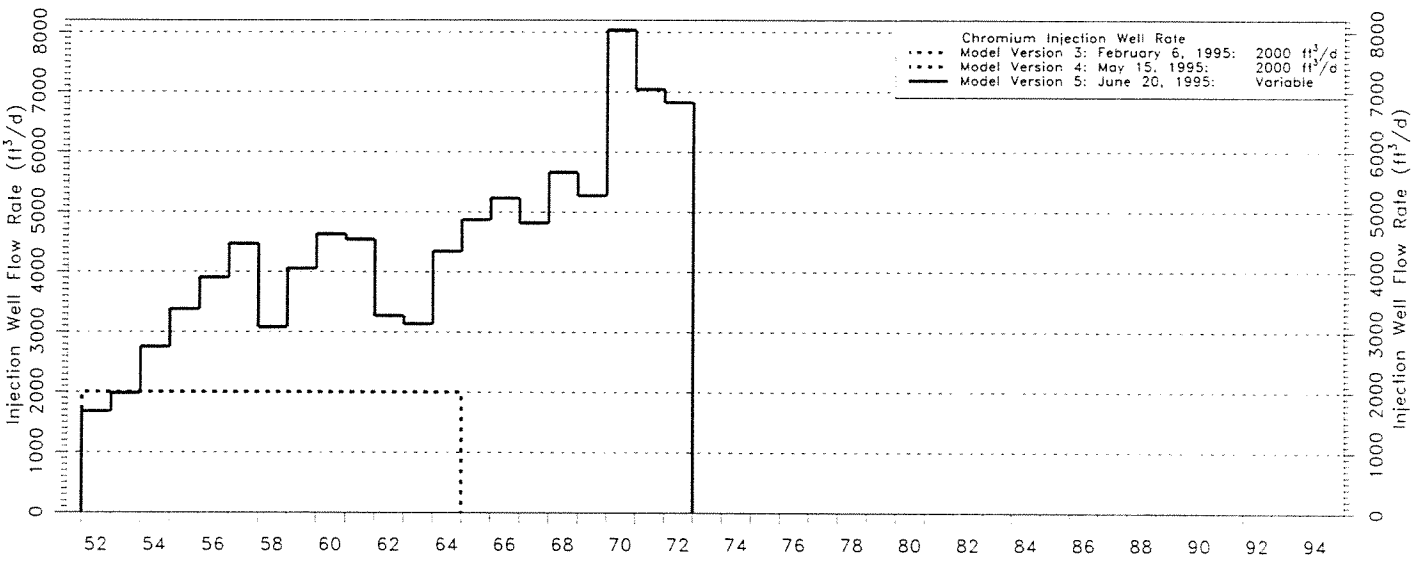
Figure 11:
Prescribed Chromium Source

Environmental Data & Interpretations: Resolving Toxic-Tort Litigation Issues

Prescribed Chromium Source Concentrations



Prescribed Chromium Source Flow Rates



Prescribed Tonnage of Chromium Source

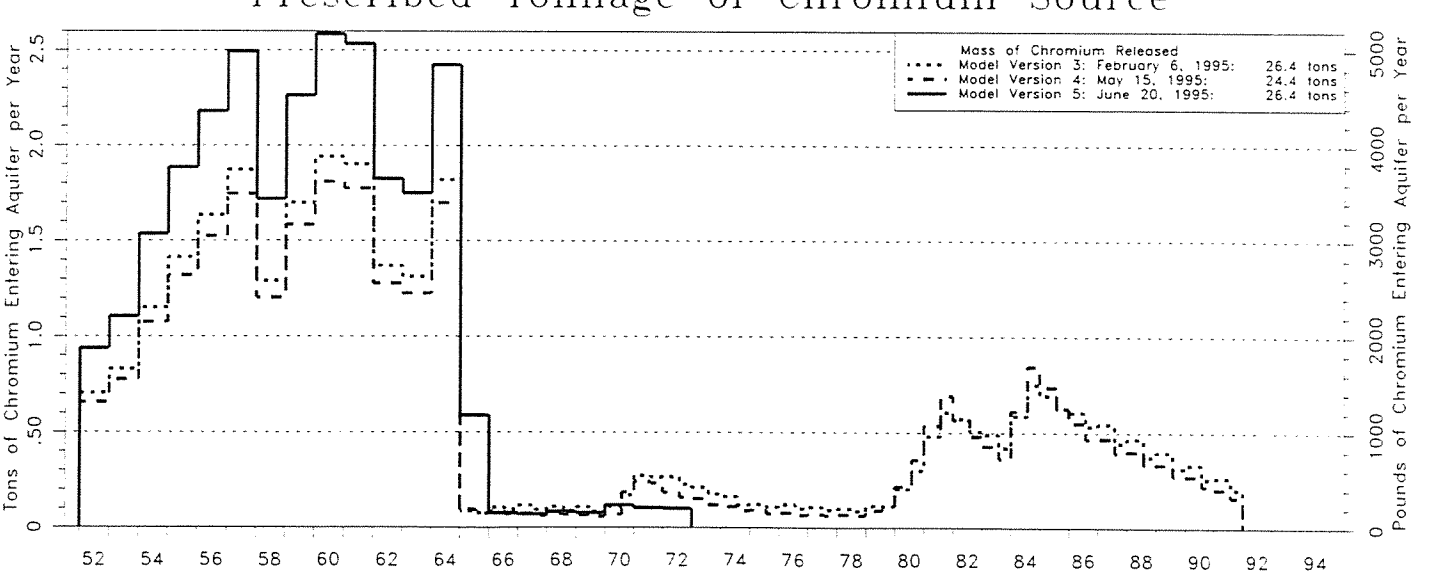
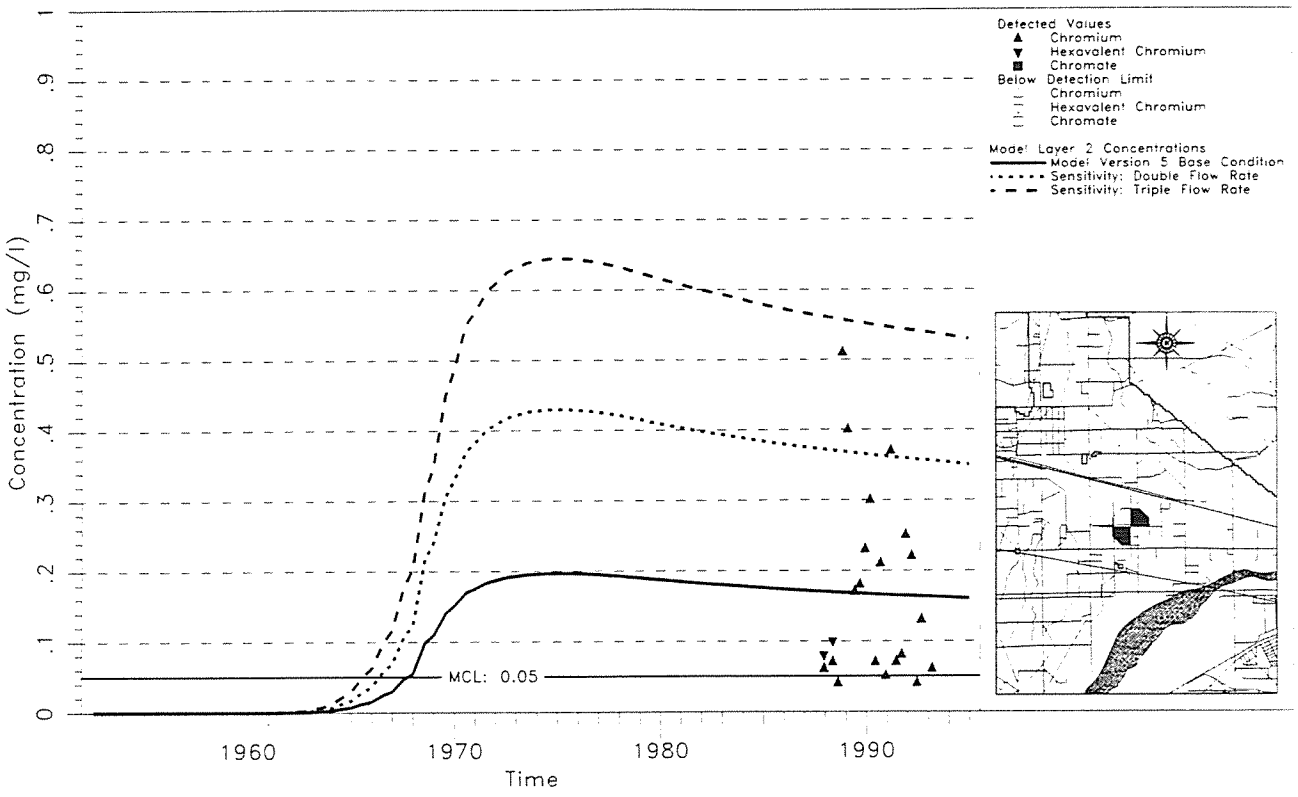


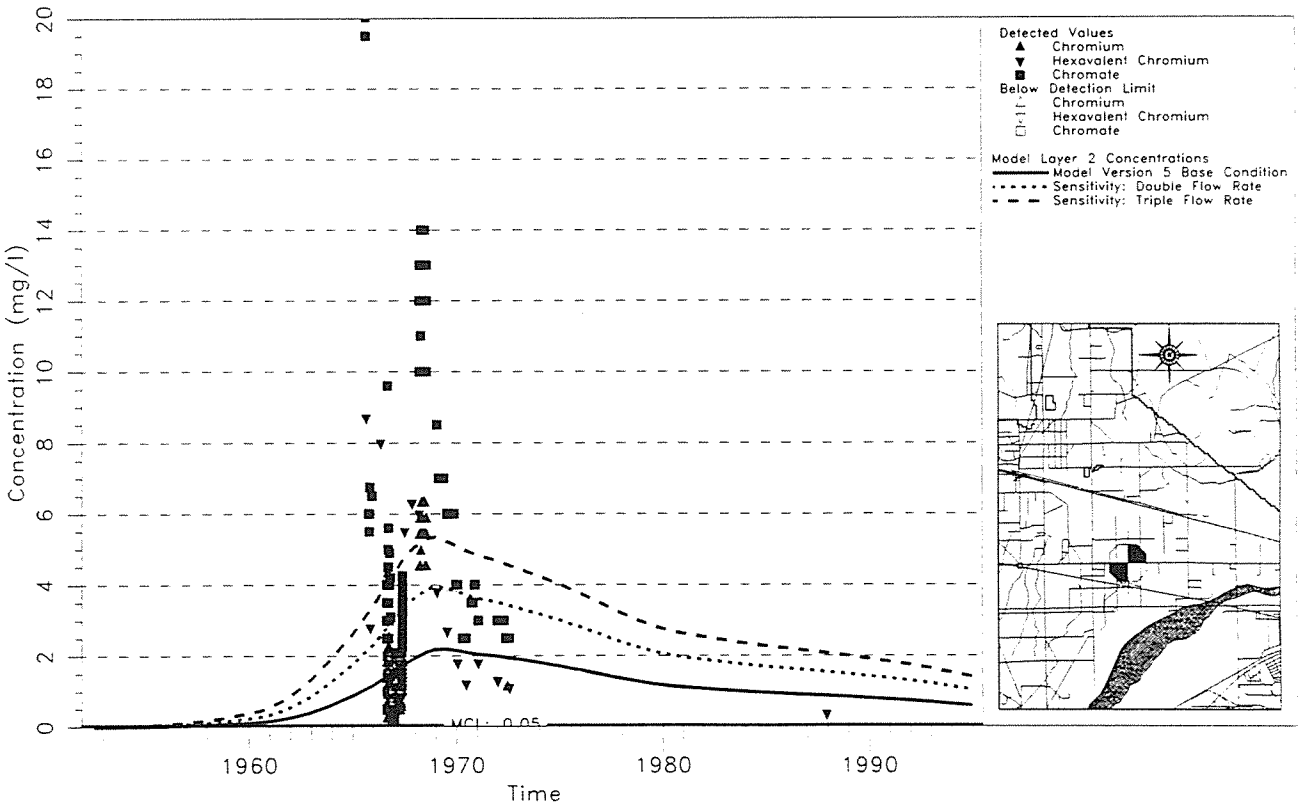
Figure 12:
Flow Sensitivity

Environmental Data & Interpretations: Resolving Toxic–Tort Litigation Issues

Well 35–20



Well 35–32



NAME: **Devraj Sharma**

PRESENT AFFILIATION:

Vice President of **Terranext, Inc.** and Director of Science & Development. A Principal Engineer/Scientist and Consultant Specializing in Applied Research & Development Activities Involving Comprehensive Data Analyses and Mathematical Model Applications in Ground and Surface Water Hydrology, Free–Product as well as Contaminant Transport, Fluid Mechanics, Heat and Mass Transfer.

EDUCATION AND ACADEMIC BACKGROUND:

B.Sc. in Science, Madras University, India, First Class.
B.Sc. in Mechanical Engineering, Utkal University, India; First Class with Honors; Received Chancellor's Gold Medal Award as Best Engineering Student of the Year.
M.Tech. in Mechanical Engineering, Indian Institute of Technology, Kanpur, India: First Class.
Ph.D. in Fluid Mechanics and Convective Phenomena, Imperial College of Science & Technology, London University, England.
D.I.C. in Mechanical Engineering, Awarded by Imperial College of Science & Technology.
Post-Doctoral Research Fellow, Imperial College of Science & Technology.
Visiting Professor at: Kyoto University, Japan; University of California at Berkeley, California; University of Illinois at Urbana/Champaign, Illinois; University of Pretoria in South Africa; Madrid School of Mines, Spain; and, Colorado School of Mines.

PAST AFFILIATIONS:

1984 – 1995: Founder and President, Principia Mathematica Inc.
1980 – 1983: Manager, Advanced Technology Center (ATC), Dames & Moore.
1978 – 1979: Senior Engineer, Advanced Technology Group, Dames & Moore, Denver.
1975 – 1977: Senior Engineer, Advanced Technology Group, Dames & Moore, London.
1972 – 1974: Senior Engineer, CHAM Ltd., England.

SPECIAL AREAS OF EXPERTISE:

He has been responsible for pioneering the development and the implementation of modern advanced methods of assembling, analyzing and simulating complex data sets as well as site conditions. As Principal engineer/scientist his expertise in the fields of data analysis and mathematical modelling are applied to: ground water flow modelling within large basins that contain surface streams and within which conjunctive water–use issues involving complex interactions of deep percolation, well pumping rates along with aquifer–stream flow interactions and phreatophyte evapotranspiration; transport of light as well as dense fluids which may or may not be miscible with ground water; transport of organic and inorganic solutes; and, ground water as well as soils remediation design. He has provided expert witness testimony in each of these subjects at several recent high–visibility litigation. His additional work experience include: evaluating mathematical modelling efforts as undertaken by other scientists; evaluating state-of-the-art mathematical models applied to predict flow and contaminant transport; teaching courses in hydrologic modelling and computational methods to personnel from advanced academic institutions and industrial organizations in the U.S.A., Europe, Japan and Africa.

THE USE OF DEMONSTRATIVE EVIDENCE IN ENVIRONMENTAL CASES

"The Next Best Thing To Being There"

MARK SMITH
AND
STEPHEN G. JONES

Visual Evidence in Environmental Cases[1]

"The Next Best Thing To Being There"

Introduction

Computer based multimedia presentations are being used with increasing frequency at trial to convey complicated technical information in a more understandable manner. Multimedia allows testifying experts and attorneys to deliver a neatly packaged and high impact presentation rather than stacks of paper and poster-board exhibits. A well planned and executed multimedia presentation can be an advantage in two ways:

- Complex or large amounts of information can be condensed for easier understanding and increased retention;
- Creative visual design enlivens the presentation, better holding the attention of jurors[2].

Environmental cases, because of their multi-disciplinary and highly technical nature, are logical beneficiaries of multimedia and visual evidence. The application of visual computer technology to environmental issues both in trial and pretrial is somewhat different than what is commonly applied in accident reconstruction, product liability, and criminal cases. For example, environmental cases often deal with complex processes that can be more easily understood through computer visualization techniques. In addition, there may be large amounts of numerical data from a variety of sources that must be normalized, interpreted, and presented to a lay jury. This paper identifies various computer visualization and data presentation techniques as they apply to selected environmental cases. These techniques will be discussed with specific examples in terms of technical content, graphics, and interactivity.

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[1] Mark A. Smith, President, GradyAlan, Inc., multimedia consultants, Austin, Texas; S. G. Jones, Technical Director, GradyAlan,Inc.

[2] Plowman, J. K., Multimedia in the Courtroom: A Valuable Tool or Smoke and Mirrors?, 15 *Review of Litigation* 417 (Spring,1996)

Types of Visual Evidence

Simply defined, visualization is "the formation of mental visual images". In medical technology, "visualization" can mean a C.A.T. scan or other diagnostic imagery created and enhanced via computer technology. In the scientific world, "visualization" leads one to university laboratories with computer generated images derived from mathematical simulations of theoretical physics or other discipline. In courtrooms, the term "visualization" usually refers to a wide variety of computer generated images that can be used for a multitude of purposes. These visualizations or visual evidence are typically called "computer simulations" and "computer animations" in the literature. In general, "computer simulation" refers to a numerical analysis with visual output that must meet the same admissibility requirements as scientific evidence as it proposes to accurately recreate an event. "Computer animations", however, are generally considered demonstrative evidence that illustrates an experts opinion. Seimer[3] describes three basic types of "computer animations": models, demonstrations, and reconstructions. These basic types parallel in the computer context what has been done for years in other media.

A computer model, like it's modeling clay or balsa wood counterpart, shows how an object looks. The object might be something that no longer exists, it might an object that is too large to bring into the courtroom, or something that is too small to see. The model might have components in its interior that can be revealed to show its inner workings. Unlike a physical model, a computer model can be viewed by the entire jury simultaneously from any angle, even from inside the model so that a virtual "fly through" of the internal components is possible. Computer models can appear as a simple 3D mesh of lines or may be so detailed and realistic they are indistinguishable from the real object.

A computer animation that is a demonstration is used primarily for instruction. The instructional sequence may include a wide range of graphics and animation, including computer models and photography to explain a process or procedure such as venting a liquid storage tank, or the basics of liquid flow through porous media. A demonstration does not show the expert's opinion but is a tutorial designed to help the jury understand the expert's opinion.

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[3] Siemer, D. C., *Tangible Evidence: How to Use Exhibits at Trial.* p388, New York (1996)

A computer reconstruction depicts the expert's theory of what happened. The classic example of a reconstruction is an automobile accident that was recreated from an expert's investigation of the accident. The animation includes scale computer models of the vehicle(s), the roadway and other objects. The motion of the models is driven by data derived by the expert, resulting in an animation that recreates the accident according to the engineer's analysis of the event.

While these three classifications: models, demonstrations, and reconstructions, are useful because of their more familiar non-computer counterparts, the separation between classifications frequently overlaps. A multimedia courtroom presentation may include something of each of these categories on the screen all at once.

Geographical Information Systems (GIS), a computer software application that integrates mapping with database functions, has been identified as a special class of computer generated visual evidence in addition to animations and simulations[4] . GIS presentations containing maps and environmental data are generally not considered scientific evidence but rather a form of map. Certain data contained in the GIS presentation, such as the results of pollutant transport modeling, may need to be introduced separately to meet admissibility rules for scientific evidence. As discussed later, GIS is especially relevant to environmental issues as most environmental data includes a geographic component.

Instructional Visualization

Visualizations for environmental cases cover a wide range of subjects and the trier of fact may need a refresher course or tutorial for understanding the information being presented. One example, involves underground storage tanks at retail gasoline facilities. While almost everyone has "filled up" at a gas station, most of us do not have an understanding of the actual workings of a gas station because most of the major components are underground and hidden from view.

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[4] Wilson, A.C., et. al., Tracking Spills And Releases: High Tech In the Courtroom. *Tulane Environmental Law Journal* (Scheduled for Publication Winter 1997)

ABC Co. purchased several hundred retail gasoline facilities from XYZ Inc. The facilities were located across the southeastern states and varied in age from ten to fifty years old. One of the conditions of sale provided for XYZ Inc. to cover the cost of any environmental clean-up and retrofitting caused by spills or leaks that occurred before the date of sale. Several years after the sale, ABC Co. was faced with substantial clean up costs as regulatory emphasis on underground storage tanks increased. ABC Co. contended that XYZ Inc. should carry a large portion of this responsibility. XYZ Inc. held the position that all of the stations were in good condition at the time of sale and that any leaks or spills occurred after ABC Co. acquired the properties. The issue was not just whether the stations were contaminated, but when did the contamination begin and how long had it existed prior to the date of sale. In addition to environmental specialists, ABC Co. retained an expert in retail gasoline facility construction and operation to audit the design and operating records of each of the stations. While the expert's audit did reveal isolated cases of equipment failure and numerous design flaws, his major conclusion was that standard engineering design and operating practices for service stations constructed prior to 1980 were inadequate to prevent or detect leaks and spills and that a substantial amount of spillage was inherent in the design and normal operation of these older facilities.

A multimedia presentation was developed to support this expert in explaining the fundamental workings of a gas station and in presenting his conclusions to an arbitration panel. The major components of the presentation included:

- An instructional sequence was produced to review the development of gasoline retailing since the early 20th century with emphasis on underground storage, pumping methods, and the increasing volume of gasoline sales as America's appetite for gasoline increased.

- 3D computer models of typical gasoline retail facilities were created, one of a 1950s vintage station and one of a 1970s station. These models were created from construction plans and specifications that were typical of the actual stations. The models included underground piping, connections, pumps, dispensers, and vent lines. Virtually all of the equipment that would actually be installed was

included in the 3D models. The models in conjunction with interactive tools allowed the expert to navigate to any part of the model, to expose underground components and to view specific pieces of equipment in detail. The expert was able to identify and detail flow patterns, design flaws, and general operation of the gasoline dispensing system which is mostly underground and hidden from view. In addition to viewing the 3D model, selected components were linked to photographs and video to allow immediate viewing of the actual components being discussed.

- Special graphics sequences were assembled to explain the installation and operation of storage tanks. By using the 3D models in conjunction with video, photographs, and animation, the expert was able to explain and demonstrate the recommended installation procedures of the past often resulted in damage to the tanks.

- Other interactive sequences were used to explain overflows during routine filling of the underground tanks from the tank trucks, tank venting, and leaks resulting from corrosion.

- A final sequence compared the design and operation of the older stations with current standards.

The multimedia presentation assisted the expert and attorney in condensing a 2000 page report with an anticipated 3 days of direct examination to 4 hours of fine tuned testimony.

Data Driven Graphics

One of the evidentiary tests commonly applied to visualizations and animations is whether the presentation fairly portrays the event and the expert's opinion. The most direct method to insure an accurate portrayal, is to let the data drive the graphics.

An example of data driven graphics could be an upset in a chemical manufacturing process that results in a release of chemicals to the atmosphere. In these cases, various types of computer air dispersion models[5] are used to track the release. In order to make these predictions, the dispersion models utilize meteorological measurements and source analysis data, (i.e. information about the emission source, such as stack height and exit velocity, and the quantity and type of compound released). The validity of the dispersion model is entirely dependent on reliable meteorological measurements and source analysis. In this example, testimony concerning the source analysis data is being supported.

Chemical processes are usually monitored and controlled by continuous measurements of temperature, pressure, input flows, output flows, etc. which are recorded by computers and/or strip chart recorders. Interpretation of this data is often used to determine the magnitude and duration of a release. In this example, an accidental release resulted from a process upset which lasted approximately 16 minutes. Upon analysis, it was found that the pressure relief valve (PRV) which vents to the atmosphere was not open throughout the entire duration of the upset. The PRV was initially open for only 6 minutes followed by a brief partial opening. The intermediate closing and partial opening meant that a smaller amount of chemical had actually been released than was originally reported. The testifying engineer developed an animation of the upset that was synchronized with the data from chart recordings of flow, temperature, and pressure to explain his interpretation of the data and subsequent conclusions concerning the amount of chemical released. The visualization included a 3D model of the reactor vessel in a cut away view to reveal the internal components. Each of the components were labeled and its function was illustrated with animation. These components included liquid feed, liquid level in the reactor, heating coils, vapor feed, and the emergency pressure relief valve. Each of the strip charts were color coded and enhanced to improve legibility. After each reactor component was identified and introduced, the component functions were reviewed again with a split screen showing the reactor and the strip chart record of the relevant component. For example, as the liquid level increased in the reactor, an increase was also followed on the strip chart trace that records liquid level.

[5] Id.

In order to show the interaction between different operating parameters, all of the strip charts were displayed simultaneously and tracked with an animated vertical cross hair. This was done to show that the strip charts were synchronized with respect to time and to demonstrate the interdependence between various operating parameters. For example, as the temperature in the vessel increased so did the pressure. Finally, the reactor was shown again in the split screen layout with the selected strip chart and vertical cross hair to reenact the events during the upset. An elapsed time counter and atmospheric release indicator were also included in this phase. This sequence was presented interactively, to allow the engineer to explain details at selected points during the animation. The animation could be frozen, played forward or in reverse at any speed, and the areas of interest in either the strip chart or the reactor vessel could be magnified to reveal additional detail.

In this visualization of the reactor, the data gathered from the strip charts was used to portray the upset event. The result yielded a presentation that was driven by the available data with very few assumptions. At every major event during the upset, the action was supported by direct interpretation of the strip charts and the reactor's design parameters. This type of visualization, driven by the data, does not constitute a "simulation" but rather a demonstrative exhibit that is easily defended in terms of being a fair and accurate representation of the actual event and expert's opinion.

Modeling Environmental Data

3D computer modeling provides a powerful tool for visualizing environmental data. Perhaps the most common application for 3D modeling of environmental data is subsurface geology and ground water. 3D models of subsurface modeling can include geological structures and the physical properties of these structures such as porosity or strength. Geologists often use fence diagrams or structure maps to show this type of data. 3D models can make this data friendlier to the lay jury and easier to focus on the interpretation of the data rather than understanding the way in which the information is being presented.

An atypical example of using 3D to visualize environmental data involved measurement of neutral to earth voltage and the behavior of electrical current flowing through the earth under various conditions. In a typical electrical distribution system, the current provided by the generating station and substations is distributed to customers through power lines. Any current that is not consumed as heat or energy completes the circuit and returns to the substation through neutral lines. Since the earth is an electrical conductor, these neutral lines are connected to the earth, grounded, in several locations throughout the system for safety purposes. One side effect of a grounded electrical system is that a small amount of current is always present between the neutral line and the ground, commonly referred to as neutral to earth voltage (NEV). When either the distribution system or the customer's electrical equipment is not installed and operated properly, the potential exists for the neutral to earth voltage to be high enough to adversely affect agricultural animals at operations such as dairy or swine facilities. In some instances, the utility company has been found liable for damages resulting from "off-farm" sources of excessive NEV. In order to correctly diagnose and identify the cause of an NEV problem, a number of precise electrical measurements must be collected in several locations by specially trained personnel. In this example, the electrical distribution system and electrical components of a dairy were modeled from construction plans and photographs. The location of electrical measurements were included in the model. The interpretation of the data was used to visualize the flow of current in the ground and conditions that could result in an NEV problem.

Geographical Information Systems (GIS)

By definition, environmental data will almost always include a geographical component, that is, data that needs to be put on a map. The merging of modern computer database features with computer mapping brought forth a class of computer software called GIS. The result is a geographically accurate interactive map that can be zoomed, panned, and layered. Any feature on the map can be linked to a computer database that may contain text, numbers, documents, and images.

The mapping capabilities of today's desktop GIS include a wide range of commercially available and public domain maps and data as detailed below:

- World coastlines and political boundaries
- US States, Counties, and Cities
- US Highways, Streets, Railways, and Waterways
- US Bureau of Census TIGER data (includes streets with addresses and census data for the US.)
- USGS Topographical Maps at various scales available as scanned paper maps or vector data.
- Aerial Photography
- Satellite Photography
- Land Surveys

Data that can be shown on GIS maps includes just about any information that can be plotted. Example types of data include:

- Sampling locations linked to monitoring data
- Structures or landmarks linked to photographs or video
- Well locations linked to well logs or chemical analysis
- Addresses linked to occupant information
- Emission sources or outfalls linked to emission rates
- Pipeline routes linked to construction details and operation records
- Pollutant transport paths (air, surface water, ground water) linked to concentration data
- Geographically defined areas, points, or lines linked to land use patterns, earth resources, or other descriptive data.

One example of an effective GIS presentation involved a class action suit claiming damages from a chemical release to the air. The location of each claimant at the time of the release was plotted and linked to a database assembled from questionnaires completed by

each claimant. The claimant locations were overlaid on a street map of the area and a high altitude aerial photograph. The aerial photograph was selected as a back drop because landmarks were easily identified, making the map more familiar to both claimants and the trier of fact. Air dispersion modeling was performed by a meteorologist and used to predict downwind concentrations of the chemical during and after the release. The results of the air dispersion model were used to develop concentration contours on 15 minute time intervals that defined an area affected by the chemical. The air dispersion models generally indicated ground level concentrations were very low and the release dissipated rapidly as a light breeze carried the plume away from populated areas. The GIS presentation clearly showed that less than 20% of the original 15,000 claimants were within a reasonable distance of the affected area and resulted in the definition of a class boundary that significantly reduced the size of the class.

The GIS presentation also helped corroborate testimony of fact witnesses and to a certain extent, verify the dispersion modeling results. As the release was in progress, the chemical plant received inquiry and complaint phone calls from the adjacent community. The location of these callers and the time of their call was added to the GIS and superimposed with the air dispersion contours. The progress of the plume moving across the community matched well with the timing and location of the callers.

The GIS was used in pretrial for managing the large number of claimants. GIS allowed attorneys to quickly locate a given claimant and to have ready access to the claimant's data base records. GIS allowed the claim data to be readily queried and analyzed within a spatial context. For example, the GIS can identify school age claimants (from the birth date field in the database) who were within a specified distance of the release point. The GIS was also used in trial in the same fashion, presenting an individual claimant's location and quickly accessing information submitted by that claimant.

Conclusions

Computer generated visual evidence can be a very effective tool in environmental cases as they frequently involve issues and events that are difficult to understand and cannot be easily reproduced. Applications of visual technology in environmental cases can include:

- Instructional graphics to tutor the trier of fact in better understanding the technical issues;
- Data driven graphics to recreate a sequence of events and convey an expert's interpretation of the data;
- 3D modeling of environmental analyses to simplify spatial data that may be difficult to visualize;
- Geographical Information Systems for analyzing and presenting environmental databases with a geographic or spatial component.

As computer technology and the internet become readily available, less expensive, and more powerful, the general population is increasingly exposed to computer based multimedia. As a result, society is becoming visually sophisticated and comfortable receiving information presented in an interactive format. Multimedia allows courtroom testimony and visual evidence to be delivered as an integrated package that is efficient, flexible, and effective.

Biographical Sketches

MARK A. SMITH is a partner in the multimedia firm of GradyAlan Inc., Austin, Texas. After attending the University of Oklahoma, Mr. Smith co-founded a technology company specializing in computer graphics and 3D animation software. He went on to serve as director of marketing for a software company providing tools used in mission critical software development. For the past 10 years, he has lead a team of creative and technical professionals in the design and development of case-specific multimedia presentations for the courtroom.

STEPHEN G. JONES is a partner in the multimedia firm of GradyAlan Inc., Austin, Texas. He received an MS from Texas A&M in 1977 and was involved in environmental research and regulatory aspects of industrial waste management until 1983. Mr. Jones has authored eight scientific papers and several government documents dealing with waste management and ground water hydrology. For the past 14 years, he has been a pioneer in the development of computer software, graphics, and animation for both commercial and legal applications.

Messrs. Smith and Jones specialize in the design and production of visualization techniques and technology in support of expert testimony at trial. Their experience covers a broad range of issues including mining, air pollution control, soil mechanics, ground water hydrology, oil and gas geology, stray voltage, and environmental remediation.

They are frequent speakers on the topic of visualization techniques at trial and have authored several papers on the subject.

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LOIS SCHIFFER

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BIOGRAPHY FOR LOIS J. SCHIFFER

Lois Schiffer is the Assistant Attorney General in The Environment and Natural Resources Division at the U.S. Department of Justice. As the Assistant Attorney General, she manages the Division with responsibility for litigation on behalf of all federal agencies related to pollution, natural resources, wildlife and certain Indian issues.

She has experience in environmental law through her previous work in private practice at Nussbaum & Wald in Washington and at the Department of Justice from 1978-1984 as Chief of the General Litigation Section and as Special Litigation Counsel in the Lands Division. She has also worked as General Counsel at National Public Radio (1984-1989); as an attorney at the Center for Law and Social Policy, a public interest law firm (1974-78). She has been an adjunct professor of environmental law at Georgetown Law School since 1986. Ms. Schiffer was formerly on the boards of a number of non-profit organizations, including the D.C. Bar. She is a graduate of Radcliffe College (1966) and of Harvard Law School (1969).

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Barry McBee

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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.

Chairman McBee has a long and stellar record of public service. Prior to this position as an appointee of Governor George W. Bush, he served on the staffs of President George Bush in Washington, D.C., Governor Bill Clements, and Texas Agriculture Commissioner Rick Perry.

He came to government from the Dallas law firm of Thompson & Knight, where he was elected as a partner in 1986 after several distinguished years in private practice and after a distinguished academic career, graduating with honors from the Southern Methodist University School of Law and Phi Beta Kappa from the University of Oklahoma.

Chairman McBee is deeply committed to his duties. His adherence to the Commission's mission, the laws and regulations governing its work, and the Commissioners' guiding principles is strict. His dedication to such large projects as regulatory reform and harmonization of risk rules has kept them on track amidst controversy. He is unwilling to assert jurisdiction beyond that expressly granted by the Legislature. Finally, and most importantly, he is fully committed to protecting Texas' precious natural resources.

He is married and the proud father of two sons.

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"I'd Like To Teach The World Io Sing In Perfect Harmony"

MARY E. KELLY
BARRY MCBEE
HAL RAY
LOIS SCHIFFER
BOB WILSON

NOTES

BIOGRAPHICAL STATEMENT

Mary E. Kelly

Since 1989, Ms. Kelly has been Executive Director of the *Texas Center for Policy Studies*, a non-profit organization in Austin, Texas. The *Texas Center for Policy Studies* produces reports and articles on state and regional environmental issues and provides technical, legal and policy assistance to citizen groups in both Texas and northeastern Mexico.

She is also *of counsel* to and a former partner in the law firm of *Henry, Lowerre, Johnson, Hess & Frederick* in which capacity she has represented local governments, farmers and ranchers and citizen groups on a variety of environmental issues.

Ms. Kelly has an undergraduate degree in Chemical Engineering from the University of Arizona (1979). Her law degree was obtained in 1985 from the University of Texas.

(7/97)

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.

Chairman McBee has a long and stellar record of public service. Prior to this position as an appointee of Governor George W. Bush, he served on the staffs of President George Bush in Washington, D.C., Governor Bill Clements, and Texas Agriculture Commissioner Rick Perry.

He came to government from the Dallas law firm of Thompson & Knight, where he was elected as a partner in 1986 after several distinguished years in private practice and after a distinguished academic career, graduating with honors from the Southern Methodist University School of Law and Phi Beta Kappa from the University of Oklahoma.

Chairman McBee is deeply committed to his duties. His adherence to the Commission's mission, the laws and regulations governing its work, and the Commissioners' guiding principles is strict. His dedication to such large projects as regulatory reform and harmonization of risk rules has kept them on track amidst controversy. He is unwilling to assert jurisdiction beyond that expressly granted by the Legislature. Finally, and most importantly, he is fully committed to protecting Texas' precious natural resources.

He is married and the proud father of two sons.

BIOGRAPHICAL SKETCH OF HAL R. RAY, JR.

Hal Ray is an assistant attorney general in the Office of the Attorney General of Texas where he is chief of the Natural Resources Division. Prior to assuming this position in August 1995, he was chief of the Elder Law and Public Health Division from its inception and served previously in the Consumer Protection Division as chief of the Elder Law Section and as chief of the Insurance Practices Section.

Hal graduated from the University of Texas with highest honors in 1981 and was elected to Phi Beta Kappa. He graduated with honors from the University of Texas Law School in 1984 where he served as a Teaching Quizmaster, a staff member on the *Review of Litigation*, and as class president. While in law school, he was elected to Phi Delta Phi and the Friar Society.

He began his legal career in Lubbock where he clerked for Halbert O. Woodward, Chief Judge of the U.S. District Court for the Northern District of Texas. He was a trial lawyer with Thompson & Knight in Dallas and Fort Worth and Sherrill & Pace in his hometown of Wichita Falls before joining the Office of the Attorney General in February 1994. He is the alternate representative of the National Association of Attorneys General on the U.S. Department of Defense's Environmental Response Task Force (DERTF). He is a fellow of the Texas Bar Foundation and a member of the Environmental Law Institute.

Hal will be leaving the Office of the Attorney General later this month to become a partner in the Fort Worth firm of Pope, Hardwicke, Christie, Harrell, Schell & Kelly, L.L.P., where he will continue his work in environmental and natural resources law and litigation.

BIOGRAPHY FOR LOIS J. SCHIFFER

Lois Schiffer is the Assistant Attorney General in The Environment and Natural Resources Division at the U.S. Department of Justice. As the Assistant Attorney General, she manages the Division with responsibility for litigation on behalf of all federal agencies related to pollution, natural resources, wildlife and certain Indian issues.

She has experience in environmental law through her previous work in private practice at Nussbaum & Wald in Washington and at the Department of Justice from 1978-1984 as Chief of the General Litigation Section and as Special Litigation Counsel in the Lands Division. She has also worked as General Counsel at National Public Radio (1984-1989); as an attorney at the Center for Law and Social Policy, a public interest law firm (1974-78). She has been an adjunct professor of environmental law at Georgetown Law School since 1986. Ms. Schiffer was formerly on the boards of a number of non-profit organizations, including the D.C. Bar. She is a graduate of Radcliffe College (1966) and of Harvard Law School (1969).

ROBERT WILSON

Admission to Bar: Texas (1968)

Education: University of Texas (B.A. 1967; LL.B., 1968)

Professional Activities and Awards:

Member, Texas Water Conservation Association Water Laws Committee (1985 - present)
Member, Environmental Law Section, State Bar of Texas
Member, South Texas Chapter, Health Physics Society
Member, Texas Mining and Reclamation Association
Member, Board of Directors, Austin Lawyers Care (1987 - 1991)
Former Member, Rules Advisory Committee, Texas Water Quality Board
Former Member, Gas Pipeline Safety Standards Committee, Texas Railroad Commission

PRACTICE AREA INFORMATION

Robert Wilson is a partner with the law firm of McGinnis, Lochridge & Kilgore where he has practiced since March 1970 and currently serves as director of the firm's environmental section. His experience includes permitting and litigation for various entities, primarily corporations and municipal subdivisions of the State of Texas before regulatory agencies including the U.S. Environmental Protection Agency, the Texas Natural Resource Conservation Commission (formed in 1993 by merger of the Texas Air Control Board and the Texas Water Commission), the Texas Railroad Commission, the United States Corps of Engineers and the Texas Department of Health Bureau of Radiation Control. Mr. Wilson has represented clients in suits involving allegations of personal injury and property damage attributed to air, soil and water contamination and in issues raised in proceedings through Superfund actions. His litigation experience not only relates to common law litigation but also to enforcement litigation brought by regulatory agencies. In addition, he has represented clients in legislative activities and rulemaking matters pertaining to items of regulatory concern and participates in environmental audits on behalf of clients. Mr. Wilson presently represents a variety of clients on Superfund issues at sites within and without the state dealing primarily with issues of attribution and allocation and related matters.

Ninth Annual Texas
Environmental Superconference

Criminal Enforcement



CRIMINAL ENVIRONMENTAL ENFORCEMENT

"Get a Rope"

Federal

GORDON YOUNG

ENVIRONMENTAL CRIMINAL ENFORCEMENT OUTLINE

For those used to dealing with environmental laws and regulations from the purely civil standpoint, any contact with the criminal process can be almost as chilling as the arrival of an IRS criminal agent at your office, and sometimes more so. Almost every federal environmental law has a criminal enforcement provision which can be invoked for conduct that may seem at first glance to be the same conduct regulated under civil enforcement. It is crucial to know at least some basics in order to understand the status of your company or client in a criminal investigation, and where to turn for advice and what to do to protect adequately the company's or client's interests and rights. Most frequently regulated companies will only come into contact with a criminal environmental investigation because the company has done business with or otherwise had some contact with the target of the investigation, but even then your company's or your client's life can be made much less complicated with a basic understanding of the environmental criminal process.

I. ENVIRONMENTAL CRIMINAL INVESTIGATIVE AGENCIES:

A. Environmental Protection Agency Criminal Investigation Division (EPA CID)
Jurisdiction over all federal environmental crimes, except those involving atomic energy.

B. United States Coast Guard
Jurisdiction over Clean Water Act, Oil Pollution Act, Act to Prevent Pollution from Ships, Ocean Dumping Act; maintains National Response Center (CERCLA & OPA discharge reports) jointly with EPA.

C. United States Army Corps of Engineers
Jurisdiction over wetlands enforcement under the CWA.

D. Federal Bureau of Investigation
Shares jurisdiction with EPA

E. United States Fish & Wildlife
Endangered Species Act cases.

F. Department of Transportation
Hazardous Materials Transportation Act cases

G. National Marine Fisheries Service
Enforces Fisheries laws, including TED's.

H. United States Customs Service
Enforces CFC smuggling cases.

II. PROSECUTION AGENCIES

A. UNITED STATES ATTORNEY

Southern District of Texas: Houston
Western District of Texas: San Antonio
Eastern District of Texas: Beaumont
Northern District of Texas: Dallas

The United States Attorney is the chief federal law enforcement prosecution agency for federal criminal statutes, including environmental law, and has primary authority to prosecute these crimes. Certain cases may be shared with the Department of Justice, Washington, or under certain circumstances, DOJ may have sole or primary authority.

B. Unites States Department of Justice, Environment & Natural Resources Division, Environmental Crimes Section, Washing ton, D.C.

DOJ ECS may be requested by the local U.S. Attorney's Office to share or take the lead in environmental prosecution, or in certain cases of particular national interest (including cases which are unique or the first under a particular statute, and multi-district cases) may have joint or lead prosecution authority.

COOPERATIVE EFFORTS WITH STATE AND LOCAL INVESTIGATION AND PROSECUTION AGENCIES: ENVIRONMENTAL TASK FORCES.

It is more common in federal environmental criminal cases (than in other federal criminal cases) to find multi-agency cooperation in environmental task forces, with shared investigative responsibilities and some shared prosecution, viz. the Texas Environmental Enforcement Task Force, comprised of federal agencies as well as the Texas Natural Resource Conservation Commission, the Attorney General's Office, Parks & Wildlife, the General Land Office, local prosecutors, and other state agencies.

FEDERAL CRIMINAL ENVIRONMENTAL STATUTES

A. The Clean Water Act, 33 U.S.C. Secs. 1251 et seq. (and 40 CFR Part 401 et seq.), contains criminal provisions at 33 U.S.C. Sec. 1319 which provides for felony penalties for knowing violations of fines not less than $2500 nor more than $25,000 per day of violation, or by imprisonment of not more than one year, or both, for the first conviction, and an increased penalty for subsequent convictions.

B. The Resource Conservation and Recovery Act (RCRA, the hazardous wastes act), 42 U.S.C. Secs. 6901 et seq. (40 CFR Part 261 et seq.), contains criminal provisions at 42 U.S.C. Secs. 6928 (d) which provide for felony penalties of not more that $50,000 for each day of violation, or 2 to 5 years imprisonment, or both, and for violations of 42 U.S.C. Secs. 6928 (e), knowing endangerment, penalties of not more that $250,000, or 15 years imprisonment, or both, and for an organization, a fine of not more than

$1,000,000.

C. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or the "Superfund Act"), 42 U.S.C. Secs. 9601 et seq. (40 CFR Part 302 et seq.), contains criminal provisions at 42 U.S.C. Secs. 9603(b) which provides for felony penalties of fines in accordance with Title 18[1] or imprisonment for not more than three years, or both, for the first conviction.

D. The Marine Protection and Sanctuaries Act (MPRSA or the "Ocean Dumping Act"), 33 U.S.C. Secs. 1401 et seq. (40 CFR Part 220 et seq.), contains criminal sanctions at 33 U.S.C. Secs. 1411, 1415(b) of not more than $50,000 or imprisonment for not more than 1 year, or both, and for dumping medical waste, a fine not to exceed $250,000, or imprisonment not to exceed 5 years, or both.

E. The Oil Pollution Act of 1990 contains criminal sanctions at 33 U.S.C. Sec. 1321 with penalties of a fine not to exceed $10,000, or imprisonment not to exceed one year, or both.

F. The Act to Prevent Pollution from Ships , 33 U.S.C. Secs 1901-1012, contains criminal sanctions at Secs. 1907 & 1908, making it a crime to discharge plastics, garbage, and oil, with jurisdiction over navigable waters and ocean waters, with a punishment of up to six years in prison, and/or a maximum fine for and individual of $250,000, for an organization, $500,000.

G. The Toxic Substances Control Act (TSCA), 15 U.S.C. Secs. 2601 et seq. (40 CFR Part 761 et seq.), contains criminal sanctions at 15 U.S.C. Sec. 2615 with penalties not to exceed a fine of $25,000 for each day of violation or imprisonment of one year or both.

H. The Clean Air Act, 42 U.S.C. Secs. 7401 et seq. (40 C.F.R. Part 50 et seq.), contains criminal sanctions at 42 U.S.C. Sec. 7413.

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[1] Title 18, United States Code, Sec. 3571 provides for fines for an individual for a felony, not more than $250,000; for a class A misdemeanor, not more than $100,000, for a class B misdemeanor, nor more than $5000, and for a misdemeanor resulting in death, not more than $250,000. Increased fines are provided for under Title 18 U.S.C. 3571(d), the alternative fine based upon gain or loss, which provides that if any person (or organization) "derives a pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss..."

I. The Hazardous Materials Transportation Act, 49 U.S.C. Secs. 1801 et seq. (49 C.F.R. Part 171 et seq.), contains criminal penalties at 49 U.S.C. Secs. 1804, 1809.

J. The Emergency Planning and Community Right To Know Act, 42 U.S.C. Secs. 11001 et seq. (See 29 C.F.R. Secs. 1910 et seq., 40 C.F.R. Secs. 302 et seq., and 40 C.F.R. Part 355), contains criminal sanctions at 49 U.S.C. Sec. 11045.

K. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. Secs. 136 et seq., (40 C.F.R. Part 152 et seq.), contains criminal provisions at 7 U.S.C. Sec. 1361.

L. The Safe Drinking Water Act, 42 U.S.C. Secs. 300f et seq. (40 C.F.R. Part 124 et seq.) contains criminal provisions at 42 U.S.C. Secs. 300h-2, 300i-1.

M. The Endangered Species Act, 16 U.S.C. Secs. 1531 et seq. (50 C.F.R. Part 17, et seq.) provides for criminal penalties at 16 U.S.C. Sec. 1540.

N. The Migratory Bird Treaty Act, 16 U.S.C. Secs. 703 et seq. (50 C.F.R. part 10.13), contains criminal sanctions at 16 U.S.C. Sec. 707.

O. The Outer Continental Shelf Lands Act, 43 U.S.C. Secs. 1331 et seq., (30 C.F.R. Part 256 et seq.), provides for criminal penalties at 43 U.S.C. Sec. 1350.

P. The Lacey Act, 16 U.S.C. Secs. 3371 et seq. (50 C.F.R. Part 10 et seq.), contains criminal penalties at 16 U.S.C. Sec. 3373.

Q. The Rivers and Harbors Appropriations Act, 33 U.S.C. Secs. 401 et seq., (33 C.F.R. Part 114 et seq.), contains a criminal provision at 33 U.S.C. Sec. 406.

R. The Surface Mining Control and Reclamation Act, 30 U.S.C. Secs. 1201 et seq., (30 C.F.R. Part 301 et seq.), contains a criminal provision at 30 U.S.C. Sec. 1268.

TOOLS OF THE PROSECUTOR: THE SEARCH WARRANT & THE GRAND JURY SUBPOENA

A. Search Warrant

Issued by a judge, on probable cause that evidence of a crime (or contraband) is to be found at a particularly described location. It must be executed within the hours described in the warrant. The agents have the right to take the original items with them; they can be returned upon order of a court, but often are not until the conclusion of the litigation; it is a separate crime to interfere with the officers executing the search warrant. Rule 41, Federal Rules of Criminal Procedure. (see attachment)

B. Grand Jury Subpoena

1. Power to subpoena witnesses to a) testify, or b) bring documents or other items described in the subpoena, or c) both

2. Grand jury may take the originals; you may request that copies be furnished to you (at your own expense).

3. Proceedings are secret (but the witness can divulge what he/she testified to.

4. The witness has no right to an attorney in the grand jury room, but the witness may have one outside and may leave for consultation.

5. Proceedings are recorded; may be used (under certain circumstances) at trial.

6. The grand jury indicts.

7. Contact the Assistant United States Attorney whose name is listed in the lower right corner for information concerning subpoenaed person's status, more time to comply, other questions.

Rule 6, Federal Rules of Criminal Procedure
(see attachment)

SENTENCING GUIDELINES

A. Computation of your individual's sentence by formulae.
(attachments)

B. The importance of preindictment settlement.

DEPARTMENT OF JUSTICE INITIATIVES

Pollution from Vessels

CFC-12 Prosecutions

National Environmental Crimes Center

PROSECUTION POST ATTIQUE AHMAD

STATISTICS:

Attached Partial list from DOJ ECS.

NOTE: All indictments and dispositions have not been recorded for FY96. Information is gathered for at least six more months to complete the latest fiscal year.

From the beginning of FY83 to the present date (June 3, 1997, the Department of Justice has recorded environmental criminal indictments against 1941 corporate and individual defendants, and 1348 guilty pleas and convictions, over $470.8 million in criminal penalties (this number includes federal and state restitutions and known costs for remediation) and 517 years of imprisonment (374 of which account for actual confinement).

Of the 1941 defendants indicted, 558 were corporations or organizations, and the remaining 1383 were individuals. Of the 1348 convictions,414 were against organizations, and the remaining 934 were against individuals.

BREAKDOWN

	INDICTMENTS	PLEAS/CONVICTIONS
FY83	40	40
FY84	43	32
FY85	40	37
FY86	94	67
FY87	127	86
FY88	124	63
FY89	101	107
FY90	134	85
FY91	127	96
FY92	187	104
FY93	218	176
FY94	202	151
FY95	257	154
FY96	247	150
TOTAL	1941	1348

United States District Court

DISTRICT OF

In the Matter of the Search of
(Name, address or brief description of person or property to be searched)

BLACKACRE

SEARCH WARRANT

CASE NUMBER: SW PL

TO: _____ and any Authorized Officer of the United States

Affidavit(s) having been made before me by _____ who has reason t
Affiant

believe that ☐ on the person of or ☐ on the premises known as (name, description and/or location)

BLACKACRE

in the _____ District of _____ there is nov
concealed a certain person or property, namely (describe the person or property)

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the perso
or property so described is now concealed on the person or premises above-described and establish grounds fo
the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before _____
Date

(not to exceed 10 days) the person or place named above for the person or property specified, serving this warran
and making the search (in the daytime — 6:00 A.M. to 10:00 P.M.) (at any time in the day or night as I finc
reasonable cause has been established) and if the person or property be found there to seize same, leaving a cop
of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or prop
erty seized and promptly return this warrant to _____
U.S. Judge or Magistrate
as required by law.

_____ at _____
Date and Time Issued City and State

_____ _____
Name and Title of Judicial Officer Signature of Judicial Officer

United States District Court

DISTRICT OF

In the Matter of the Search of
(Name, address or brief description of person or property to be searched)

BLACKACRE

SEARCH WARRANT

CASE NUMBER:

TO: S/A X and any Authorized Officer of the United States

Affidavit(s) having been made before me by _____ who has reason to
Affiant

believe that ☐ on the person of or ☐ on the premises known as (name, description and/or location)

SAMPLE

in the _____ District of _____ there is now
concealed a certain person or property, namely (describe the person or property)

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before _____
Date

(not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search (in the daytime — 6:00 A.M. to 10:00 P.M.) (at any time in the day or night as I find reasonable cause has been established) and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to _____
U.S. Judge or Magistrate
as required by law.

_____ at _____
Date and Time Issued City and State

_____ _____
Name and Title of Judicial Officer Signature of Judicial Officer

United States District Court

SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TO: PRESIDENT
BLACKACRE, INC

SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:
☐ PERSON ☐ DOCUMENTS OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE	ROOM
U. S. Courthouse and Federal Building 515 Rusk Houston, Texas 77002	Grand Jury Room 5th Floor
	DATE AND TIME

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

BOOKS, RECORDS, DOCUMENTS, COMPUTER FILES, PERTAINING TO _____

SAMPLE

☐ *Please see additional information on reverse*

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK	DATE
MICHAEL MILBY, Clerk	
(BY) DEPUTY CLERK	

This subpoena is issued upon application of the United States of America
GAYNELLE GRIFFIN JONES
UNITED STATES ATTORNEY

NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY
AUSA 713 555 5555

*If not applicable, enter "none."

To be used in lieu of AO110

FORM OBD-227
JAN. 86

PART Q - OFFENSES INVOLVING THE ENVIRONMENT

1. ENVIRONMENT

§2Q1.1. Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants

(a) Base Offense Level: 24

Commentary

Statutory Provisions: 33 U.S.C. § 1319(c)(3); 42 U.S.C. § 6928(e).

Application Note:

1. If death or serious bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

Background: This section applies to offenses committed with knowledge that the violation placed another person in imminent danger of death or serious bodily injury.

Historical Note: Effective November 1, 1987.

§2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

(1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide into the environment, increase by 6 levels; or

(B) if the offense otherwise involved a discharge, release, or emission of a hazardous or toxic substance or pesticide, increase by 4 levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 9 levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(4) If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by 4 levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

(6) If the offense involved a simple recordkeeping or reporting violation only, decrease by 2 levels.

Commentary

Statutory Provisions: 7 U.S.C. §§ 136j-136l; 15 U.S.C. §§ 2614 and 2615; 33 U.S.C. §§ 1319(c)(1), (2), 1321(b)(5), 1517(b); 42 U.S.C. §§ 300h-2, 6928(d), 7413, 9603(b), (c), (d); 43 U.S.C. §§ 1350, 1816(a), 1822(b); 49 U.S.C. § 1809(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"Recordkeeping offense" includes both recordkeeping and reporting offenses. The term is to be broadly construed as including failure to report discharges, releases, or emissions where required; the giving of false information; failure to file other required reports or provide necessary information; and failure to prepare, maintain, or provide records as prescribed.*

2. *"Simple recordkeeping or reporting violation" means a recordkeeping or reporting offense in a situation where the defendant neither knew nor had reason to believe that the recordkeeping offense would significantly increase the likelihood of any substantive environmental harm.*

3. *This section applies to offenses involving pesticides or substances designated toxic or hazardous at the time of the offense by statute or regulation. A listing of hazardous and toxic substances in the guidelines would be impractical. Several federal statutes (or regulations promulgated thereunder) list toxics, hazardous wastes and substances, and pesticides. These lists, such as those of toxic pollutants for which effluent standards are published under the Federal Water Pollution Control Act (e.g., 33 U.S.C. § 1317) as well as the designation of hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (e.g., 42 U.S.C. § 9601(14)), are revised from time to time. "Toxic" and "hazardous" are defined differently in various statutes, but the common dictionary meanings of the words are not significantly different.*

4. *Except when the adjustment in subsection (b)(6) for simple recordkeeping offenses applies, this section assumes knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.*

5. *Subsection (b)(1) assumes a discharge or emission into the environment resulting in actual environmental contamination. A wide range of conduct, involving the handling of different quantities of materials with widely differing propensities, potentially is covered. Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from the offense levels prescribed in these specific offense characteristics may be appropriate.*

6. *Subsection (b)(2) applies to offenses where the public health is seriously endangered. Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. See Chapter Five, Part K (Departures).*

7. *Subsection (b)(3) provides an enhancement where a public disruption, evacuation or cleanup at substantial expense has been required. Depending upon the nature of the contamination involved, a departure of up to two levels either upward or downward could be warranted.*

8. *Subsection (b)(4) applies where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required. Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels either upward or downward may be warranted.*

9. *Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).*

Background: This section applies both to substantive violations of the statute governing the handling of pesticides and toxic and hazardous substances and to recordkeeping offenses. The first four specific offense characteristics provide enhancements when the offense involved a substantive violation. The last two specific offense characteristics apply to recordkeeping offenses. Although other sections of the guidelines generally prescribe a base offense level of 6 for regulatory violations, §2Q1.2 prescribes a base offense level of 8 because of the inherently dangerous nature of hazardous and toxic substances and pesticides. A decrease of 2 levels is provided, however, for "simple recordkeeping or reporting violations" under §2Q1.2(b)(6).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1993 (see Appendix C, amendment 481).

§2Q1.3. Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a pollutant into the environment, increase by 6 levels; or

(B) if the offense otherwise involved a discharge, release, or emission of a pollutant, increase by 4 levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 11 levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(4) If the offense involved a discharge without a permit or in violation of a permit, increase by 4 levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

Commentary

Statutory Provisions: 33 U.S.C. §§ 403, 406, 407, 411, 1319(c)(1), (c)(2), 1415(b), 1907, 1908; 42 U.S.C. § 7413. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"Recordkeeping offense" includes both recordkeeping and reporting offenses. The term is to be broadly construed as including failure to report discharges, releases, or emissions where required; the giving of false information; failure to file other required reports or provide necessary information; and failure to prepare, maintain, or provide records as prescribed.*

2. *If the offense involved mishandling of nuclear material, apply §2M6.2 (Violation of Other Federal Atomic Energy Statutes, Rules, and Regulations) rather than this guideline.*

3. *The specific offense characteristics in this section assume knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.*

4. *Subsection (b)(1) assumes a discharge or emission into the environment resulting in actual environmental contamination. A wide range of conduct, involving the handling of different quantities of materials with widely differing propensities, potentially is covered. Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation a departure of up to two levels in either direction from that prescribed in these specific offense characteristics may be appropriate.*

5. *Subsection (b)(2) applies to offenses where the public health is seriously endangered. Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. See Chapter Five, Part K (Departures).*

6. *Subsection (b)(3) provides an enhancement where a public disruption, evacuation or cleanup at substantial expense has been required. Depending upon the nature of the contamination involved, a departure of up to two levels in either direction could be warranted.*

7. *Subsection (b)(4) applies where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required. Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels in either direction may be warranted.*

8. *Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).*

Background: This section parallels §2Q1.2 but applies to offenses involving substances which are not pesticides and are not designated as hazardous or toxic.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 205).

§2Q1.4. Tampering or Attempted Tampering with Public Water System

(a) Base Offense Level: 18

(b) Specific Offense Characteristics

(1) If a risk of death or serious bodily injury was created, increase by 6 levels.

(2) If the offense resulted in disruption of a public water system or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(3) If the offense resulted in an ongoing, continuous, or repetitive release of a contaminant into a public water system or lasted for a substantial period of time, increase by 2 levels.

(4) If the purpose of the offense was to influence government action or to extort money, increase by 6 levels.

Commentary

Statutory Provision: 42 U.S.C. § 300i-1.

Application Note:

1. "Serious bodily injury" is defined in the Commentary to §1B1.1 (Application Instructions).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 206).

§2Q1.5. Threatened Tampering with Public Water System

(a) Base Offense Level: 10

(b) Specific Offense Characteristic

(1) If the threat or attempt resulted in disruption of a public water system or evacuation of a community or a substantial public expenditure, increase by 4 levels.

(c) Cross Reference

(1) If the purpose of the offense was to influence government action or to extort money, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).

Commentary

Statutory Provision: 42 U.S.C. § 300i-1.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 207).

§2Q1.6. Hazardous or Injurious Devices on Federal Lands

(a) Base Offense Level (Apply the greatest):

(1) If the intent was to violate the Controlled Substance Act, apply §2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances);

(2) If the intent was to obstruct the harvesting of timber, and property destruction resulted, apply §2B1.3 (Property Damage or Destruction);

(3) If the offense involved reckless disregard to the risk that another person would be placed in danger of death or serious bodily injury under circumstances manifesting extreme indifference to such risk, the offense level from §2A2.2 (Aggravated Assault);

(4) 6, otherwise.

Commentary

Statutory Provision: 18 U.S.C. § 1864.

Background: The statute covered by this guideline proscribes a wide variety of conduct, ranging from placing nails in trees to interfere with harvesting equipment to placing anti-personnel devices capable of causing death or serious bodily injury to protect the unlawful production of a controlled substance. Subsections (a)(1)-(a)(3) cover the more serious forms of this offense. Subsection (a)(4) provides a minimum offense level of 6 where the intent was to obstruct the harvesting of timber and little or no property damage resulted.

Historical Note: Effective November 1, 1989 (see Appendix C, amendment 208). Amended effective November 1, 1990 (see Appendix C, amendment 313).

* * * * *

2. CONSERVATION AND WILDLIFE

§2Q2.1. Offenses Involving Fish, Wildlife, and Plants

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the offense (A) was committed for pecuniary gain or otherwise involved a commercial purpose; or (B) involved a pattern of similar violations, increase by 2 levels.

(2) If the offense (A) involved fish, wildlife, or plants that were not quarantined as required by law; or (B) otherwise created a significant risk of infestation or disease transmission potentially harmful to humans, fish, wildlife, or plants, increase by 2 levels.

(3) (If more than one applies, use the greater):

(A) If the market value of the fish, wildlife, or plants exceeded $2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit); or

(B) If the offense involved (i) marine mammals that are listed as depleted under the Marine Mammal Protection Act (as set forth in 50 C.F.R. § 216.15); (ii) fish, wildlife, or plants that are listed as endangered or threatened by the Endangered Species Act (as set forth in 50 C.F.R. Part 17); or (iii) fish, wildlife, or plants that are listed in Appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (as set forth in 50 C.F.R. Part 23), increase by 4 levels.

Commentary

Statutory Provisions: 16 U.S.C. §§ 668(a), 707(b), 1174(a), 1338(a), 1375(b), 1540(b), 3373(d); 18 U.S.C. § 545. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"For pecuniary gain" means for receipt of, or in anticipation of receipt of, anything of value, whether monetary or in goods or services. Thus, offenses committed for pecuniary gain include both monetary and barter transactions. Similarly, activities designed to increase gross revenue are considered to be committed for pecuniary gain.*

2. *The acquisition of fish, wildlife, or plants for display to the public, whether for a fee or donation and whether by an individual or an organization, including a governmental entity, a private non-profit organization, or a private for-profit organization, shall be considered to involve a "commercial purpose."*

3. *For purposes of subsection (b)(2), the quarantine requirements include those set forth in 9 C.F.R. Part 92, and 7 C.F.R. Chapter III. State quarantine laws are included as well.*

4. *When information is reasonably available, "market value" under subsection (b)(3)(A) shall be based on the fair-market retail price. Where the fair-market retail price is difficult to ascertain, the court may make a reasonable estimate using any reliable information, such as the reasonable replacement or restitution cost or the acquisition and preservation (e.g., taxidermy) cost. Market value, however, shall not be based on measurement of aesthetic loss (so called "contingent valuation" methods).*

5. *If the offense involved the destruction of a substantial quantity of fish, wildlife, or plants, and the seriousness of the offense is not adequately measured by the market value, an upward departure may be warranted.*

Background: This section applies to violations of the Endangered Species Act, the Bald Eagle Protection Act, the Migratory Bird Treaty, the Marine Mammal Protection Act, the Wild Free-Roaming Horses and Burros Act, the Fur Seal Act, the Lacey Act, and to violations of 18 U.S.C. § 545 where the smuggling activity involved fish, wildlife, or plants.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 41); November 1, 1989 (see Appendix C, amendments 209 and 210); November 1, 1991 (see Appendix C, amendment 407); November 1, 1992 (see Appendix C, amendment 452); November 1, 1995 (see Appendix C, amendment 534).

§2Q2.2. [Deleted]

Historical Note: Section 2Q2.2 (Lacey Act; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants), effective November 1, 1987, was deleted by consolidation with §2Q2.1 effective November 1, 1989 (see Appendix C, amendment 209).

SENTENCING TABLE
(in months of imprisonment)

	Criminal History Category (Criminal History Points)					
Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

Zone A

Zone B

Zone C

Zone D

GORDON SPEIGHTS YOUNG is the Chief of the Environmental Unit at the United States Attorney's Office, Southern District of Texas, Houston, Texas, where he is responsible for criminal and civil environmental litigation in the Southern District (Houston, Corpus Christi, Brownsville, McAllen, and Laredo). He is a former Assistant District Attorney, Hidlago County, Texas; a former Assistant Attorney General, for tax prosecutions, Des Moines, Iowa, and a former District Associate Judge, Iowa Second Judicial District. He has tried a variety of criminal and civil environmental cases involving RCRA, the Clean Water Act, TSCA, including U. S. v. Baytank (Houston), Inc., U. S. v. Applied Coating Services, Inc., Oil Pollution Act litigation, and CFC prosecutions under the Clean Air Act, and has worked in conjunction with Environmental Enforcement and Defense Sections on CERCLA, CWA, and CAA cases. He is a graduate of Southern Methodist University and Southern Methodist University Law School, is a native Houstonian, and has acted with the Houston Grand Opera.

CRIMINAL ENVIRONMENTAL ENFORCEMENT

"Get a Rope"

State

JOHN RILEY

NOTES

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 murder cases for four years.

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 has appeared as an expert legal commentator on Court TV.

Since September 1994, John has been employed at the TNRCC. He has been Director of the Litigation Support Division since November of 1994. In that position, John has oversight responsibility for forty seven employees including attorneys, legal assistants and administrative support personnel devoted to administrative and civil enforcement and the TNRCC special investigations unit which is devoted to criminal environmental law enforcement.

During the 74th and 75th Texas Legislative Sessions, John was involved in developing the Environmental, Health and Safety Audit law and its amendment. In the last three years, John has testified before the United States Senate and other states' legislatures on environmental audit legislation. He, with others, successfully worked with EPA to resolve the areas of concerns involving the Texas statute related to continued and future delegation of federal environmental programs. These discussions provided the foundation for the legislative amendments enacted May, 1997.

John continues to speak before groups such as the American Bar Association, University of Houston School of Law, and many others on environmental enforcement, administrative law, and is recognized as a national expert on environmental audit statutes.

Ninth Annual Texas
Environmental Superconference

Expert Witness/Mock Examination - Hypothetical



HYPOTHETICAL

Honorable Margaret Cooper, Judge
Mike Gallagher - Plaintiff's Counsel
Carrick Brooke-Davidson - Defendant's Counsel
Davis Ford - Defendant's Expert

Background of Case

This case involves alleged subsurface contamination of a potable aquifer from lined ponds and petroleum storage tanks located in an oil and gas production field. The basic dispute is as follows:

1. A rancher leases his mineral rights to a major oil company who handles its production waste in general accordance with Texas Railroad Commission and TNRCC regulations. There is evidence, however, that the rancher's shallow aquifer is being contaminated by dissolved salts and petroleum hydrocarbons. The possible sources of these contaminants are attributed to leaking petroleum tanks or lined produced water ponds.

2. The rancher sues the oil company for property diminution, livestock deaths, and loss of fresh water supply to his ranch.

Issues and Procedural Posture

The primary focus of the demonstration is to highlight the issues presented by the cases dealing with the admissibility of scientific evidence, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), E.I. duPont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995), Hartman v. State, No. 484-96 (Tex. Crim. App. April 23, 1997) and Merrell Dow Pharmaceuticals, Inc. v. Havner, No. 95-1036 (Tex. July 9, 1997). For purposes of our demonstration, we are conducting a hearing on a pretrial motion to exclude Davis Ford as an expert.

EXPERT WITNESS/MOCK EXAMINATION

"Home of the Whopper"

Expert Witness

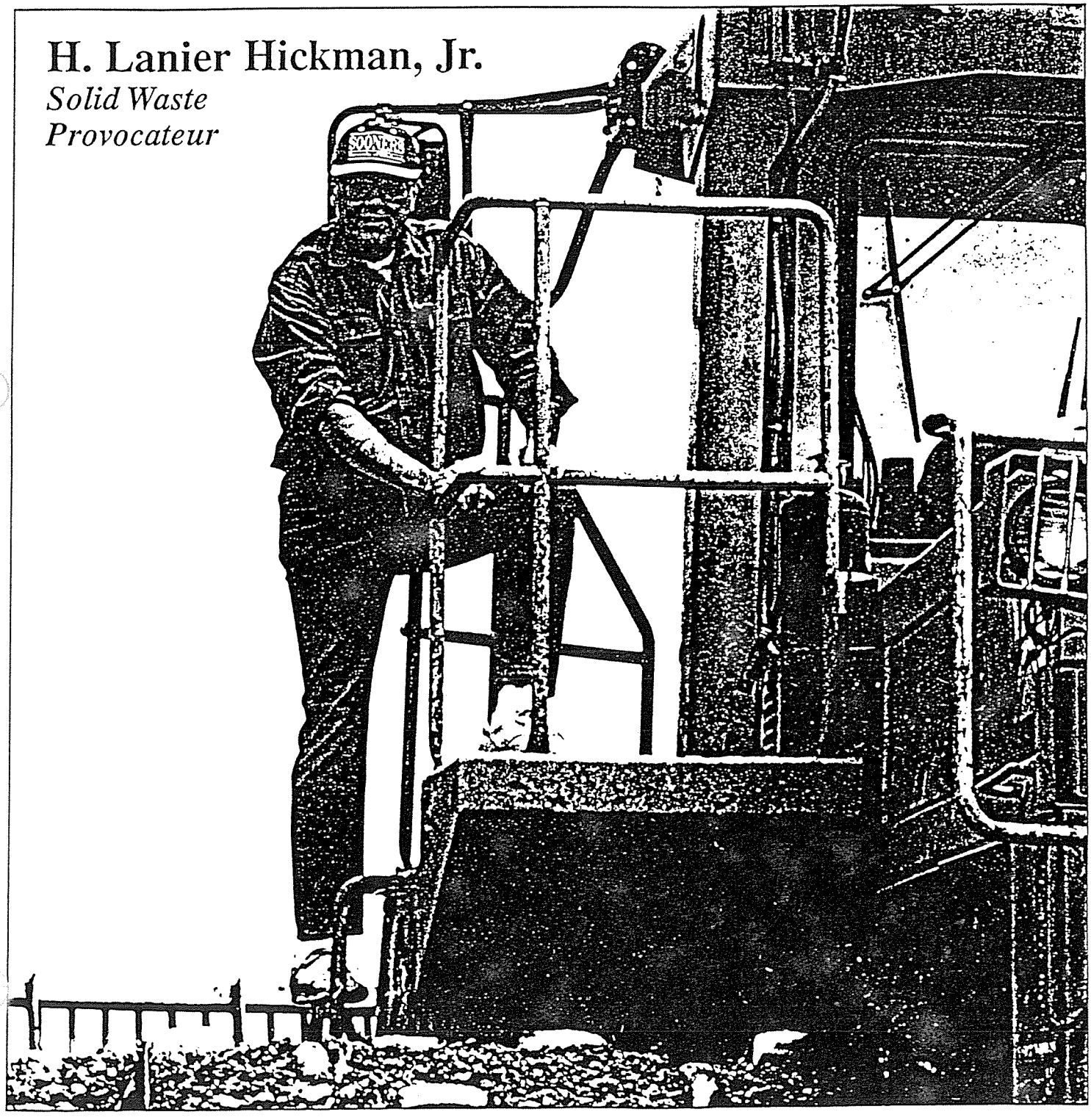
DAVIS FORD

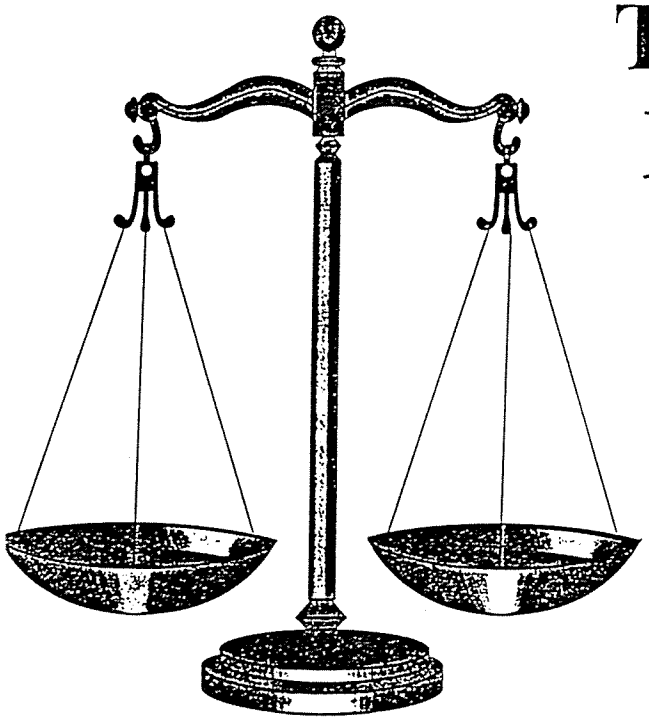
ENVIRONMENTAL ENGINEER

VOLUME 31, NUMBER 3 • *The Magazine of the American Academy of Environmental Engineers®* • JULY 1995

H. Lanier Hickman, Jr.

Solid Waste Provocateur





The Role of the Environmental Engineer/Scientist in Arbitration, Negotiation & Courtroom Litigation

by DAVIS L. FORD, PH.D., P.E., DEE

The role of the environmental engineer/scientist in the world of legal disputes and the American judicial process is both expanding and changing as the profession moves through the labyrinth of environmental statutes, regulative, and administrative procedures. Environmental professionals are today playing a key role in the disputes arising from the passage of such legislation as the Clean Water Act, the Safe Drinking Water Act, the Clean Air Act, the Toxic Substances Control Act, the Marine Protection and Sanctuaries Act, the National Environmental Protection Act, and particularly the Resource Conservation and Recovery Act and the Comprehensive Environmental Response, Conservation, and Liability Act (Superfund). These statutes and amendments have expanded the overlap of attorneys, consultants, academics, officials from the private and public sectors, and regulators in the quest of sorting out the interpretation, resolution, and implementation of the environmental protection process. As the annual environmental protection costs of this country are approaching two hundred billion dollars, the importance of the technical community in understanding our role in the sphere of legal disputes comes into focus. It also underscores the need for the technical community to know the rules of the judicial process, to renew our commitment to the ethics involved, and continually update our knowledge of the constantly evolving technologies.

There is another evolution taking place as we proceed through the fading years of this century. One only has to review the House version of the Superfund Amendments which surely will be passed in the next year or so. Such phrases as "risk assessment" cleanups (compared to numerical based ones) emerge. Required resolution of disputes by binding arbitration and alternative dispute resolution (ADR) evolves. Concurrently, major reform of the entire legal process is being seriously considered at the State and Federal levels. It is therefore the obligation of the technical community not only to recognize our critical role in the legal process, but to enhance and streamline it, with the noble objective of maximizing the efficiency of the environmental dollar toward cleanup rather than unnecessary or prolonged disputes.

The Role

Back in the 17th century, Sir Isaac Newton developed three basic laws of physics which serve as our cornerstone for many engineering theories and formulations. Layered onto these time-proven laws are those from Euclid, Decartes, Darcy, and innumerable others whose theories are not disputable in a court of law. The problem is the massive area of gray technological interpretation which enters into the decision process from environmental disputes. Enter the technological expert, fact witness, rebuttal witness, consultant, mediator or arbitrator.

The matter of identifying and recruiting environmental experts is not a simple and straightforward task. The qualifications based on formal training, experience in the field, personal and professional reputation, publications, and ability to communicate are obviously the starting point. The law firms and the clients they serve normally make the witness selection. There are three categories of individuals from which to select, two of which should be avoided. The first category consists of potential engineers/scientists who want to avoid serving in disputes because of other priorities, conflicts of interest, preference for professional anonymity, company or institutional policies, or some other reason. The second, and more onerous category, consists of the "professional witness", who chases the litigation dollar, lacks technical depth, unduly advocates the technical issues to the point of sloppy or incorrect science, and allows oneself to be stretched beyond one's capability. Unfortunately, the rules of evidence and judicial safeguards don't sufficiently guarantee against "junk science" weighing in heavily toward a decision. The third, and most propitious category, consists of those who become involved in litigation as an outgrowth of their professional engineering or scientific endeavors and who provide technical consultation or testimony based on what they are practicing, not just what they are saying. They are intellectually honest, seek the truth, are qualified, experienced, stay current with new technologies, statutes and regulations, can communicate with the "trier of fact", and can work effectively with other consultants and experts as well as with the legal team.

The Process

Once the engineer/scientist has become involved as part of the team, there are numerous protocols and procedures which must be understood. Among these are discovery, consulting advice to the attorneys relating to opposition experts and the issues of the case, the deposition phase, and the trial phase. It is not the purpose of this treatise to go through these protocols and procedures mechanically as this is done elsewhere[1,2,3,4]. However, it is important to understand what is expected from one who enters the dispute as a technical individual. There is intense scrutiny from the other side as to one's publications, practice, and overall credentials. Any flaws should be analyzed and disclosed to the team early in the procedure. Potential conflicting testimony from the past and real or perceived conflicts of interest should be reviewed, analyzed, and properly considered. An understanding between the engineer/scientist and attorney(s) should be established early with respect to opinions, budgets, discovery, deposition and trial testimony, reports, and other areas of litigation philosophy and strategy. It should be understood that the background and professional skills of attorneys and technical consultants or experts normally differ. For example, we need to recognize the mutual dependence on our respective professional backgrounds in order to achieve true synergism as a team. We probably started at some common point during our secondary education process, but our professional pathways have since diverged. The methods of learning, remembering, developing, and perfecting professional skills in law school as compared with the college of engineering or science are quite different. As an engineering graduate student in the 1960's, I used to seek seclusion at the University of Texas Law School library in order to study, armed with a calculator, integral calculus tables, and other supporting documents. With this arsenal, I settled down at the table, using two to three times my allocated space. I was amazed at the law students whose study aids consisted only of a felt pen and piles of books. I calculated and they read. I use this illustration to show that our formal training is significantly different. Moreover, attorneys are disciplined to think and speak at the same time, while engineers are not. Technical people are normally trained to tell all they know, while in legal disputes, you tell only that which supports your opinions and is pertinent to the case. This is often difficult to do and takes mental discipline to be effective. The communication skills of engineers/scientists are not inherently natural to the dispute process, and take time and experience to perfect. This puts an additional burden on the attorneys whose job description includes not only the selection of the right individuals but also their proper preparation.

Preparation

The preparation of the engineer/scientist involved in a dispute can be rigorous and time consuming, not unlike preparation for a term quiz or professional exam. The discovery process may provide the individual with multiple boxes of reports, depositions, correspondence, and other archival data pertinent to the case for review and digestion. One must therefore have the ability to distill this information in a manner which leads to a comprehensive understanding of that which is pertinent, while casting aside that which is not. It has generally been my practice to summarize key documents, depositions, reports, and pertinent literature reports into a condensation of "hot documents". These can then be reviewed before deposition and trial (which may occur months after their preparation) in order to sharpen the key information for which one is responsible. A good memory helps, but good organization is more important. The rules are essentially the same whether one serves as a "non-testifying expert" or consultant, compared to one who will actually testify (expert, fact, or rebuttal witness). However, if one is expected to testify, then the additional task of preparing discoverable reports and exhibits are usually necessary. With the advent of new software, exhibits can be effective, if properly conceived, to best convey the key points of testimony. For example, it is becoming more common to plug a large screen easily seen by the judge and jury into a computer terminal, allowing display of videotaped depositions, graphs, and dynamic modeling, chronologizing events and occurrences, and the presentation of other forms of key information.

Junk Science in the Courtroom

The flippant use of technological fiction to prove a desired decision has long been a problem in litigation. The court first addressed this in 1923 in *Frye v. United States*. This decision basically held that expert testimony must be based on scientific techniques or methods that had gained "general acceptance" in the field of expertise at issue. The United States Supreme Court recently decided *Daubert v. Merrill Dow Pharmaceuticals, Inc.* in June, 1993. In doing so, the court ruled that when it comes to scientific evidence, judges have a duty to distinguish between "good science" and "bad science". Serious engineers and scientists have been protesting for years that their disciplines were being debased by plaintiff's lawyers screaming

Continued →

environmental harm at every turn. The Supreme Court, sending *Daubert* to the Ninth Circuit for review, has left judges some latitude in acting as scientific "gatekeepers", excluding evidence that is not scientifically reliable[5]. If other courts follow the unanimous opinions of the Ninth Circuit of Appeals in dismissing a recent case involving Bendectin, then the much-needed reform of minimizing junk science will have been achieved. The opinion states that "none of the plaintiff's scientific findings had been published in scientific journals or offered up for peer review." It further states that "the only review the plaintiffs' experts work has received has been by judges and juries, and the only place their theories and studies have been published is in the pages of federal and state reporters". This is encouraging to serious engineers and scientists and should be the major criterion for developing a scientific basis for testimony.



Alternative Dispute Resolution

Congress passed *The Administrative Dispute Resolution Act* in 1990 with the intent of encouraging arbitration provision and other alternative dispute resolution (ADR) mechanisms by government agencies to resolve contract disputes. Pursuant to the Act, government agencies were required to adopt policies for the use of ADR and appoint a senior official as a dispute resolution specialist. Similar provisions have been adapted by several trade associations including the American Institute of Architects (AIA), the American Society of Civil Engineers (ASCE), and the National Society of Professional Engineers (NSPE)[6]. Moreover, the House version of the proposed Superfund Amendment (HR 3800) which should pass Congress in some form within the next two to three years will most certainly address the joint and several liability and retroactive issues as well as forcing ADR resolution of Superfund disputes[7]. Some of the proposed provisions include:

(1) clarify the definition of "negligence" under the Superfund law;

(2) further expand expedited settlements with parties who contribute "de minimus" quantities of hazardous wastes;

(3) exempt any party from CERCLA for activities connecting that party to a site if it can be demonstrated that the actions took place before CERCLA enactment if activities were fully in accord with then-existing state and federal statutes and regulations; and

(4) further expand expedited settlement provisions and amend current liability and allocation provisions.

The ADR concept is not new. However, excessive litigation costs (estimated to have reduced the GNP by ten percent below its potential this past decade) have created an impetus by legislators, the legal community, and the general public to develop systematic techniques which enable clients in many instances to avoid the nightmare of costly litigation when disputes arise. A common approach now is to force ADR contractually in the original agreement if and when disputes arise.

Basically, ADR consists of negotiation, mediation, and arbitration. Negotiation and mediation are non-binding. Arbitration can be either binding or non-binding, as specified in the contract.

Negotiation is a voluntary, informal, unstructured process used by the parties to reach a mutually acceptable agreement. The parties may or may not be represented by counsel, since the role of the parties is to have direct conversation with the opposing side, including high personal involvement by a senior representative of each party who has settlement authority. Ideally, negotiation results in a mutually acceptable compromise based on shared interests.

Mediation is a private voluntary process in which an impartial person is chosen to facilitate communications between parties in order to promote settlement. The mediator will assist in identifying and clarifying issues, generate solution options, and facilitate a mutually acceptable agreement.

The process is designed to be flexible, confidential, and lend itself to creative problem solving. In extremely complex business disputes, a form of mediation is the mini-trial, in which each party gives a summary presentation of its case to a panel comprised of representatives from each party who possess settlement authority. An impartial third party may be selected to preside over the presentations and assist in eliciting information.

Mini-trials have been found to result in settlement in over 90% of the cases where the process is used.

Finally, *arbitration* is an adversarial system that requires the parties to employ counsel, select an independent arbitrator or panel of arbitrators, file and respond to discovery requests and engage in a proceeding which is not dissimilar from a trial. Although arbitration can, on occasion, be almost as time-consuming and expensive as litigation, it is more flexible and can result in a possible compromise between the parties, as opposed to the "Win-Lose" nature of litigation.

An abbreviated form of a "three-step" dispute resolution clause which includes negotiation, mediation and arbitration could be drafted along the following lines:

1. Negotiation between Executives

a. The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiations between executives who have authority to resolve the controversy. Any party may give the other party written notice of any dispute not resolved in the normal course of business. Within twenty days after receipt of said notice, executives of both parties shall meet at a mutually agreeable time and place, and thereafter as often as they deem necessary, to exchange relevant information and to attempt to resolve the dispute. If the matter has not been resolved within sixty days of the disputing party's notice, or if the parties fail to meet within twenty days, either party may initiate mediation (or mini-trial) of the controversy or claim as provided hereinafter.

b. If a negotiator intends to be accompanied at a meeting by an attorney, the other negotiator shall be given at least three working days notice of such intention and may also be accompanied by an attorney. All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of the United States Federal Rules of Evidence and appropriate State Rules of Evidence.

(U.S. Federal Rules of Evidence provide for the confidentiality of compromise and settlement negotiations in order to encourage parties to engage in productive discussions and avoid litigation.)

2. Mediation for Mini-trial

a. If the dispute has not been resolved by negotiation as provided herein, the parties shall endeavor to settle the dispute by mediation or mini-trial. The parties will jointly appoint a mutually acceptable mediator, seeking appropriate assistance in such regard if they have been unable to agree upon such appointment within twenty days from the conclusion of the negotiation period.

Continued on page 30 →

continued from page 16

b. In any mediation, evidence of anything said or any admission made in the course of the mediation or any document prepared for the purpose of or in the course of, or pursuant to, the mediation, or any copy thereof, shall not be admissible in evidence, and any disclosure of any such evidence or document shall not be compelled in any civil action in which, pursuant to law, testimony can be compelled to be given.

(The purpose of Paragraph (2.b.) is to encourage the parties to fully participate in the mediation process without fear that statements made or documents submitted in the mediation would be used against them in future litigation.)

3. Arbitration

Any dispute arising out of or relating to this Agreement, or the breach, termination or validity thereof, which has not been resolved through negotiation or mediation (or mini-trial) as provided within a stipulated time from initiation of such procedures, shall be finally settled by arbitration in accordance with the applicable rules.

(At this point, a standard arbitration provision should be included which specifies the organization such as the American Arbitration Association or the International Chamber of Commerce whose rules will apply, the place of arbitration, the selection of the arbitrator(s), the language of the arbitration (if an international transaction) and a statement that judgment upon the award rendered in the arbitration may be entered in any court having jurisdiction thereof.)

If the contract parties adopt a common philosophy from the beginning of their negotiation that promotes cooperation to resolve disputes, they have the best chance to reduce future costs, focus their employees on profit-making opportunities rather than non-profitable litigation, and ensure that the relationship between their companies will continue to be productive and mutually beneficial. ADR encourages compromise and conciliation, ensures privacy and promotes long-term business relationships[7].

There are other creative ways in addition to or instead of ADR to settle disputes, thereby avoiding lengthy hearings and/or litigation in environmental disputes. Two recent examples of disputes in the environmental permitting process between large petrochemical/petroleum refining industries and environmental groups resulted in the formation of a three-member commission empowered by contract to perform specific environmental studies. The contract required the contestants to withdraw their opposition to the permits while requiring the industries to provide stipulated environmental safeguards with the blessing of the State and Federal regulatory agencies, allowing the process to proceed in a less emotional and more cost-effective manner[8].

Summary

The public and private sector environmental expenditures of this nation now approach 200 billion dollars annually. The opportunities for the environmental engineer/scientist to play a major role in efficiently directing the expenditure of these environmental dollars to better benefit the environment is greater than at any time during our history. Although engineers and scientists historically have not been attuned for their roles of arbitrator, negotiator, or courtroom expert witness, the demands for such services are acute. Environmental fears, legal disputes, and junk science in the courtroom are a lucrative business. They are responsible for an enormous drain of capital that could better have been directed toward solving environmental problems. Those with scientific and technical training have more opportunities now than ever before to become involved in re-directing the application of limited environmental capital.

I would submit that every member of the Academy who has not already done so, will at some point in the future play a role in the dispute process: as a consultant, mediator or arbitrator, fact witness, rebuttal witness, or expert witness. There are many factors inherently built into the legal system which are inefficient and potentially unfair. The environment and environmental issues are emotional ones with personal, local, national, and international implications. With public health and welfare sometimes at stake, the conflicts of growth with environmental protection are highly visible, polarizing, and complex. The importance of the environmental engineer/scientist in resolving these conflicts is obvious.

Continued on page 34 →

1995 Election Results

The ballots have been counted. While the results will not be official until the Annual Meeting when the Teller's Report is confirmed by the Board, clear convincing wins were chalked up by all candidates. Current President-Elect Roger J. Dolan will succeed to the Office of the President. Charles A. Willis will be President-Elect and E. Joe Middlebrooks will be Vice President. Richard A. Conway won the race for the Trustee-at-Large position, replacing E. Joe Middlebrooks.



Roger J. Dolan



Charles A. Willis



E. Joe Middlebrooks



Richard A. Conway

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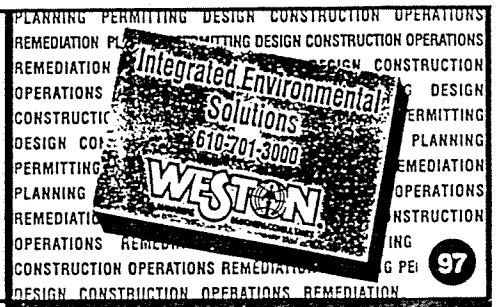

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Role of the Environmental Engineer/Scientist
continued from page 30

Our ability to communicate the technical facets and to apply the common sense business skills in this legal process could be the key determinants in its outcome.

About the Author: Dr. Ford is President of Davis L. Ford & Associates in Austin, Texas, and is an adjunct professor at the University of Texas. Dr. Ford is also a contributing editor to Environmental Engineer.

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DAVIS L. FORD, Ph.D.
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STATEMENT OF QUALIFICATIONS
DAVIS L. FORD

Davis L. Ford is an environmental engineer with approximately thirty years of experience in the field. He has worked with over one hundred and fifty industries and municipalities in the area of water pollution control, solid waste management, and hazardous waste remediation. In addition to his extensive experience as a practitioner, he has served on the faculty at the University of Texas at Austin as an adjunct professor for the past twenty years, publishing over one hundred technical papers, and co-authoring or contributing to five text books. He has lectured extensively throughout the United States and many foreign countries.

Dr. Ford received his bachelors degree in Civil Engineering at Texas A&M University, and his master and doctorate degrees in Environmental Engineering at the University of Texas at Austin. He started the southern division of the firm of Engineering-Science, Inc. in 1968, and following the sale of this firm to the Ralph M. Parsons Corporation, he formed Davis L. Ford & Associates in 1985.

Specific experience includes directing refinery, petrochemical, and chemical solid waste management projects commencing in 1968, designing liquid and solid waste pollution control programs for a variety of industries throughout the past twenty-five years, managing major construction projects, providing operator training, and directing hazardous waste remediation programs.

He has been active in various professional organizations, has served on the Marine Board of the National Research Council, the Science Advisory Board to the Administrator of EPA, and chaired the program committee for the Water Pollution Control Federation. He is a registered professional engineer in twelve states.

Dr. Ford is a Distinguished Engineering Graduate at both Texas A&M University and the University of Texas at Austin, as well as a Distinguished Alumnus of Texas A&M. He is a member of the Amercian Academy of Environmental Engineers and was recently elected to the National Academy of Engineering. His honorary affiliations include Tau Beta Pi, Sigma Xi, and Chi Epsilon.

EXPERT WITNESS/MOCK EXAMINATION

"Home of the Whopper"

Plaintiff Position

MIKE GALLAGHER

NOTES

MICHAEL T. GALLAGHER
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Houston, Texas 77002
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PERSONAL:

Born Houston, Texas, 7-23-39; admitted to bar 1965, Texas; USDC - Southern/Eastern Districts 1982, Northern/Western Districts 1996; U.S. Court of Appeals, Fifth/Seventh/Eleventh Circuits; U.S. Supreme Court, 1980; admitted to the Eastern District of Michigan.

EDUCATION:

University of Houston, 1962; University of Texas (L.L.B. 1965); Phi Alpha Delta.

LAW RELATED PUBLICATIONS:

Evidence for the Plaintiff in a Product Liability Action, 19 So. Tex. Law Journal 559, 1978.

The Child Victim: Proving Future Medical Needs for the Child, TRIAL Magazine, March 1988.

Proof of Future Medical Care Needs for the Injured Child, AmJur Proof of Facts, 3rd Ed. Vol. 4, Bancroft - Whitney, May 1989.

Seatbelt Safety, Automotive Engineering and Litigation, Garland Law Publishing Company, Spring 1989.

PROFESSIONAL ORGANIZATIONS, APPOINTMENTS AND HONORS:

Only Texas lawyer appointed to Plaintiffs' Settlement Committee for the nationwide Breast Implant Litigation. Active on the Plaintiffs' Discovery/Steering Committee in the Harris County, Texas Consolidated Breast Implant Litigation. Also selected member of Tort Claimants' Committee in the Dow bankruptcy proceedings in Michigan federal court. Specializes in product liability and personal injury and continues to serve as a chief negotiator on Product Liability Reform.

Selected, The Best Lawyers in America, 1984.
International Academy of Trial Lawyers, Fellow, 1986-present.
International Society of Barristers, Fellow, 1985-present.
American College of Trial Lawyers, Fellow, 1984-present.
Fellow, American Board of Trial Advocates, 1976.
Fellow, Texas Bar Foundation.
Texas Trial Lawyers Association (Chairman, Lawyers involved for Texas, 1975-1976; Member, Board of Directors, 1975; President - Elect, 1977; President, 1978).
Association of Trial Lawyers of America (Board of Governors, 1979-1982; 1985-Present; Secretary, 1987-Present; Chairman, Task Force Committee, 1972-1974; Chairman, Coordinating Committee, 1974-1975).
Special Counsel to the House Committee on Strict Liability, 1977-1981.

EXPERT WITNESS/MOCK EXAMINATION

"Home of the Whopper"

Defense Position

CARRICK BROOKE-DAVIDSON

NOTES

Allen Spock Hartman, Appellant

NO. 484-96 v.

THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Fourth Court of Appeals

[Bexar County]

OPINION ON PETITION FOR DISCRETIONARY REVIEW

A jury convicted appellant of driving while intoxicated. Punishment was assessed at ninety days imprisonment, probated for two years, and a fine of $300. The court of appeals affirmed. Hartman v. State, 917 S.W.2d 115 (Tex. App.--San Antonio 1996). We granted appellant's petition for discretionary review to determine whether the admissibility criteria for scientific evidence announced in Daubert v. Merrill Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993) and Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992), apply to all scientific evidence."[1]

Officer John Muzny was on patrol the night of July 8, 1992, when he noticed appellant's car weaving and operating without its taillights. As Muzny approached the car, he also noticed it did not appear to have its headlights on. He pulled the car over and appellant got out of the car. Muzny recognized that appellant exhibited signs of intoxication, including bloodshot eyes, and that his breath smelled strongly of alcohol. Muzny administered several field sobriety tests to appellant, all of which appellant failed. He then arrested appellant for driving without a valid driver's license or effective liability insurance and took him to the police station at 11:55 p.m. At both 12:36 and 12:39 a.m., Muzny gave

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[1] We also granted the following two points of error:

(2) Is an expert opinion, extrapolating intoxilyzer results to an earlier point in time in order to give the chemical concentration of alcohol in the blood and tissues of a particular person at the earlier point in time, a genre of "scientific evidence" within the meaning of Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992)?

(3) Where the State relies upon the per se definition of intoxication of .10 breath alcohol concentration at the time the individual was driving or in actual physical control of a motor vehicle, is the defendant entitled to a jury instruction which requires the State to properly prove their case by extrapolation to the point in time when the defendant was "driving or in actual physical control of a motor vehicle?"

Due to the disposition of appellant's first point of error, we do not reach these points; they are dismissed without prejudice.

appellant intoxilyzer tests which measured appellant's blood alcohol content (BAC) at 0.138.

Prior to trial, appellant moved to suppress the results of the intoxilyzer test. Among other grounds, appellant objected to testimony given by Muzny or George McDougall, Bexar County's Breath Test Technical Supervisor, concerning the results of the intoxilyzer test on the basis that such testimony pertained to scientific techniques which were not shown to be reliable or relevant under Rule of Criminal Evidence 702.[2] The court of appeals described McDougall's testimony at the hearing on appellant's motion to suppress as follows:

> McDougall testified that at the time of the test appellant's BAC was 0.138. From this, McDougall extrapolated that appellant's BAC was between 0.110 and 0.15 or 0.16 at the time of the stop. When asked whether he knew what appellant had eaten prior to the stop, his age, his drinking history, or his weight, McDougall testified that he knew only appellant's age. However, McDougall explained that he was able to testify regarding appellant's BAC range at the time of the stop because of his training in studying the effects of alcohol upon a person's ability to safely drive a car, his study of how much alcohol it takes to reach a given alcohol concentration based on body weight, and his observations of over 2,000 students going through a complete drinking cycle at classes he taught at San Antonio College over the last seventeen years. McDougall also explained that the Intoxilyzer test "already accounts for the subject's body weight...." In short, McDougall repeatedly testified that, although he could not testify to a precise BAC level at the time of the stop, he could testify to a BAC range.
>
> On cross-examination, counsel for appellant and McDougall agreed that the standard elimination rate of alcohol is .02 percent per hour. McDougall also testified that, while it would take one to two minutes for alcohol to begin to register in the body if a person drank a shot of alcohol on an empty stomach, it might take ten to fifteen minutes if the person had just finished a meal of meat and potatoes. Accordingly, if appellant had just finished a full meal at the time of the stop--forty minutes before registering 0.138 on the Intoxilyzer--his BAC level at the time of the stop would most likely have been between 0.12 to 0.15. McDougall also testified, however, that it would not be remarkable for a person to maintain the same BAC level for forty minutes or longer.

Hartman, 917 S.W.2d at 118-19. The trial judge denied appellant's motion to suppress.

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[2] As described in the court of appeals' opinion, appellant objected under Rule 401, 402, 403, 702 and 705. Hartman, 917 S.W.2d at 118.

On appeal, appellant argued that the State failed to make the Rule 702 showing for admissibility of scientific expert testimony as required by the United States Supreme Court in Daubert, supra, and by this Court in Kelly, supra and Emerson v. State, 880 S.W.2d 759 (Tex. Crim. App.), cert. denied, 115 S.Ct. 323 (1994). The court of appeals held Daubert, Kelly, and Emerson were inapplicable because those cases concerned evidence based upon novel scientific theory. By contrast, the court of appeals stated, the instant case did not involve novel scientific evidence, noting that it was confronted by an intoxilyzer test rendered admissible by statute[3] without any predicate showing as to reliability. Hartman, 917 S.W.2d at 120. The court of appeals concluded that "the procedures and burden of persuasion enunciated in Kelly do not apply unless the proffered testimony is indeed novel" and that "when the proffered evidence is not novel, the admissibility of the evidence should be examined in line with the more general criteria of Rule 702." Id. The court continued, "Rule 702 thus provides a two-prong test for the admissibility of expert testimony: (1) the expert must be qualified by knowledge, skill, experience, training, or education; and (2) the expert testimony must assist the trier of fact to understand the evidence or decide a fact." Concluding McDougall was qualified to testify by his many years of experience and training, and that his testimony was of assistance to the jury, the court of appeals determined that the trial court did not abuse its discretion in denying appellant's motion to suppress.

In Kelly, we held Rule 702 superseded the Frye "general acceptance" standard for the admissibility of scientific expert testimony. Kelly, 824 S.W.2d at 572. The trial court's task in assessing admissibility under Rule 702 "is to determine whether the scientific evidence is sufficiently reliable and relevant to help the jury in reaching accurate results." Id. (emphasis added). To be considered reliable, evidence based on a scientific theory must

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[3] Tex.Rev.Civ.Stat. Ann. Art. 6701l-5, 3(a) (Vernon Supp. 1995).

satisfy three criteria: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question. Id. at 573. We also provided a list of non-exclusive factors that could affect a trial court's determination of reliability. Id. We noted "[u]nreliable . . . scientific evidence simply will not assist the [jury] to understand the evidence or accurately determine a fact in issue; . . . ." Id. at 572.[4]

In Daubert, the United States Supreme Court held, in light of the adoption of Federal Rule 702, the Frye test was no longer the standard for admissibility of scientific expert testimony. Daubert, 113 S.Ct. at 2793. Daubert set forth a two-pronged reliability and relevance standard virtually identical to the one we had adopted in Kelly. Id. at 2796. The Supreme Court explained "[t]his entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Id. The Texas Supreme Court followed suit in E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995), adopting the tests enunciated in Kelly and Daubert.

Nowhere in Kelly did we limit the two-pronged standard to novel scientific evidence. The Supreme Court in Daubert directly addressed the issue in a footnote, stating "[a]lthough the Frye decision itself focused exclusively on 'novel' scientific techniques, we do not read the requirements of Rule 702 to apply specifically or exclusively to unconventional evidence."[5] Daubert, 113 S.Ct. at 2796 n.11. The Supreme Court noted that "under the Rules, the trial judge must ensure that any and all scientific

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[4] Recently, in Jordan v. State, 928 S.W.2d 550 (Tex. Crim. App. 1996), we addressed the admissibility of scientific expert testimony under Rule 702, following the principles established in Kelly and Daubert. We there reiterated the use of the two-pronged reliability and relevance standard for determining the admissibility of scientific expert testimony.

[5] Likewise, the phrase "novel scientific evidence" used in Kelly, was not intended as a limitation of the standard announced in that case; rather, we used that phrase in rejecting Frye, a test specifically governing admissibility of novel scientific evidence.

testimony or evidence admitted is not only relevant, but reliable." Id. at 2795 (emphasis added). We likewise see no value in having a different standard of admissibility for novel scientific evidence. The problems presented in determining whether or not a particular type of evidence would be considered "novel" are daunting enough to reject application of a dual standard. Moreover, we observe that the factors and criteria set forth in Kelly as bearing upon the reliability of proffered scientific evidence are adequate measure for assuring that "novel" scientific evidence which is "junk science" is excluded. These factors "address the soundness of the underlying scientific theory and technique." Jordan v. State, 928 S.W.2d 550, 554 (Tex. Crim. App. 1996). This is the linchpin of Rule 702:

> [R]eliability depends upon whether the evidence has its basis in sound scientific methodology. This demands a certain technical showing. Accordingly, it is upon the reliability inquiry that trial courts can weed out testimony pertaining to so-called "junk science." *Id.* It is largely to this end that trial judges are called upon to serve as "gatekeepers." *Daubert*, supra. While "junk science" or otherwise inadequately tested scientific theories might be shown to relate to the facts of a case and to that extent be of assistance to the jury, it will not have a sufficiently sound scientific basis to be reliable.

Id at 555.

The standard adopted by this Court in Kelly applies to all scientific evidence offered under Rule 702. The court of appeals erred in applying a standard different than that set forth in Kelly. Accordingly, we reverse the judgment of the court of appeals and remand this cause to that court to reconsider the admissibility of the evidence in light of the appropriate standard.

MEYERS, J.

Delivered April 23, 1997
Publish

ALLEN SPOCK HARTMAN, Appellant

NO. 484-96

THE STATE OF TEXAS

Petition for Discretionary Review from the Fourth Court of Appeals

[BEXAR County]

CONCURRING AND DISSENTING OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

I agree with the majority that Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992) announces the proper test for all scientific evidence. As the majority correctly states, scientific evidence must meet a three-pronged reliability test to be admissible: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question. Id. at 573.

I would add, however, that in many instances, prongs (1) and (2) can be decided by appellate courts as matters of law. Absent constitutional concerns, the Legislature can recognize the validity of particular scientific theories and techniques through statutory enactment. Trial and appellate courts would be bound to follow such enactments. Even absent legislative action, however, the validity of a particular scientific theory or technique may be established well enough that parties should not be required to relitigate its admissibility. Indeed, the Supreme Court has recognized that some scientific principles are so well established that they may be subject to judicial notice. Daubert v. Merrill Dow Pharmaceuticals, Inc., ___ U.S. ____, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 483 n. 11 (1993). Even if a scientific theory or technique does not occupy a status deserving of judicial notice, it may nevertheless have been established sufficiently to warrant admissibility as a matter of course. Any disputes about the validity of such theories and techniques may then be litigated in the adversarial setting before the factfinder. Permitting judicial recognition of the validity of a scientific theory or technique would provide guidance to trial courts through the development of precedent. See Villareal v. State, No. 0241-95, Keller, J. concurring, slip. op. at 7 (Tex. Crim. App., delivered November 20, 1996). Trial courts should not become constantly embroiled in determining the admissibility of scientific theories and techniques

that have already been well established as reliable.

Of course, absent legislative action, until an appellate court announces that a scientific theory or technique has been proven sufficiently reliable to be admissible as a matter of law, parties will have to litigate its admissibility; this is true of any issue of first impression. Villareal, Keller, J. concurring, slip op at 5-6. Moreover, the reliability of many scientific theories and techniques may not be sufficiently established that an appellate court can with confidence declare the theory or technique admissible as a matter of law. In such cases, an appellate court should refrain from making such a declaration until such time as scientific knowledge has progressed to enable doing so. Further, even after a particular theory or technique has been declared admissible as a matter of law, parties should be permitted to urge a re-examination of the status of a theory or technique if subsequent developments in the scientific field cast doubt upon its continuing validity.

Finally, unlike the first two prongs of the Kelly test, the third prong — whether the technique has been properly applied on the occasion in question — must necessarily be decided on a case-by-case basis.

With these principles in mind, I turn to the present case. The Legislature has enacted a statute governing the admissibility of breath alcohol tests. Such tests are admissible so long as they are "performed according to the rules of the Texas Department of Public Safety and by an individual possessing a valid certificate issued by the Texas Department of Public Safety for that purpose." Texas Revised Statutes, Article 6701*l*-5, §3(b)(Vernon's Supp. 1993). The Legislature has statutorily dispensed with any need to analyze the validity of the theory and technique behind the intoxilizer. The only open issue for the trial court to address is whether a test in a particular case satisfies the statutory requirements, i.e. the third prong of Kelly — whether the technique was properly applied on the occasion in question.

But the statute does not address the reliability of techniques

for interpreting or extrapolating intoxilizer results, and I would remand for the Court of Appeals to make a determination in the first instance. That court should analyze the various theories and techniques in dispute and determine whether some or all may be declared sufficiently well established as reliable to be admissible as a matter of law. If the court refrains from making such a declaration with regard to a particular theory or technique, then it should determine whether the trial court abused its discretion in determining the theory or technique to be reliable under the facts presented. Finally, even when a theory or technique is determined to be reliable, the Court of Appeals should determine whether the trial court abused its discretion in determining that the technique was correctly applied on the occasion in question.

I would remand the case to the Court of Appeals to reconsider the admissibility of the evidence in light of the comments made in this opinion.

KELLER, J.

EN BANC
DELIVERED: April 23, 1997
PUBLISH

McCormick, P.J., joins.

CARRICK BROOKE-DAVIDSON

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Carrick Brooke-Davidson recently moved to the Austin area from Washington, D.C., where he served as a supervising attorney and trial attorney in the Environmental Enforcement Section of the United States Department of Justice's Environment and Natural Resources Division. Mr. Brooke-Davidson, an honors law graduate of the University of Texas School of Law, has worked for 12 years on a variety of civil environmental enforcement litigation under all the major environmental statutes. A majority of Mr. Brooke-Davidson's cases originated with the United States Environmental Protection Agency's Region 6 office in Dallas, Texas. He has appeared for the United States frequently in the federal district courts in Texas, Louisiana, Oklahoma, and Arkansas and has assisted on appeals to the Fifth Circuit. Mr. Brooke-Davidson has received several awards for his outstanding government service.

Mr. Brooke-Davidson received a Bachelor's degree in aeronautics and astronautics and Master's degree in technology and policy from the Massachusetts Institute of Technology. He worked as a consulting environmental engineer in Dallas prior to attending law school. While at the University of Texas, he was one of the founding members and first president of the Environmental and Natural Resources Law Society, as well as editor-in-chief of The Review of Litigation and a member of the Order of the Coif and the Board of Advocates.

Mr. Brooke-Davidson is a member of the State Bar of Texas (Environmental and Natural Resources Law Section; Litigation Section; and Administrative Law Section), the American Bar Association (Section of Natural Resources, Energy, and Environmental Law; Section of Litigation; Section of Administrative Law and Regulatory Practice; Tort and Insurance Practice Section; and Section of Law Practice Management), and the Environmental Law Institute.

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NOTES

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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RAMON E. DASCH

Ramon E. Dasch is the Senior Attorney for the Pollution Cleanup Division of the Texas Natural Resource Conservation Commission. His practice is in the areas of state and federal superfund, spill response, natural resource damages and voluntary cleanups.

Mr. Dasch earned his J.D. in 1972 and his B.A. in 1964, from the University of Texas.

Beverly Ann Hartsock

Office of Policy and Regulatory Development

Beverly Hartsock serves as the Deputy Director for the Office of Policy and Regulatory Development of the Texas Natural Resource Conservation Commission. As Deputy Director, Beverly oversees development of regulations, regulation revisions, and policy positions established or adopted by the agency in the air, water, or waste management areas. Prior to serving in this position, Beverly was the Deputy Director for the Office of Air Quality overseeing the state's air quality program including its permitting, enforcement, monitoring, mobile source, and planning functions. Beverly has worked with the agency since 1978. Prior to that time, she worked with the Texas Department of Health and the University of Texas in vaccine and biological production.

Ms. Hartsock holds a Bachelor of Arts Degree in Biology with Honors from the University of Texas at Austin and holds a Master of Arts Degree in Botany from the University of Texas at Austin. Beverly is a member of Phi Beta Kappa. She is also a member of the Air and Waste Management Association, a member of the Federal Clean Air Act Advisory Committee, a member of the Common Sense Initiative Petroleum Refinery Sector Workgroup, and serves as Past-President of the State and Territorial Air Pollution Program Administrators.

Telephone: (512) 239-1120

Biography for Ann McGinley

Ann McGinley works at the Texas Natural Resource Conservation Commission (TNRCC) as the Division Director of the Enforcement Division. She graduated with a B.A. from Trinity University in chemistry in 1976 and an M.S. from Texas A&M University in chemistry in 1978. Ms. McGinley worked at Texas A&M University as a Research Associate from June, 1978 until April, 1979. Ms. McGinley worked on the Texas Department of Water Resources staff in industrial solid waste registration and permitting area from December, 1979 to November, 1980. She worked in industrial hazardous and solid waste enforcement from November, 1980 to October, 1985 on staff and as a supervisor (Texas Department of Water Resources/Texas Water Commission). She worked on division director's staff from October, 1985 until August, 1986 coordinating hazardous waste permitting and enforcement activities for the agency's federal grant. She worked as manager of the wastewater permitting program from August, 1986 until January, 1992. She served as the Assistant Division Director for Watershed Management Division working with the state water quality and water rights program, dam safety and flood control program, ground water protection program, and a community support program from January, 1992 until September, 1992. She was the Assistant Division Director of Field Operations Division from September, 1992 until April, 1993 when she became the Division Director working with inspections of industrial and hazardous waste facilities, municipal solid waste facilities, wastewater facilities, individual septic tanks, drinking water facilities and conducting surface water quality sampling. In September, 1993, Ms. McGinley became Division Director of the TNRCC Field Operations Division which included inspections of industrial and hazardous waste facilities, municipal solid waste facilities, wastewater facilities, individual septic tanks, drinking water facilities, air emission facilities, conducting ambient air monitoring and conducting surface water quality sampling. On September 1, 1995, Ms. McGinley became the Division Director of the Enforcement Division which was created to consolidate all of the TNRCC enforcement programs.

Kenneth L. Petersen, Jr.

Kenneth L. Petersen, Jr. graduated magna cum laude from the University of Texas in Austin and received a Doctor of Jurisprudence degree there in 1978.

Career experience leading up to the present has involved administrative work before the Texas Natural Resource Conservation Commission and its predecessor agencies, the Texas Water Commission, the Texas Department of Health, and the Texas Air Control Board, as well as related litigation in various courts involving permit applications, rules development, and administrative penalty and compliance proceedings in water quality, municipal solid waste, regulation of constitutional conservation districts, industrial solid and hazardous waste, incineration activities, solution mining, petroleum storage tanks, injection well disposal, water rights, water and wastewater utilities, and Open Meetings and Open Records Act requirements.

Currently, as Deputy Director, Office of Water Resource Management, Texas Natural Resource Conservation Commission, Mr. Petersen is responsible for the administration of the State's water quality, water resource, and water and wastewater utility programs. He is also closely involved with the current Texas Legislature as it works to revamp water related legislation for the state of Texas.

Jeffrey A. Saitas, P.E.

Texas Natural Resource Conservation Commission

Jeffrey A. Saitas holds a Bachelor of Science Degree in Mechanical Engineering from the Georgia Institute of Technology and a Master of Science Degree in Engineering from the University of Texas at Austin. Mr. Saitas has received certification as a registered Professional Engineer in Texas. Mr. Saitas was previously employed by Exxon Company USA in Houston, Texas and spent several years in various engineering positions in the oil and gas industry before joining the Texas Air Control Board in April of 1989. Mr. Saitas currently is the Deputy Director, Office of Air Quality of the Texas Natural Resource Conservation Commission.

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Moderators' Biographical Information



BIOGRAPHICAL INFORMATION

ABBREVIATED BIOGRAPHY FOR
ART BEDROSIAN

With 27 years in the environmental profession, Art Bedrosian is currently a Vice President with Zephyr Environmental Corporation. He is certified as a Qualified Environmental Professional (QEP) and has provided air quality expertise in the areas of regulatory interpretation, ambient monitoring, dispersion modeling, emissions inventory calculation, control technology evaluations, and environmental impact statement preparation.

Mr. Bedrosian graduated from Stevens Institute of Technology in 1969 with a Bachelor of Science degree in Physics. He then completed in 1970 the 43 semester hour U.S. Air Force Meteorology Training Program at Texas A&M University.

He is currently Vice-Chair for the Central Texas Clean Air Force Technical Advisory Committee, a coalition of businesses, government entities, environmental groups, and citizens who are working together toward cleaner air for Austin and its surrounding communities.

His professional affiliations include the Air & Waste Management Association (AWMA) where he was last year's Chair for the 1200 member Southwest Section and the Technical Program Chair for the 1995 Annual Meeting which was attended by more than 6000 environmental professionals, worldwide. He also serves on the Board of Trustees for the Institute of Professional Environmental Practice (IPEP) and is a member of the American Meteorological Society (AMS).

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R. Walton Shelton is a partner with the Austin law firm of Shelton & Dewan, L.L.P. He was previously associated with the environmental practice group of Baker & Botts, L.L.P. in Austin. Mr. Shelton specializes in transactional and regulatory areas of environmental law. He has extensive experience in the environmental aspects of lending, real estate, corporate, and other transactional matters.

In addition to his law practice, Mr. Shelton is a part-time professor at Baylor University Law School, where he has taught since 1990. He currently teaches two courses at Baylor: Environmental Law, and Business and State Issues in Environmental Law. Additionally, Mr. Shelton supervises environmental internships at governmental agencies (including SOAH, TNRCC, EPA Region 6, and the General Land Office) and directs independent studies.

Mr. Shelton received a Bachelor of Arts in History from the University of Texas in 1977, a Master of Arts in Religion from Baylor University in 1979, and a Doctor of Jurisprudence from Baylor University in 1989.

JEFFERY K. GORDON

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Mr. Gordon is an attorney in the Austin office of Mayor, Day, Caldwell & Keeton. He specializes in civil, environmental and toxic tort litigation before state and federal courts in the firm's Environmental and Litigation Sections. Before joining Mayor, Day in September 1995, Mr. Gordon was a trial attorney with the Environmental Enforcement Section of the U.S. Department of Justice in Washington, D.C.. While at the Department of Justice, he handled all aspects of complex litigation involving the enforcement of federal environmental laws, including the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Superfund, on behalf of the U.S. Environmental Protection Agency and the U.S. Department of the Interior. Mr. Gordon also served as a Special Assistant U.S. Attorney in the United States Attorney's Office for the Eastern District of Virginia in 1994 where he was responsible for investigating and prosecuting felony and misdemeanor criminal cases in federal court. He was awarded the U.S. Environmental Protection Agency Bronze Medal Award in January 1993, and the U.S. Department of Justice Special Achievement Award in September 1992.

Mr. Gordon received his J.D. from Georgetown University Law Center in 1990. He received his Bachelor of Arts from Trinity University in San Antonio in 1987.

Mr. Gordon is a member of the State Bars of Texas and Maryland, the Western District of Texas, the Austin Young Lawyers Association, the Travis County Bar Association, and the American Bar Association.

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CAROL V. BATTERTON

Director, Compliance Support Division
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Carol V. Batterton received her B.S. in biology from Baylor University and her M.A. in biological sciences from the University of Texas at Austin. From 1978 to 1985 she worked for the Texas Department of Water Resources becoming Head of the Enforcement Support Unit in 1984. With the reorganization of the Texas Water Commission in 1985, Ms. Batterton was promoted to Assistant Section Chief of Wastewater Enforcement. From 1986 until March of 1993, she served as director of the Field Operations Division where she directed the activities of the agency's fourteen field offices and laboratory. She presently serves as director of the Compliance Support Division. In this position she oversees the agency's educational outreach programs for the regulated community, occupational licensing and certification programs, and local government assistance. She serves as Chair of the National Environmental Laboratory Accreditation Conference and is also a past president of the Water Environment Association of Texas (a member association of the Water Environment Federation).